

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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

Petitioner, Getty Terminals Corp., 125 Jericho Turnpike, Jericho, New York 11753, filed an exception to the determination of the Administrative Law Judge issued on June 23, 1988 with respect to its petition for a hearing with regard to a bond required under section 283 of Article 12-A of the Tax Law (File No. 804745). Petitioner appeared by Dornbush, Mensch, Mandelstam & Silverman (Richard J. Schaeffer, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Thomas C. Sacca, Esq., of counsel).

Only the petitioner filed a brief on exception. Oral argument, at the request of the petitioner, was heard on January 17, 1989.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the Division properly required the petitioner, as a condition of maintaining its registration as a motor fuel distributor, to file a surety bond in the amount of \$8,200,000.00.

FINDINGS OF FACT

We find the facts as stated in the Administrative Law Judge's determination and such facts are incorporated herein by this reference. They are as follows.

Petitioner, Getty Terminals Corp. ("Getty Terminals"), is a wholly-owned subsidiary of Getty Petroleum Corp. ("Getty Petroleum"). Getty Terminals imports oil into New York and sells it to distributors or Getty Petroleum, and also operates terminals.

On April 30, 1987, the Division advised petitioner that it was proposing that security be set in the amount of \$15,744,000.00. The amount of the security sought was based on the excess of petitioner's potential motor fuel and sales tax liability for a six-month period over petitioner's net worth (that is, \$22,724,192.00 minus \$6,980,000.00).

On or about May 8, 1987, petitioner filed a motor fuel bond in the amount of \$50,000.00. In September 1987, the Division returned petitioner's \$50,000.00 bond and reiterated its position that security in the amount of \$15,744,000.00 was required.

At the time of the hearing, the Division reduced the amount of security being sought on the basis of more recent information which disclosed that petitioner's potential six-month motor fuel and sales tax liability was \$19,817,824.00 and petitioner's net worth was \$10,859,000.00. The Division determined that security in the amount of \$9,000,000.00 was required representing the approximate excess of petitioner's potential tax liability over its net worth.

After the hearing, the Division again reduced the amount of security being sought based on the availability of still more recent information. The information available at the time of the hearing shows that petitioner has current assets of \$50,437,000.00 and current liabilities of \$40,057,000.00 resulting in a current ratio of 1.26 to 1. On the basis of an examination of petitioner's taxable receipts for the months of May 1987 through October 1987, the Division concluded that petitioner's potential tax liability for a six-month period was \$19,381,417.00. The Division concluded that security in the amount of \$8,200,000.00 was required. As in the prior determinations, the amount of the security sought represents the approximate remainder resulting from subtracting petitioner's net worth of \$11,203,000.00 from petitioner's potential six-month tax liability.

For Federal income tax purposes, petitioner's corporate income tax return is consolidated with the return of Getty Petroleum. On September 10, 1987, the Division gave Getty Petroleum tentative permission to file a combined report for corporation franchise tax purposes with, among others, petitioner.

During the period December 1986 through November 1987, petitioner's total motor fuel tax liability, including New York City tax, was \$23,631,774.08. During the same period of time, petitioner had credits and made payments of \$25,303,569.49, resulting in a net overpayment of \$1,671,795.41 and an average monthly overpayment of \$139,316.00. The reason for the overpayments was that petitioner paid tax on the basis of conservative estimates of its tax liability. The overpayments were then claimed as credits on the following month's return.

During the months of December 1986 through November 1987, petitioner incurred sales tax liability of \$16,385,525.66 and made payments of \$17,231,951.17. Consequently, during this period petitioner made a total overpayment of \$864,425.51 and an average monthly overpayment of \$72,035.46. The overpayments of sales tax were the result of petitioner's making payments on the basis of a conservative estimate of its sales tax liability. At a later time, petitioner amended its returns to reflect the actual amount due.

The consolidated balance sheet of Getty Petroleum and its subsidiaries for the year ended January 31, 1987 lists current assets of \$105,670,000.00 and current liabilities of \$84,356,000.00 resulting in a current ratio of 1.25 to 1. Utilizing the six-month period ending October 1987, Getty Petroleum's consolidated net worth exceeds Getty Terminals' potential motor fuel and sales tax liability by \$50,070,790.00.

The consolidated balance sheet of Getty Petroleum and its subsidiaries for the year ended January 31, 1988 reports current assets in the amount of \$133,368,000.00 and current liabilities of \$100,228,000.00 resulting in a current ratio of 1.33 to 1. For the year ended January 31, 1988, Getty Petroleum and its subsidiaries had a net worth of \$82,008,000.00.

