

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Dave Reisdorf, 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 }
County of Albany } ss.:

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 10th day of September, 1984, he served the within notice of Decision by certified mail upon Dave Reisdorf, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Dave Reisdorf, Inc.
16 Clinton Street
P.O. Box 288
Batavia, NY 14020

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
10th day of September, 1984.

Daniel Parchuck

James P. Hagelich
Authorized to administer oaths
pursuant to Tax Law section 174

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

September 10, 1984

Dave Reisdorf, Inc.
16 Clinton Street
P.O. Box 288
Batavia, NY 14020

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

STATE OF NEW YORK

STATE TAX COMMISSION

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

Petitioner, Dave Reisdorf, Inc., 16 Clinton Street, P.O. Box 288, Batavia, New York 14020, 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 Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Office Campus, Albany, New York on July 27, 1984 at 9:30 A.M. Petitioner appeared by its president, Thomas Reisdorf. 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 \$126,000.00.

FINDINGS OF FACT

1. Petitioner, Dave Residorf, Inc., is a motor fuel distributor located in Batavia, New York, and operating primarily in the Western New York counties of Genesee, Wyoming and Orleans.

2. By a letter dated May 14, 1984, the Audit Division 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. In response to the Audit Division's request, petitioner submitted its financial statements for the fiscal years ended May 31, 1982 and May 31, 1983, consisting of the following items:

- a) Review report of certified public accountant
- b) Financial statements
 - i) Balance sheets
 - ii) Statements of income and retained earnings
 - iii) Statements of changes in financial position
 - iv) Notes to financial statements
- c) Supplementary information
 - i) Schedules of operating and general expenses

4. Petitioner's financial statements were not unqualified statements certified by a certified public accountant. The statements were, however, prepared by certified public accountants (the firm of Andrews & Tenney) and included the following statement:

"We have reviewed the accompanying balance sheets of Dave Residorf, Inc., at May 31, 1983 and 1982, and the related statements of income and retained earnings and changes in financial position together with supplementary information for the years then ended in accordance with standards established by the American Institute of Certified Public Accountants. All information included in these financial statements is the representation of the management of Dave Residorf, Inc.

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.

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". (Emphasis supplied).

5. By a letter dated June 29, 1984, the Audit Division advised petitioner that since its financial statement (for FYE 5/31/83) was not an unqualified statement certified by a certified public accountant, petitioner was required to post a surety bond in the amount of \$126,000.00 by August 16, 1984, or its registration as a motor fuel distributor would be cancelled.

6. Petitioner immediately filed a petition for a hearing to contest this determination.

7. Petitioner began doing business in or about 1953, was incorporated on June 6, 1960, and has continued to do business since that time.

8. Petitioner has an unblemished record for timely filing of returns and reports and payment of taxes due. Petitioner has never failed to take advantage of a discount on supplies offered by its suppliers.

9. Petitioner's financial statements for the fiscal years ended May 31, 1982 and 1983 reveal the following information:

| | <u>FYE 5/31/82</u> | <u>FYE 5/31/83</u> |
|---|--------------------|--------------------|
| Current ratio (Current assets/current liabilities) | 1.66:1 | 1.51:1 |
| Net worth (assets less liabilities) | \$363,238.00 | \$429,890.00 |

10. The amount of the bond sought by the Audit Division is based upon petitioner's tax liability for the six-month period spanning November 1983 through April 1984 (\$125,519.76; rounded to 126,000.00).

11. Computer printouts of petitioner's preliminary financial data for its fiscal year ended May 31, 1984 (compiled for management purposes), reveal a current ratio of 1.95:1 and a net worth of \$502,288.75.

12. There is no indication that petitioner's financial statement for fiscal year 1984 will be an unqualified statement certified by a certified public accountant. Petitioner's president and sole shareholder, Mr. Thomas Reisdorf, testified that he questioned petitioner's independent accounting firm as to the cost of a certified financial statement. He was advised that such a statement would cost substantially more (\$2,000.00 - \$3,000.00) than the approximately \$800.00 cost quoted to petitioner for the posting of a \$126,000.00 surety bond.

13. The sole basis upon which the Audit Division asserts the need for a bond is that petitioner's financial statements are not unqualified statements certified by a certified public accountant pursuant to an audit conducted by such accountant.

14. Petitioner asserts that its strong financial condition, its unblemished filing and payment record (over a thirty year period of doing business) and its established position as a successful business militates against the requirement of a bond. Petitioner admits its financial statements are not unqualified statements certified by a certified public accountant, does not claim financial hardship or an inability to afford the cost of posting a bond, but maintains that such requirement is unfair and adds an unnecessary cost to petitioner's business.

CONCLUSION 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, 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, notwithstanding petitioner's past perfect filing and payment record and the indication on its financial statements that it clearly meets the tests of financial condition specified in 20 NYCRR 414.2 (i.e. "current ratio" and "net-worth" tests).

Finally, in establishing the January 19, 1984 effective date of the instant regulations, this Commission provided that a currently registered distributor who fails to file the requisite unqualified certified financial statement may nonetheless maintain his registration without need to post a bond, if such distributor meets all of the other requirements of 20 NYCRR 414 and "within the succeeding twelve months such distributor files an unqualified financial statement certified by a certified public accountant..." (see New York State Register, Agency Action I.D. No. TAF-32-83-00009-A, Section 4, February 8, 1984, p.23). The financial statements for petitioner's fiscal years ended May 31, 1982 and May 31, 1983, submitted in response to the Audit Division's request, are not unqualified certified statements. Furthermore, there was no assertion made or other indication given that petitioner's financial statement for its fiscal year ended May 31, 1984 (the preliminary data for which was submitted at the hearing) or for any other future years would be unqualified certified statements (see Finding of Fact "12"). Accordingly, the foregoing provision is inapplicable and the bond requirement is sustained.

D. That the petition of Dave Residorf, Inc. is hereby denied and the requirement of a surety bond in the amount of \$126,000.00 as a condition of continued registration as a motor fuel distributor is sustained.

Dated: Albany, New York

STATE TAX COMMISSION

SEP 10 1984

Rodriguez Cline
PRESIDENT

Francis R. Koenig
COMMISSIONER

Mark J. Smith
COMMISSIONER