

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Simon Oil Company, 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

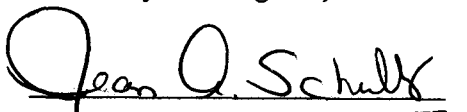
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 12th day of August, 1983, she served the within notice of Decision by certified mail upon Simon Oil Company, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Simon Oil Company, Inc.
c/o Eugene Dimet, V.P.
1316 Main Street
Niagara Falls, NY 14301

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) 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
12th day of August, 1983.


Jean A. Schult
AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174


Connie G. Hagelund

STATE OF NEW YORK

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In the Matter of the Petition :
of
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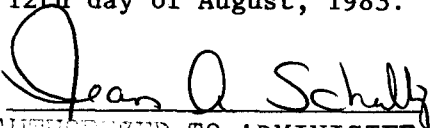
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 12th day of August, 1983, she served the within notice of Decision by certified mail upon Lawrence H. Levin the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

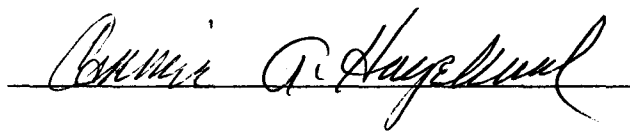
Lawrence H. Levin
Seligman, Sunshine & Co.
3912 Maple Road
Amherst, NY 14226

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) 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
12th day of August, 1983.


AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



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

August 12, 1983

Simon Oil Company, Inc.
c/o Eugene Dimet, V.P.
1316 Main Street
Niagara Falls, NY 14301

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, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted 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
Lawrence H. Levin
Seligman, Sunshine & Co.
3912 Maple Road
Amherst, NY 14226
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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

DECISION

Petitioner, Simon Oil Company, Inc., 1316 Main Street, Niagara Falls, New York 14301, 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 June 6, 1983 at 9:00 A.M. Petitioner appeared by its Vice-President, Eugene Dimet, and by Seligman, Sunshine & Co., C.P.A.'s (Lawrence H. Levin, C.P.A.). The Audit Division appeared by John P. Dugan, Esq. (Thomas Sacca, Esq., of counsel).

ISSUE

Whether the Audit Division's determination that petitioner is required to file a surety bond to secure the payment of motor fuel tax as a condition of maintaining its registration as a motor fuel distributor should be sustained.

FINDINGS OF FACT

1. On January 27, 1983, the Audit Division issued to petitioner, Simon Oil Company, Inc., a Notice to Distributors of Gasoline, together with a (blank) Motor Fuel Distributor Information Report (Form TP-187.16). This Notice requested petitioner to complete and return by February 28, 1983 the

Distributor Information Report, together with its most recent certified financial statement, in order that the Audit Division could make a determination as to the need for and amount of a surety bond from petitioner as security for the payment of motor fuel tax.

2. On or about February 25, 1983, petitioner returned its (completed) Distributor Information Report, together with its consolidated financial statements for the fiscal years ended August 31, 1981 and August 31, 1982. These consolidated financial statements included the accounts of both petitioner and its wholly-owned subsidiary, Gas-N-All, Inc. (with all significant inter-company transactions eliminated) and, though uncertified, had been reviewed by certified public accountants.¹

3. By a letter dated April 22, 1983, the Audit Division advised petitioner, in pertinent part, as follows:

"An analysis of your financial statement which was sent with Form TP-187.16 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.

As a condition of your continued registration as a motor fuel distributor, it will be necessary for you to post a surety bond in the amount of \$426,000. The necessary bond forms and information are attached.

Failure to post the surety bond by June 1, 1983 will result in the cancellation of your registration as a motor fuel distributor".

¹ A cover letter from Seligman, Sunshine & Co., C.P.A.'s, dated December 23, 1982, stated that their review of the August 31, 1982 consolidated financial statements indicated such statements required no material modifications in order to be in conformity with generally accepted accounting principles. This same conclusion was reached by predecessor accountants reviewing the August 31, 1981 consolidated financial statements in a report dated December 10, 1982. Petitioner's financial statements, as submitted, have been accepted by the Audit Division, with a requirement for certified financial statements not being imposed until 1984. Accordingly, petitioner's arguments relating to the high cost of a certified financial statement are not relevant to the issue of a bond required for maintaining registration in the current year (1983).

4. By a letter dated May 6, 1983, petitioner requested a hearing with regard to the above-noted surety bond being required by the Audit Division.

5. Simon Oil Company, Inc. ("Simon Oil"), began doing business in or about 1921 and has been in business continuously since that time. Simon Oil is engaged in the business of distributing gasoline to service stations pursuant to contracts with such stations.

6. In its early years, Simon Oil supplied only a few service stations. Its business has grown substantially through the years and, at present, Simon Oil distributes gasoline to approximately one hundred service stations, with this number expected to increase to approximately one hundred twenty stations in the near future when it assumes responsibility for supplying gasoline to all Sun Oil Company service stations in Erie and Niagara counties. This addition of the Sun Oil Service Stations will also result in an extension to the duration of supply contracts between Sun Oil and Simon Oil.

7. In or about 1979, Simon Oil decided to invest in "retail outlets" selling convenience foods and gasoline. This decision was prompted by an industry-wide movement toward diversification, and involved an investment by Simon Oil in excess of two million dollars.

8. Simon Oil's wholly-owned subsidiary, Gas-N-All, Inc., operates the retail outlets (eight such outlets were in operation as of August 31, 1982). The investment in these outlets was made by Simon Oil's utilization of approximately one million dollars of its own money, with the balance (approximately one million dollars) consisting of loans from banks. Approximately \$250,000.00 to \$300,000.00 of these loans have been repaid by Simon Oil. The real property upon which the retail outlets are situated is owned by Simon Oil (and carried on its books), while furnishings, inventory and equipment, etc., of the retail outlets are owned by Gas-N-All (and carried on its books).

9. Losses have resulted during the "start up" period, as expected by Simon Oil, on its investment in the retail outlets. However, according to testimony, this investment is nearing a breakeven point and it is projected that the next financial statements will indicate a profit being generated by the retail outlets.

10. The Audit Division introduced in evidence a document entitled Solutions To Motor Fuel Distributors Re-Registration Problems, which provides guidelines to be utilized by Audit Division personnel when reviewing Motor Fuel Distributor Information Reports and determining the need for and amount of a surety bond from motor fuel distributors in order to register or maintain registration. These guidelines set forth a current ratio test (current assets divided by current liabilities) and a net worth test, each of which must be met in order to avoid the Audit Division's assertion that a bond is required. Said tests, and the corresponding solution or action to be instituted by the examining agent for the Audit Division if either test is not met, are stated as follows:

Tests:

"a.) The current ratio is less than 1:1.

b.) The net worth is insufficient to cover 6 months tax liability.";

Solutions:

"a.) 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 6 months tax liability, bond should be required for the difference plus the amount of the difference in the current ratio criteria.

b.) If current ratio is at least 1:1 and net worth is inadequate to cover 6 months liability, request bond for the difference".

The guidelines further specify that any exceptions to the policy would be resolved on an individual basis after consultation.

11. An examination of Simon Oil's financial statements (specifically for the fiscal year ended August 31, 1982) and its Motor Fuel Distributor Information Report with respect to the above tests reveals the following information:

current assets : \$1,601,511.00 = .79 (current ratio)
current liabilities : \$2,027,453.00 = 1

net worth (assets less liabilities) = \$1,439,676.00
prior six month's motor fuel tax = \$ 761,360.16

12. The Audit Division admits that Simon Oil clearly passes the net worth test, but not the current ratio test. Accordingly, the Audit Division asserts its request for a bond in the amount of \$426,000.00 on the basis of the difference between current assets and current liabilities (\$425,942.00; rounded upward to \$426,000.00).

13. Simon Oil has never before been required to post a bond for the payment of motor fuel taxes and objects to the requirement of such a bond. In support of its objection to a bond, Simon Oil points to an unblemished record of collection, filing of returns and payment of taxes over a period of sixty-two years of doing business. During its history, Simon Oil has never missed a payment to its suppliers or a discount on supplies offered by its suppliers.

14. Simon Oil's vice-president, Eugene Dimet, testified that Simon Oil has always been a profitable business, with the possible exception of only two years. Furthermore, prior to its investment in the retail outlets in 1979, Simon Oil was described as a "cash rich" company. Its financial statement for the fiscal year ended August 31, 1979 showed current assets of \$1,254,889.64, as opposed to current liabilities of \$633,459.51 (current ratio of 1.9:1).

15. With respect to its investment in the retail outlets, Simon Oil maintains it could have financed the venture with long-term debt rather than with its own funds and thus, while incurring additional interest expense, could have maintained a more favorable current ratio. It also notes the projection that its next financial statements will indicate a profit on this investment,

and also projects an additional \$250,000.00 of net profit will be gained when it assumes supply responsibility for the additional Sun Oil Company service stations, since little additional expense is anticipated in undertaking such responsibilities (see Finding of Fact "6"). No date for such undertaking was specified by Simon Oil.

16. Petitioner notes that a part of its business is the purchase and sale of real property. Real property, as reflected on Simon Oil's financial statements (including the real property owned by Simon Oil and on which the retail outlets are situated), is valued at \$399,554.00, with no long-term debt attributable to such property. Petitioner thus asserts that although carried on the books as a fixed asset (property, plant and equipment) rather than as a current asset, such property should be considered as having a current nature.

17. Petitioner maintains that although it is financially capable of securing a bond in the amount of \$426,000.00, such a requirement would cost petitioner approximately \$8,000.00, and would cause difficulties in petitioner's business relationships with its bankers, suppliers and customers. Petitioner maintains a difficulty in obtaining such a bond involves an alleged requirement by bonding companies that they be given first priority on petitioner's assets in the event of a default, and also that the filing of such a bond casts doubts on the financial stability of the filer. Finally, petitioner notes that it meets the net worth test specified in the Audit Division's guidelines (net worth v. six month's tax liability) and suggests a comparison of total assets to total liabilities (net worth), rather than the current ratio test, as a fairer test of its financial condition.

18. The Audit Division asserts, by contrast, that the guidelines utilized are reasonable and are applied in the same manner to all distributors applying for registration or re-registration. It is further noted that petitioner is not being forced out of business under the bond requirement sought, but rather

is faced with the alternative business choices of either purchasing the bond and maintaining its registration, readjusting its assets to reflect a more favorable current ratio (thus avoiding the need for a bond), or not maintaining its registration and paying the tax to its supplier when the gasoline is purchased. Finally, the Audit Division asserts the current ratio test is appropriate since current assets represent an immediate source of funds to protect the (state's) revenues, whereas fixed assets, while subject to the imposition of liens, are not generally a liquid or ready source of funds.

CONCLUSIONS OF LAW

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

"[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 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 judgement the same is necessary as a protection to the revenues under [Article 12-A].".

No regulations have been promulgated by the Commission with respect to section 283.

B. That while the Audit Division's guidelines are not unreasonable, this Commission is not obligated to sanction the Audit Division's application thereof in each instance. In determining the need for and amount of a bond as security for the payment of sums due pursuant to Article 12-A, consideration will be given to the distributor's overall financial situation. The judicious exercise of discretion after reviewing all relevant factors may allow, in certain instances, a departure from the use of the current ratio and/or net worth versus six month's tax liabilities standards in making such a determination.

C. That in view of all the facts and circumstances presented herein, the filing of a bond in this case (and at this time) is not required. We note

specifically petitioner's long history of financial solvency and stability, its established record of timely filing of returns and payment of taxes, and its real estate holdings totalling approximately \$400,000.00 acquired by the expenditure of its own funds in connection with its investment in the retail outlets (causing the present shortfall in its current assets)². Accordingly, although petitioner's current assets do not equal or exceed its current liabilities, there exists sufficient security in view of petitioner's entire financial situation to allow continued registration without the filing of a bond.

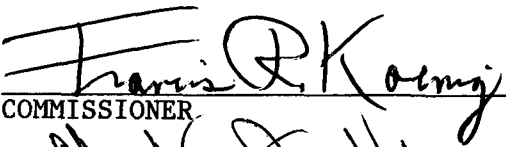
D. That the petition of Simon Oil Company, Inc. is hereby granted and the revocation of its registration (as called for in the Audit Division's letter of April 22, 1983; see Finding of Fact "3"), together with the requirement of a bond in the amount of \$426,000.00, is cancelled.

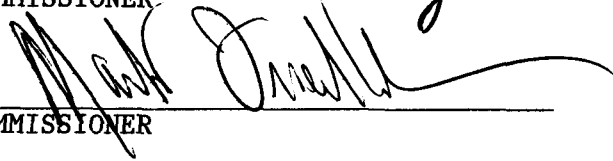
DATED: Albany, New York

STATE TAX COMMISSION

August 12, 1983


PRESIDENT


COMMISSIONER


COMMISSIONER

² This decision does not confer upon petitioner's real estate holdings the status of current assets, but merely recognizes that this real estate is not encumbered by long term debt, is owned by and carried on the books of Simon Oil and not on the books of its subsidiary, and is readily available as security in the event Simon Oil should encounter future difficulties in the payment of its taxes.