Petitioner has entered into an agreement with Getty Petroleum and its subsidiaries whereby the signatories have agreed to assume, as co-obligors, the obligations of Getty Terminals to collect and pay over motor fuel tax and sales and use taxes for a two-year period of

time commencing February 24, 1988. In the agreement, the obligors stipulated, among other things:

"that in any action against the Obligors to require payment of the Taxes, the Obligors shall succeed to any defenses, counterclaims, rights of set-off or similar rights which [Getty] Terminals may have...."

OPINION

The Administrative Law Judge determined that petitioner was a distributor within the purview of Tax Law section 283(3) and was required to file a bond as prescribed by the Division in accordance with its regulations. The Administrative Law Judge determined that the net worth of petitioner's parent company did not have to be taken into account in determining the amount of the bond; that the parent company of the petitioner was not liable for petitioner's tax payments under section 289-b(2) of the Tax Law; and that the agreement between petitioner and its parent concerning the tax obligations of petitioner had no application with regard to petitioner's obligation to file the required bond or other security required by the Division. Finally, the Administrative Law Judge dismissed petitioner's assertion that the Division did not give sufficient consideration to petitioner's past filing record as not persuasive.

On exception petitioner raises the same arguments that it raised below, namely that only a minimum bond should be required in view of the net worth of its parent company which, pursuant to the agreement between the two is available to satisfy the tax obligation of the petitioner; that the parent is liable for petitioner's tax obligation pursuant to Tax Law section 289-b(2) and that the Division failed to give adequate consideration to its past filing record.

On exception the Division relies on the determination of the Administrative Law Judge.

We affirm the determination of the Administrative Law Judge.

Tax Law section 283(3) provides, in part, as follows:

"The tax commission shall require a distributor to file with the department of taxation and finance a bond issued by a surety company approved by the superintendent of insurance as to solvency and responsibility and authorized to transact business in this state or other security acceptable to the tax commission, in such amount as the tax commission may fix, in an amount determined in accordance with rules and regulations prescribed by it, to secure the payment of any sums due from such distributor (i) pursuant to [Article 12-A] and (ii) pursuant to articles twenty-eight and twenty-nine of this chapter with respect to sales and uses of motor

fuel. The tax commission shall require that such a bond or other security be filed before a distributor is registered, and the amount thereof may be increased at any time when in its judgment the same is necessary as a protection to the revenues under this article and articles twenty-eight and twenty-nine of this chapter."

Section 18 of Chapter 282 of the Laws of 1986 transferred the functions of the Tax Commission as prescribed above to the Commissioner of Taxation and Finance.

The purpose of Tax Law section 283(3) is to protect the revenues of New York State by requiring the registration of distributors and the filing by such distributors of a bond or other security to secure the payment of motor fuel and sales and use taxes (see, Matter of Major Oils, Tax Appeals Tribunal, August 4, 1988).

The Division adopted regulations pursuant to section 283(3) which provide the method by which the bond or other security is determined (see, former 20 NYCRR 414 et seq applicable to this proceeding¹). Part 414.2 entitled "Determination of amount of bond" provided in relevant part that:

"Prior to the approval of an application for registration of a distributor and during any subsequent review of a registered distributor the [Division] will: determine the estimated or actual six month maximum potential 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. In addition to the above criteria, any independent information concerning the operation 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."

Part 414.2(b) of the regulations provides as follows:

"Bond Required. In all cases a distributor is required to file with the department a bond, the amount of which shall be at least adequate to meet the requirements of paragraphs (1) through (6) of this subdivision."

Paragraphs (1) through (6) provide the various methods by which the amount of the security of a distributor is to be determined. These methods involve an analysis of a distributor's ratio of current assets to current liabilities and a comparison of its net worth to its six month maximum potential tax liability. The current ratio measures the distributor's

¹Effective April 4, 1988 the Division adopted new regulations, 20 NYCRR 411.3, concerning the bonding requirements of Tax Law section 283(3).

liquidity, that is, the ability of the business to meet current debts as they become due. The net worth analysis is done to judge the solvency of the distributor. A review is also made of the financial statements to determine the types of assets and liabilities of the business, the amount of cash on hand, how inventory is valued, the value of fixed assets and whether and to what extent they are encumbered. The Division, by analyzing the financial statements of the distributor, attempts to determine the ability of a distributor to pay its taxes as they become due in the short term and to forecast the distributor's chances of long range viability. The results of these analyses are compared to the distributor's six month maximum potential tax liability to determine the security required to be filed.

