

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Benak Corp. :

AFFIDAVIT OF MAILING

for a Hearing with Regard to a Bond Required to be :
filed 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 15th day of January, 1985, he served the within notice of Decision by certified mail upon Benak Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Benak Corp.
Route 2 Highland Rd.
Massena, NY 13662

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
15th day of January, 1985.

David Parchuck

James A. Agnew
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Benak Corp. :

AFFIDAVIT OF MAILING

for a Hearing with Regard to a Bond Required to be :
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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 15th day of January, 1985, he served the within notice of Decision by certified mail upon Thomas Donovan, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Thomas Donovan
Charles L. Marvin & Co.
One Steuben Place
Albany, NY 12207

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 representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
15th day of January, 1985.

David Parchuck

James A. DeGennaro

Authorized to administer oaths
pursuant to Tax Law section 174

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

January 15, 1985

Benak Corp.
Route 2 Highland Rd.
Massena, NY 13662

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: Petitioner's Representative
Thomas Donovan
Charles L. Marvin & Co.
One Steuben Place
Albany, NY 12207

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
BENAK CORP.	:	DECISION
for a Hearing with Regard to a Bond Required	:	
to be filed under Section 283 of Article 12-A	:	
of the Tax Law.	:	

Petitioner, Benak Corp., Route 2, Highland Road, Massena, New York 13662, filed a petition for a hearing with regard to a bond required to be filed under section 283 of Article 12-A of the Tax Law.

A formal hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Building 9, State Office Campus, Albany, New York, on December 12, 1984 at 9:30 A.M., with all briefs to be submitted by December 14, 1984. Petitioner appeared by Thomas Donovan, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, 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 \$200,000.00.

FINDINGS OF FACT

1. Petitioner, Benak Corp., is a motor fuel distributor located in Massena, New York. Petitioner imports petroleum products from Canada and sells them wholesale. Petitioner also purchases motor fuel on a tax pre-paid basis from companies in Syracuse, New York. Petitioner made most of its gasoline sales to three dealers in western New York.

2. The Audit Division, by letter dated July 27, 1984, advised petitioner as follows:

"In accordance with Section 414.1(c) of the Motor Fuel Tax Regulations, we are conducting a periodic review of motor fuel distributors to determine whether a surety bond should be required or a surety bond already on file is sufficient to safeguard the revenue due under the Motor Fuel Tax Law.

To assist us in making this determination, please send a copy of your current unqualified financial statement certified by a certified public accountant pursuant to an audit conducted by him. This financial statement will be analyzed together with your motor fuel tax account and a bond determination made."

3. Petitioner failed to send a financial statement of any kind for the Audit Division to review and, as a result, on September 27, 1984, the Audit Division advised petitioner that petitioner was required to post a surety bond in the amount of \$200,000.00 by November 13, 1984, or its registration as a New York State motor fuel distributor would be cancelled.

4. Petitioner failed to post the requested bond and the Audit Division cancelled petitioner's registration as a motor fuel distributor effective midnight, November 30, 1984. Petitioner immediately requested a hearing to contest the cancellation.

5. The Audit Division had conducted a field audit of petitioner and determined that \$187,517.84 in additional motor fuel tax was due for the period January, 1983 through May, 1984. For the period January, 1984 through May, 1984, petitioner imported no gas from Canada so that the entire liability determined to be due was incurred during the period January, 1983 through December, 1983. Petitioner reported \$205,037.00 in motor fuel taxes for the period January, 1983 through December, 1983 and no tax for the period January, 1984 through May, 1984. The reason for the reduced tax liability after December,

1983 was that Canadian prices were less favorable than domestic prices and petitioner no longer imported motor fuel without prepaying tax.

