

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :

of

EMPIRE AERO SERVICES, INC. :

AFFIDAVIT OF MAILING

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

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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 30th day of January, 1985, he served the within notice of Decision by certified mail upon Empire Aero Services, Inc. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Empire Aero Services, Inc.  
P.O. Box 206  
Syracuse, NY 13211

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  
30th day of January, 1985.

David Parchuck

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

## STATE TAX COMMISSION

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

Authorized to administer oaths  
pursuant to Tax Law section 174

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

January 30, 1985

Empire Aero Services, Inc.  
P.O. Box 206  
Syracuse, NY 13211

Gentlemen:

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

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
James H. Messinger, Jr.  
1500 Mony Plaza  
Syracuse, NY 13202  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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

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Petitioner, Empire Aero Services, Inc., P.O. Box 206, Syracuse, New York 13211, 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 Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Office Campus, Albany, New York, on December 18, 1984 at 10:00 A.M. Petitioner appeared by James H. Messenger, Jr., Esq., Assistant Secretary. The Audit Division appeared by John P. Dugan, Esq. (Anna D. Colello, 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 \$100,000.00.

FINDINGS OF FACT

1. In a letter dated May 14, 1984, the Audit Division requested that petitioner, Empire Aero Services, Inc., file a current unqualified financial statement certified by a certified public accountant pursuant to an audit conducted by him. The letter advised petitioner that the financial statement would be analyzed in conjunction with its motor fuel tax account in order to determine whether a surety bond would be required.

2. Thereafter, petitioner submitted financial statements prepared by a certified public accountant. The financial statements were preceded by a statement which provided, in part, as follows:

"A review consists principally of inquiries of company personnel and analytical procedures applied to financial data. It is substantially less in scope than an examination in accordance with generally accepted auditing standards, the objective of which is the expression of an opinion regarding the financial statements taken as a whole. Accordingly, we do not express such an opinion. (Emphasis added.)"

Based on our review, we are not aware of any material modifications that should be made to the accompanying financial statements in order for them to be in conformity with generally accepted accounting principles."

3. The financial statements submitted by petitioner included a balance sheet dated October 31, 1983. The balance sheet disclosed that petitioner had a net worth of \$29,921.00 and that its ratio of current assets to current liabilities was 4.64:1.

4. On June 26, 1984, the Audit Division determined that since petitioner did not submit a current unqualified financial statement and since petitioner did not report any tax liability for the period October, 1983 through March, 1984,<sup>1</sup> a bond in the amount of \$100,000.00 would be required as a condition for continued registration as a motor fuel distributor.

5. In a letter dated June 28, 1984, the Audit Division advised petitioner of its determination and further, that unless a bond in the amount of \$100,000.00 was posted, its registration as a motor fuel distributor would be cancelled.

6. Petitioner and Sair Aviation, Inc. ("Sair") are wholly-owned subsidiaries of the Messenger Group, Inc.

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1 It has been recognized by the parties that this is incorrect (see Finding of Fact "10", infra).

7. Petitioner was formed in 1961 as a distributor of corporate aircraft. It conducted retail sales of aircraft from 1961 to 1963. From 1963 to 1980, it was a wholesale dealer of aircraft. Currently, petitioner does not sell aircraft. At present, the primary sources of petitioner's income are from the rental of a hangar and the sale of fuel.

8. In 1966, petitioner established a division known as Sair Aviation. In 1976, Sair Aviation was incorporated as Sair Aviation, Inc. Sair provides general aviation services consisting of airplane sales, services and fueling. Sair provides fuel to airlines based in Syracuse, New York. Sair obtains its fuel from Exxon. Exxon fuel sells for a relatively high price because of Exxon's quality assurances.

9. Over a number of years, petitioner acquired the opportunity to obtain generic brands of fuel. This opportunity, in turn, gave petitioner the possibility of selling fuel to a type of customer that was not serviced by Sair -- airlines that would land airplanes in Syracuse on a non-periodic basis. For example, an airline might make a non-periodic landing in Syracuse in order to onload a particular object or an airline might make a non-periodic landing in Syracuse because of inclement weather. Petitioner also sells fuel to airports.

