



DISCUSSION

Section 22.19(f)(1) of the Consolidated Rules of Practice (40 C.F.R. § 22.19(f)(1)), permits discovery upon a determination by the Presiding Officer:

- (i) That such discovery will not in any way unreasonably delay the proceeding;
- (ii) That the information to be obtained is not otherwise obtainable; and
- (iii) That such information has significant probative value.

In the instant case, Respondent contends that the information requested by Complainant lacks "significant probative value" with respect to the issue of Respondent's current ability to pay:

how Respondent ran its business years ago, including issues as to whether it got fair value in connection with certain transactions, are matters that are wholly irrelevant to the issue at hand, Respondent's current ability to pay any assessed civil penalty.<sup>1</sup>

Complainant, however, maintains that the requested documents:

contain significant probative information needed to conduct a complete financial analysis of Respondent's ability to pay. The requested information relates directly to sources of income to fund a penalty; assets and liabilities; income and expenditures; and sales and purchases. All of this information has significant probative value in assessing Respondent's inability to pay claim.<sup>2</sup>

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<sup>1</sup> Respondent's Reply to Complainant's Reply to Respondent's Response in Opposition to Complainant's Motion for Order Compelling Response to Request for Production of Documents and Request for Admission, August 31, 1994, at 2.

<sup>2</sup> Complainant's Reply to Respondent's Response in Opposition to Complainant's Motion for Order Compelling Response to Request for Production of Documents and Request for Admissions, August 16, 1994, at 7.

However, Complainant fails to specify how the requests are relevant to Respondent's current ability to pay. The requests deal largely with past transactions and records which bear no relevance to Respondent's current ability to pay, absent a showing by Complainant that there is reason to believe that assets were transferred fraudulently in anticipation of a penalty assessment.<sup>3</sup> Here, there has been no such assertion of fraud or even an assertion that there is reason to believe fraud was committed.<sup>4</sup> Consequently, Complainant may not inquire into the past business dealings and records of Respondent. Such information lacks "significant probative value" on the issue of Respondent's current ability to pay. Accordingly, Complainant fails to demonstrate "good cause"<sup>5</sup> to order the production of Respondent's past business dealings and records.

At issue here is only information relating to current

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<sup>3</sup> Cf. Joslyn Manufacturing Co. v. T.L. James & Co., Inc., 893 F.2d 80, 83 (5th Cir. 1990) ("[v]eil piercing should be limited to situations in which the corporate entity is used as a sham to perpetrate a fraud or avoid personal liability.")

<sup>4</sup> Notwithstanding three rounds of filings, the closest thing to an assertion of fraud is an allusion to a possibility that assets may have been undervalued in a sale to Respondent's parent. Complainant's Response to Respondent's September 1, 1994 Reply, September 15, 1994, at 2.

In addition, Complainant's claim that the requested information is needed to clarify inconsistencies in Respondent's information currently in Complainant's possession falls short of constituting an allegation of fraud. Indeed, Complainant provides no indication as to what these inconsistencies are.

<sup>5</sup> Pursuant to 40 C.F.R. § 22.04(c)(5), the Presiding Officer may, "[f]or good cause, upon motion or sua sponte, order a party, or an officer or agent thereof, to produce testimony, documents, or other nonprivileged evidence. . . ." 40 C.F.R. § 22.04(c)(5).

financial condition or anything explaining inconsistencies to the extent it relates to current financial condition, and not whether there were bad business judgments, or even efforts by Respondent's parent and sister corporations to bleed Respondent. This proceeding concerns Respondent Tex Tin, not Respondent's parent and/or sister subsidiaries.

Complainant cites cases holding that the respondent bears the burden of proof with regard to a claim of inability to pay,<sup>6</sup> and indeed, the Chief Judicial Officer twice reached this result.<sup>7</sup> However, these cases ought not to be interpreted as allowing inquiry into past business operations absent a showing of fraud. In fact, neither decision suggests that complainant in those matters even requested records of past business operations. In Pivirotto, only tax returns and a statement of net worth were

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<sup>6</sup> See Complainant's Response to Respondent's September 1, 1994 Reply at 3; Complainant's Reply to Respondent's Response in Opposition to Complainant's Motion for Order Compelling Response to Request for Production of Documents and Request for Admissions at 8-9.