6. In determining the amount of the bond to be posted by petitioner, the Audit Division added the \$205,037.00 reported by petitioner for 1983 to the \$187,517.00 additional tax due for that period to arrive at total tax liability for 1983 of \$392,554.00. The latter figure was divided by two and rounded off to the bond amount of \$200,000.00. The audit had disclosed that, in addition to the added tax liability, petitioner had been consistently late in filing its motor fuel tax returns. The Audit Division maintains that such determinations indicated that petitioner was unreliable and that a bond was appropriate.

7. Petitioner argues that it would have been virtually impossible to submit a certified financial statement in July or August, eight months after the close of the fiscal year, because of the difficulty in testing records and examining inventories and that it should not, therefore, be held to the requirement of submitting a certified financial statement. Alternatively, petitioner argues that the most recent six month period should be used to determine the amount of the bond. Inasmuch as the tax liability for the most recent six months was virtually zero, petitioner maintains there should be no bond or a considerably reduced bond to reflect its current purchasing practices.

CONCLUSIONS OF LAW

A. That section 283 of the Tax Law provides, in part:

"[t]he tax commission may require any 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, to secure the payment of any sums due from such distributor pursuant to [Article 12-A]. The tax commission may require that such a bond be filed before a distributor is registered, or at any time when in its judgment the same is necessary as a protection to the revenues under [Article 12-A]."

B. That 20 NYCRR 414.1(c), effective January 19, 1984, provides as follows:

"(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 TP187.16);
and

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

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

"[i]f any distributor fails to meet in full the requirements of subdivision (c)(2) of this section, a bond equal to six months tax liability will be required of such distributor regardless of the net worth or financial status of such distributor. In cases where an applicant or distributor shows financial hardship by reason solely of the requirements of subdivisions (b)(2) and (c)(2) of this section that the unqualified financial statement be certified by a certified public accountant, the State Tax Commission, on petition, either through the hearing process or on the motion of the State Tax Commission, may permit a licensed public accountant not a certified public accountant, to certify such financial statement". [20 NYCRR 414.1(d); emphasis added.]

C. That petitioner has not submitted, as required, an unqualified financial statement certified by a certified public accountant pursuant to an audit conducted by such certified public accountant. The purpose of this requirement is to provide independent verification of the reliability of a distributor's financial statements and, in turn, its financial condition. Accordingly, in the absence of such a statement, a bond equal to six month's tax liability is required.

D. That the Tax Law and regulations do not specify which periods are to be used in computing the six month tax liability which serves as the basis for

setting the bond requirement. It is implicit, however, that the bond should be set at the amount which most accurately reflects petitioner's tax liability. The Audit Division's use of 1983 figures failed to give any weight whatsoever to the fact that petitioner's tax liability for the first five months of 1984 was zero. Petitioner's contention, on the other hand, that only the most recent six months be used, fails to take into account that any time the Canadian price structure changes, petitioner will reinstitute its importing practice and incur a tax liability. The most accurate computation of the bond requirement is, therefore, measured by the period June, 1983 through May, 1984. This period covers the most recent audited year prior to imposing the bond requirement and includes periods when petitioner imported motor fuel and when it did not import.

E. That the bond required is to be reduced to \$115,000.00 computed as follows:

Tax reported for 1983	\$205,037.00
Additional 1983 tax per audit	<u>187,517.00</u>
Total tax for 1983	\$392,554.00

Average monthly tax $\frac{\$392,554.00}{12} = \$32,712.83$

Average monthly tax	\$32,712.83
Seven months (June, 1983-December, 1983)	$\times \quad 7$
	<u>\$228,989.81</u>

Tax liability for last seven months of 1983	\$228,989.81
Tax liability for first five months of 1984	<u>0</u>
Twelve month liability	\$228,989.81


Six month liability $\frac{\$228,989.81}{2} = \$114,494.91$


F. That the petition of Benak Corp. is granted to the extent that the amount of the bond to be filed is reduced to \$115,000.00.

DATED: Albany, New York

STATE TAX COMMISSION

JAN 15 1985


PRESIDENT


COMMISSIONER


COMMISSIONER