The distributor here is the petitioner, Getty Terminals. The application of the above methodology to its financial situation resulted in a determination by the Division that a bond of \$8,200,000 should be filed in order for Getty Terminals to be registered. The determination was based solely on the financial information provided with respect to petitioner and did not take into account the net worth of the petitioner's parent company, nor the obligations purportedly included in the agreement between the petitioner and its related corporations and the petitioner and its parent. In short, the analyses was done in strict accordance with the statute and regulations adopted by the Division in accordance with that statute. We see no reason to modify the determination of the Administrative Law Judge.

Petitioner asserts that to take into account the substantial net worth of its parent company in determining the bond requirement of petitioner is in accord with the Division's regulations. Petitioner relies on that portion of the Division's regulations (20 NYCRR 414.2) which provides that the Division "[I]n addition to the above criteria . . . [the Division may consider] . . . any independent criteria concerning the operations or financial status of a distributor . . . in determining the amount and sufficiency of a bond." We do not find this persuasive. The clear wording of the statute and the regulations adopted by the Division is to require the person or entity which is the distributor, and which will be liable for the taxes due under the law, to furnish both evidence of its financial status and the security necessary to protect the state

interest in such taxes. Here, that is the petitioner and not its parent. Thus, it seems clear to this Tribunal that the Division proceeded properly in looking at only the net worth of the petitioner and not of its parent.

Petitioner advances two reasons why it is appropriate to take into account the net worth of its parent company.

We deal first with the assertion by petitioner that pursuant to section 289-b(2) of the Tax Law its parent company is directly liable for petitioner's tax obligations. We find no merit in petitioner's assertion. Liability under section 289-b(2) is not absolute but is premised on the shareholder being one who is under a duty to act for the corporation in the carrying out of its responsibilities under the Tax Law. Liability does not flow merely because one is a shareholder. The clear wording of the section bears this out. Further, we find persuasive the judicial interpretation of similar language in section 1131(1) (see, Matter of Blodnick v. State Tax Commn., 124 AD2d 437). Petitioner's interpretation would make any shareholder of a corporation liable for its tax obligations irrespective of such shareholder's involvement or lack of involvement in the corporation's activities. We find no basis for this result in the words of the statute nor in its legislative history.

Further, we agree with the statement of the Administrative Law Judge that even if the facts supported a conclusion that Getty Petroleum was under a duty to act for petitioner, and was thus liable for taxes due from petitioner, the two could change their interaction in the future to eliminate such a duty. Since the purpose of the bond requirement is to secure future liabilities, it would be inappropriate to determine it based on the unknown future relationship of the two corporations.

We reach the same conclusion with respect to petitioner's assertion that the contract between petitioner and Getty Petroleum should be taken into account by the Division because it makes the parent an obligor with regard to petitioner's taxes. We do not find this argument persuasive. We reiterate the point made above, i.e., that the statute and the regulations require that the applicant for registration as a distributor provide the bond or security required by the

Division. Petitioner is the distributor/applicant here, not its parent. The crux of the matter is that the statute has as its principal goal the protection of the state's tax revenues. The regulations adopted by the Division (20 NYCRR 414.3) provide for the deposit of securities in lieu of a bond to satisfy this requirement including United States Treasury bonds and bonds of New York State.² These securities provide the state with a direct alternative to assure receipt of its tax moneys. The Division here has determined that the contractual obligations offered by the petitioner do not offer the degree of assurance contemplated by the statute and its regulations. The Administrative Law Judge has also made that determination. We find no reason advanced by the petitioner to modify this determination.

Finally, we deal with petitioner's assertion that the Administrative Law Judge did not give due consideration to its filing record. In those cases where the Division and the former State Tax Commission reduced the amount of security required by a distributor there were factors in addition to past filing records which formed the basis for the decision (see, e.g., Matter of Campbell Oil Company, Inc., State Tax Commn., March 24, 1986; Matter of Simon Oil Company, Inc., State Tax Commn., August 12, 1983). Here the petitioner relies solely on its past filing record which, in our opinion, standing alone, is not sufficient to reduce the bond amount.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner, Getty Terminals Corp., is in all respects denied;
2. The determination of the Administrative Law Judge is affirmed; and

²Former 20 NYCRR 414.3 which provided for deposit of specific securities in lieu of bond did not provide for "other forms of security" acceptable to the Division as do the regulations, 20 NYCRR 411.3, in effect as of April 4, 1988.

3. The petition of Getty Terminals Corp. is denied and the bond requirement in the amount of \$8,200,000.00 imposed by the Division of Taxation is sustained.

DATED: Troy, New York
May 18, 1989

/s/ John P. Dugan
John P. Dugan
President

/s/ Francis R. Koenig
Francis R. Koenig
Commissioner