<sup>7</sup> See In re Helena Chemical Company, FIFRA Appeal No. 87-3 (November 16, 1989) at 22 ("[t]he burden of providing the information supporting the contention that the proposed penalty will have such adverse effect rests upon respondent. A determination of such adverse effects shall be made only upon an analysis by complainant of certified financial records of all business operations of respondent."); In re Edward Pivirotto and Josephine Pivirotto d/b/a E&J Used Tool Co., TSCA Appeal No. 88-1 (February 15, 1990) at 9 ("[r]espondents have the burden to raise and establish their inability to pay proposed penalties.").

Note that In re Colonial Processing, Inc., II EPCRA-89-0114, is an Initial Decision (June 24, 1991), not a Final Decision. See Complainant's Reply to Respondent's Response in Opposition to Complainant's Motion for Order Compelling Response to Request for Production of Documents and Request for Admissions at 8, n. 1.

supplied, and those were deemed adequate.<sup>8</sup> In Helena, there is no indication that the submission of current certified financial records of the respondent would not have sufficed.<sup>9</sup>

Moreover, several circuit courts, including the Fifth Circuit, have held that the burden of going forward with the evidence on ability to pay rests with the proponent of the penalty. E.g., Dazzio v. F.D.I.C., 970 F.2d 71, 77 (5th Cir. 1992); Merritt v. United States, 960 F.2d 15, 18 (2d Cir. 1992); Bosma v. United States Dep't of Agriculture, 754 F.2d 804 (9th Cir. 1984). In Dazzio, the Fifth Circuit held that the F.D.I.C., "as proponent of the penalty assessment, ha[s] the burden of going forward with evidence on all the statutory factors -- including ability to pay."<sup>10</sup> Accordingly, it would appear that under Dazzio, even if Complainant could demonstrate "good cause" and "significant probative value" with respect to its requests, Complainant would have to bear the expense of obtaining the information.

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<sup>8</sup> Pivirotto, TSCA Appeal No. 88-1 at 10.

<sup>9</sup> See Helena, FIFRA Appeal No. 87-3 at 22.

<sup>10</sup> Dazzio, 970 F.2d at 77. As the court stated: If Congress had intended a different result [than placing the burden of proof on the proponent] when a defendant's lack of resources is an issue, it could have written inability to pay a fine into the statute as an affirmative defense and shifted the burden of going forward with the evidence onto the defendant. Congress did not do that.

Id. (quoting Merritt, 960 F.2d at 18).


The TSCA penalty provision at issue in the instant case, 15 U.S.C. § 2615(a)(2)(B), is substantively equivalent to those at issue in Merritt and Dazzio. See Dazzio, 970 F.2d at 77.

Complainant has failed to demonstrate how the documents sought relate to Respondent's current ability to pay. However, if Complainant can point to decisions which allowed inquiry into the history of past business dealings of a respondent claiming inability to pay, in the absence of a showing that there was reason to believe fraud occurred, then a motion to reconsider will be appropriate.

ORDER

Accordingly, Complainant's Motion for Order Compelling Response to Request for Production of Documents and Request for Admissions is denied with respect to requests for information not relevant to Respondent's current ability to pay.

The parties shall have twenty-one (21) days in which to resolve amongst themselves how information relating to the current financial condition of Respondent will be supplied consistent with this ruling.

  
J. F. Greene  
Administrative Law Judge

November 2, 1994  
Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that the original of this ORDER was sent to the Regional Hearing Clerk and copies were sent to the counsel for the complainant and counsel for the respondent on November 4, 1994.

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Shirley Smith  
Legal Staff Assistant  
for Judge J. F. Greene

NAME OF RESPONDENT: Tex Tin Corporation  
DOCKET NUMBER: TSCA=VO=5-3C

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