UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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IN THE MATTER OF	:	
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SAM EMANI d/b/a **Auto Stop of Godby Road**	:	Docket Number: CAA-IV-93-007
	:	
Respondent	:	Judge Greene

ORDER
GRANTING "ACCELERATED" DECISION AS TO PENALTY

Clean Air Act § 113 (d) (1) (B), 42 U.S.C. § 7413 (d) (1) (B), and § 609(e), 42 U.S.C. § 7671h (e); 40 C.F.R. § 82.40:

1. Regarding the civil penalty issue in the circumstances of this this case, no oral evidentiary hearing is required, it being clear that nothing of consequence will be gained by holding such a hearing. Decision as to the appropriate penalty may properly be rendered here upon a motion for "accelerated decision."

2. Inability to pay a penalty proposed in a complaint is treated treated as an affirmative defense to the penalty issue, and must be established by respondent with credible, reliable evidence. Failure to produce adequate evidence of inability to pay a civil penalty in the amount sought makes the penalty issue appropriate for summary determination upon motion by the opposing party.

3. The appropriate civil penalty, where Respondent asserted inability to pay Complainant's reduced civil penalty proposal of $1000 based upon Respondent's income tax returns but did not demonstrate by means of credible, reliable evidence that he could not pay the reduced amount, is $1000, where Complainant has shown that the proposal was made in accordance with the Act and appliable U. S. Environmental Protection Agency penalty policies; (b) the proposal is fair and reasonable based upon the record; and (c) no credible basis for a reduction of the proposed penalty appears in the record.

Appearances:

David A. Savage, Esquire, Office of Regional Counsel, Region IV, 345 Courtland Street, N. E., Atlanta, Georgia 30365, for Complainant.

Mr. Sam Emani, 100 Acorn Ridge, Fairburn, Georgia 30213, for Respondent.

BEFORE: J. F. Greene, Administrative Law Judge
Decided November 30, 1994

DECISION AND ORDER

On May 27, 1994, an Order Granting Motion for Partial "Accelerated Decision" was entered in this matter. The Order granted judgment against respondent as to liability for the charges alleged in the complaint. [1],[2]

Respondent herein was found liable for selling a twelve-ounce container of automobile air conditioner refrigerant in commerce from its place of business on December 1, 1992, after the effective date of the federal prohibition against such sales, to an individual who was not trained or certified pursuant to 40 C.F.R. § 82.40 to operate approved refrigerant recycling equipment, who did not assert or demonstrate such training, and who did not intend to resell the container.[3] It was also found that Respondent did not display a sign regarding the prohibition against such sales, as required by 40 C.F R. § 82.42(c).[4] Based upon these violations, it was determined that respondent is subject to imposition of a civil penalty pursuant to section

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[1] A copy of the Order Granting Motion for Partial "Accelerated" Decision of May 27, 1994, is attached hereto.

See **Complainant's Motion for Partial Accelerated Decision,** November 22, 1993.

[2] The Order also denied Complainant's Motion for Default judgment of November 29, 1993.

[3] Count I of the Complaint.

[4] Count II of the Complaint. **Order Granting Motion for Partial "Accelerated Decision,"** May 27, 1994, at 8-12.

113(d)(1)(B) of the Clean Air Act.[5]

The parties were ordered to confer for the purpose of attempting to settle the remaining issue, i. e. the amount of the penalty, and were directed to report upon status during the week ending June 24, 1994.[6] On June 21, 1994, Complainant reported that the case had been discussed with Respondent, but that no progress had been made toward settlement because "Respondent is unwilling to submit his tax returns to Complainant and, therefore, Complainant is unable to evaluate Respondent's claim of inability to pay."[7] On June 28, 1994, Respondent was given through August 5, 1994, in which to produce credible evidence of inability to pay the civil penalty proposed by Complainant.[8] As of August 5, 1994, respondent had not produced such evidence.[9]

A preliminary issue here is whether respondent is entitled to an oral evidentiary hearing in connection with a determination as to the appropriate penalty for the violations found. That issue may be reduced, on the facts of this matter, to a question

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[5] **Id** at 12.