10. Petitioner obtained its registration as a motor fuel distributor in October, 1982. Since that time, its returns have reported the following:

<u>Date of Return</u>	<u>Amount of Tax Due</u>	<u>Date of Return</u>	<u>Amount of Tax Due</u>
October, 1982	\$ -0-	October, 1983	\$ -0-
November, 1982	-0-	November, 1983	-0-
December, 1982	-0-	December, 1983	368.24
January, 1983	-0-	January, 1984	-0-
February, 1983	-0-	February, 1984	-0-
March, 1983	-0-	March, 1984	-0-
April, 1983	402.08	April, 1984	-0-
May, 1983	-0-	May, 1984	-0-
June, 1983	-0-	June, 1984	-0-

July, 1983	-0-	July, 1984	1,593.20
August, 1983	693.52	August, 1984	-0-
September, 1983	-0-	September, 1984	1,030.40
		November, 1984	574.96

11. Petitioner reported no tax due in certain months because either no fuel was sold in those months or the fuel sales made were to other distributors of fuel. The tax liability which was disclosed on the returns arose from bulk sales of fuel to a non-distributor.

12. Petitioner averred at the hearing that if it lost its registration as a motor fuel distributor, it would lose the airlines as customers. Further, it would have difficulty obtaining a bond in the amount of \$100,000.00 because its sales of fuel are sporadic. Lastly, petitioner maintained that a bond in the amount sought by the Audit Division would adversely affect its credit rating.

#### 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 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), further provides as follows:

"If any applicant fails to meet in full the requirements of subdivision (b)(2) of this section, a bond equal to six months estimated tax liability will be required of such applicant regardless of the net worth or financial status of such applicant. If 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)].

C. That since petitioner did not submit an unqualified financial statement certified by a certified public accountant, the Audit Division properly determined that petitioner was required to file a surety bond [20 NYCRR 414.1(d)].

D. That 20 NYCRR 414.2 provides:

"Determination of need for and amount of bond. Prior to the approval of an application for registration as a distributor and during any subsequent review of a registered distributor, the department will: determine the estimated or actual six-month tax liability of such distributor, and analyze the certified financial statement of such distributor with particular emphasis on the ratio of current assets to current liabilities and the net worth (total assets less total liabilities) of such distributor determined under generally accepted accounting methods. In addition to the above criteria, any independent information concerning the operations or financial status of a distributor, which is available at the time of the review, may be used in determining the amount and sufficiency of a bond. For example, consideration may be given to a taxpayer's filing record which may indicate any delinquencies in filing and/or payment of tax as a motor fuel distributor or for any other New York State tax for which the distributor is responsible. Thus, a registration may not be approved unless a distributor is registered and is current in filing and paying over as a vendor for purposes of sales tax or, if an applicant has applied for registration as a vendor for purposes of sales tax."



E. That said regulation at subdivision (b)(4) provides:

"Where the amount of liability of a distributor cannot be determined, for example where a distributor is unable to furnish an average monthly gallonage sold, a bond for \$100,000 will be requested if the applicant'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."

F. That, in this case, the Audit Division has argued that by virtue of 20 NYCRR 414.2(b)(4), a surety bond of \$100,000.00 is required. It is clear, however, that 20 NYCRR 414.2(b)(4) is inapplicable since petitioner has a consistent filing record disclosing its tax liability (see Finding of Fact "10", supra).


G. That in view of the nature of petitioner's operations, its filing record and the tax liability it has incurred in the past, it is found that a surety bond in the amount of \$5,000.00 will be sufficient to secure the amount of tax due for a six-month period (20 NYCRR 414.1(d); 414.2). Accordingly, the amount of the surety bond which petitioner is required to file to retain its registration as a motor fuel distributor is set at \$5,000.00.

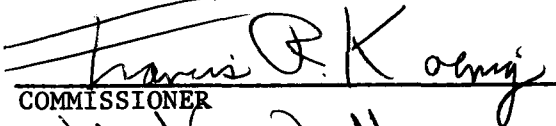
H. That the petition of Empire Aero Services, Inc. is granted to the extent of Conclusion of Law "G", supra; the petition is, in all other respects, denied.

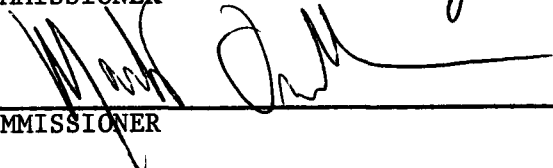
DATED: Albany, New York

STATE TAX COMMISSION

JAN 30 1985

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER