5/14/96

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Obron Atlantic Corporation	)	Docket No. TSCA-V-C-038-93
	)	
Respondent	)	

ORDER DENYING MOTION FOR ACCELERATED DECISION

Respondent is charged with failing to submit timely the report "Partial Updating of TSCA Inventory Data Base Production and Site Report (Form U)" for five chemicals manufactured or imported in reportable quantities during its latest fiscal year before August 25, 1990. The report should have been filed by February 21, 1991. It was not filed until 62 days later on April 24, 1991.

Respondent has moved for an accelerated decision that it is a small manufacturer as defined in the applicable regulations and, as such, is exempt from reporting four of the five chemicals alleged in the complaint, since they were each imported or manufactured in less than 100,000 pounds.[1]

Under the regulation, 40 C.F.R. §704.3, a manufacturer qualifies as a small manufacturer if its total annual sales when combined with those of its parent company are less than $40

[1] 40 C.F.R. §704.3. Complainant's objection to the motion on the grounds that Respondent has waived the small manufacturer's exemption by not raising it earlier in its answer or prehearing exchange is denied. Complainant has not shown that it is prejudiced by consideration of the motion at this stage in the proceedings.

million. A parent company is defined as a company that owns or controls another company. Id. Total annual sales are defined as the total revenue generated by the sale of all products of a company. It includes the total annual sales revenue of all sites owned or controlled by that company and the total annual revenue of that company's subsidiaries and foreign or domestic parent company, if any. Id.

Respondent in support of its motion makes two arguments that it claims are substantiated by the papers in the file.

The first argument is that Respondent and those domestic entities to which it is related through ownership in 1989 had combined annual sales of less that $40 million.

The second argument has to do with the relationship between Respondent and what it terms "Foreign Entities", which it says precludes attributing any of the sales of these Foreign Entities to Respondent for purpose of determining whether Respondent qualifies as a small manufacturer.

It is, of course, Respondent's burden to establish that there is no genuine issue of material fact as to either of these two arguments and that Respondent is entitled to prevail as a matter of law.

We consider here the issue whether Respondent has met its burden of showing that it qualifies as a small manufacturer. The EPA does not appear to seriously question the financial information submitted by Respondent showing that in 1989, the combined sales of Respondent, the partnership and the companies in which Respondent

held stock had sales of less than $40 million.

Congress included the small manufacture exemption to the reporting requirements of section 8 to protect small manufacturers from unreasonably burdensome reporting requirements.[2] In determining whether a reporting requirement was unreasonably burdensome, the EPA considered not only the resources of the company itself but also those of its parent, defined as one owning 50% or more of a company's voting stock or has the power to control the management and policies of the company. This definition was taken from the United States Department of Commerce, 1977 Economic Census, which, in reporting the industrial activity of U.S. business, apparently treated the corporation and the subsidiaries through which it operated as one consolidated entity.

Nevertheless, in interpreting the exemption, we should not be limited to what business activity the Department of Commerce would consider should be reported in consolidated form for its economic census. As the EPA pointed out, in framing the exemption for small manufacturers, Congress had two concerns in mind. On the one hand, there was the need to protect small manufacturers from unreasonably burdensome requirements. Balanced against this, was the EPA's need for sufficient data from the chemical industry to accurately assess the risk potential of individual chemicals.[3] Since we are dealing here with remedial legislation, the regulation should be construed,

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[2] H.R. Conf. Rep. No. 94-1679, 94th Cong. 2d Sess. 80 (1976).

[3] Proposed rule, 47 Fed. Reg. 27207 (Jun 23, 1982).

consistent with its language, so as to best effectuate its goals.[4] This means looking to the economic reality of the relationship between a manufacturer or importer and other entities and applying the exemption only to those manufacturers or importers who truly have limited resources available to them and upon whom reporting would be a burden.

Respondent has treated much of the information on which it has based its argument as confidential information for reasons which are not entirely clear.[5] This much, however, Respondent has disclosed. Respondent is owned by a partnership formed by three non-resident aliens on behalf of themselves and other individuals. The partners also hold interests in "Foreign Entities" located outside the United States. Since individuals, according to Respondent, would form any link between Respondent and any foreign entity, there is no basis under the regulation for combining the sales of any foreign entity with Respondent's to determine whether the total combined sales exceed $40 million. The regulation intends to combine only the sales of companies and the subsidiaries which they directly own or control

I disagree. The purpose of the exemption is to lighten the reporting burden on firms with limited resources. So the test

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[4] Tcherepnin v. Knight, 384 U.S. 332, 336 (1967).

[5] For example, I am unable to understand why Respondent has deleted as "CBI" on page 9 of its memorandum, language which it has disclosed in other parts of its memorandum. The net effect is simply to make the redacted version of the argument virtually unintelligible as well as to inhibit the content of what Respondent would regard as permissible disclosure.

should be what resources are available to a reporting entity by reason of its relationship to other business enterprises. The regulation does not require that the businesses of the parent and subsidiary be related for purpose of counting total sales nor does combining sales depend upon the extent to which the parent company actually exercises its control over the subsidiary's operations.

If companies X and Y are owned in common or are both controlled by an individual A, the resources of the entire group would seem to be as much available to X or Y as if X owned or controlled Y directly. To limit the resources of each company in the one case to its own sales but combine the sales of the two in the other case would be to make the difference depend on the form in which businesses chose to operate rather than upon the unified ownership or control that actually exists. Whether or not the Department of Commerce would combine the sales of the two enterprises in compiling economic statistics should not be controlling, because it does not appear that the Department of Commerce necessarily had the same concerns in mind as exist under TSCA, section 8.

There is in the record evidence that would contradict the claims that Respondent makes about it being free from any control by any other entity. I find, accordingly, that there is a factual issue over whether there is not a basis for including the sales of some other enterprise besides those admitted to be "related companies" in determining whether Respondent is entitled to the small manufacturer exemption.

Respondent's cross-motion for an accelerated decision that it is a small manufacturer and not subject to the inventory reporting requirements except as a small manufacturer is denied.

Complainant is directed to report on the status of this case by June 3, 1996.

Gerald Harwood
Senior Administrative Law Judge

Dated: May 14 ,1996.

In the Matter of Obron Atlantic Corporation, Respondent
Docket No. TSCA-V-C-038-93

Certificate of Service

I certify that the foregoing **Order**, dated 5/14/96, 1996, was sent this day in the following manner to the addressees listed below.

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Dated: May 14, 1996