[6] **Id.** at 13.

[7] **Third Status Report**, June 21, 1994.

[8] **Order Denying Motions and Scheduling Submission of Materials**, June 28, 1994. In the Order, Respondent's request (which was treated as a motion) for reversal of the May 27, 1994, Order granting "accelerated decision" in Complainant's favor, was denied.

[9] **Fourth Status Report**, August 8, 1994.

of whether respondent has a right to present evidence and argue his case on the penalty issue orally where there has been little or no willingness to support allegations of inability to pay at appropriate earlier points in the history of this matter.

Assertions of inability to pay must be considered to be in the nature of affirmative defenses the establishment of which are peculiarly within a respondent's ability. This interpretation is consistent with the federal Administrative Procedure Act, 5 U.S.C. § 551, § 556, and with EPA regulations. Not unreasonably, it is up to Respondent to demonstrate inability to pay, since this was asserted as a defense to the penalty proposal.

The question of whether an opportunity must be afforded to present evidence orally on the penalty issue has been addressed previously in decisions at this level, and it has been held uniformly that in appropriate cases no oral evidentiary hearing is required.[10] An oral evidentiary hearing convened to hear unsupported assertions would be unproductive. Opportunity to confront the government's witnesses serves no purpose for the

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[10] See In the Matter of Bestech, Inc., Docket No. IF&R-004-91-7073-C, March 13, 1992, at 4-5 slip opinion; Environmental Protection Agency v. Streeter Flying Service, Inc., IF&R VII-612C-85P, August 27, 1985, at 6-7 slip op.; In re World Wide Industrial Supply, FIFRA 1085-01-13-012P, January 9, 1986, at 4. See also Rainbow Paint and Coatings, Inc., EPCRA Docket No. VII-89-T-609; In re Swing-A-Way Manufacturing Co., Docket EPCRA-VII-91-T-650-E (Order Denying Motion for Accelerated Decision as to Penalty for Certain Counts. In the Matter of Jenny Rose, Inc., Docket IFR III 395-C, February 22, 1993, to the effect that respondent is not entitled to a hearing concerning the penalty question under all circumstances.

opposing party or for the presiding judge when the issue raised by a respondent is whether respondent can afford to pay a penalty, if respondent has failed or refused to produce sufficient credible evidence to support that assertion. When the process of reaching a decision will not be enhanced or assisted by the receipt of evidence in an oral evidentiary hearing, an agency is not required to provide one, as opposed to providing "some form of hearing," in the absence of remarkable circumstances.[11] Due process does not require in such instances that a party be given an oral hearing as opposed to being given an opportunity to submit a case by way of documents and written arguments.[12] It is sufficient if respondent has been given "a meaningful opportunity to present [its] case."[13]

An Order Granting "Accelerated Decision" as to Penalty was issued herein on August 31, 1994.[14] It was noted in the decision preceeding the Order that Respondent had consistently failed or refused to provide credible financial evidence in support of his alleged inability to pay the original proposed civil penalty of $3105. Nevertheless, chiefly because Respondent was representing

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[11] See 2 Fed. Proc. LEd § 2:103; Mathews v. Eldridge, 424 U. S. 319, 332. See also discussion at 333-335, 343-349.

[12] 2 Fed. Proc. LEd §2.106; Allied Van Lines v. United States, 303 F. Supp. 742 (C. D. Cal. 1969).

[13] Id. at 349. See also 333: "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner,'" quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965). See also the discussion at 348-349.

[14] Order Granting "Accelerated" Decision as to Penalty, August 31, 1994, a copy of which is attached hereto.

himself in this matter, the Order gave Respondent a last chance to submit copies of income tax returns for the years 1991 through 1993. It provided that if he did so within ten days of the date of the Order, a petition to stay the effect of the Order "for an appropriate period pending Complainant's assessment of the contents of the tax returns will be entertained."[15] Shortly thereafter, Respondent did provide to Complainant what purported to be copies of his federal income tax returns for the years in question. An Order Providing For Reopening and for Complainant's Statement of Evaluation of Respondent's Ability to Pay issued on October 25, 1994. Complainant thereafter proposed a civil penalty of $1000, based upon its examination of Respondent's income tax return copies. Respondent was given an opportunity to rebut this proposal, but reiterated only that he could not afford the $1000. No further evidence has been submitted in support of the claim of inability to pay the reduced amount now sought by Complainant.

Accordingly, it will be found that Respondent has failed to carry its burden of demonstrating with credible, reliable financial information that the reduced penalty is beyond its ability to pay. It will be found further that, based upon the record as it now stands, a civil penalty in the amount of $1000 is fair and reasonable in the circumstances of this case.
At this juncture, there appears to be no reason to believe that a trial would result in further evidence of Respondent's alleged

[15] Order, at 11.

inability to pay $1000, and Respondent's defense remains merely unsupported argument which cannot form the basis of a dispute over material facts at issue such as would justify going to trial. Neither is there any reason to believe, on this record, that oral testimony would be helpful in resolving credibility aspects, if there are any, of the issue. Respondent's defense, if it were to be presented orally at trial without adequate supporting data, could be accorded no more weight than can be given now based upon the written record. Respondent has the burden of showing that something is to be gained with respect to the penalty issue by going to trial. No such showing has been made. Moreover, any party to a suit, including the federal government, ought not to be sandbagged by evidence produced for the first time in the courtroom, when, despite numerous opportunities to disclose his evidence fully, Respondent has failed or refused. Indeed, Respondent has had unlimited opportunity to supply adequate evidence to support his defense to the penalty issue.

A review of the facts and law here reveals no denial of respondent's rights. There is no entitlement to further consideration. There is no legal or evidentiary reason in the current posture of this case to convene an oral evidentiary hearing. A review of the facts and law reveals no denial of respondent's due process rights.

As has been noted above, the civil penalty proposed in the complaint totalled $3105 for the two charges. That proposed

penalty has now been reduced by Complainant based upon an examination of Respondent's income tax return copies.

Section 113(e) of the Act provides that:

> In determining the amount of the penalty to be assessed . . . the court. . . shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence . . . , payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation . . . .

It is concluded, based upon Complainant's moving papers, that the $1000 civil penalty proposal now proposed has been made by Complainant in consonance with the Act and the applicable civil penalty policy, including the Clean Air Act Civil Penalty Policy Applicable to Persons Who Perform Service for Consideration on a Motor Vehicle Air Conditioner Inolving the Refrigerant or Who Sell Small Containers of Refrigerant in Violation of 40 C.F.R. Part 82, Protection of the Stratospheric Ozone, Subpart B: Servicing of Motor Vehicle Air Conditioners, of July 19, 1993.[16] Accordingly, it is determined that the penalty proposed by complainant is fair and reasonable on the facts and in the circumstances of this case. Complainant's basis for requesting imposition of a penalty in the amount of $1000 is unrebutted. It is determined that there is no substantial evidence in this record to justify a reduction of that amount.

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[16] **Complainant's Memorandum in Support of Motion for Partial Accelerated Decision as to Penalty**, August 8, 1994, at 3.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Respondent is a "person," as defined by law.

Respondent is liable for violations of the Clean Air Act and implementing regulations (see Order Granting Partial Accelerated Decision" of May 27, 1994, attached hereto), and, consequently, is liable for a civil penalty for such violations.

Respondent has provided insufficient credible evidence upon which a finding of inability to pay a $1000 civil penalty proposed by complainant could be based, despite full opportunity to do so.

In these circumstances, Respondent is not entitled to an oral evidentiary hearing and it is determined that no such hearing is required to be held in this matter.

The penalty proposed in the complaint was determined in accordance with relevant statutory and regulatory strictures, and in accordance with Environmental Protection Agency policy regarding penalties proposed to be assessed in cases brought pursuant to the Clean Air Act. The proposal is fair and reasonable on the record of this case.

No further reduction of the penalty is warranted, on this record.

There being insufficient credible evidence upon which to base any finding of inability to pay the penalty proposed by Complainant, Complainant's motion for "accelerated" decision as to penalty will be granted.

ORDER

It is hereby **ORDERED** that the Order of August 31, 1994, in this matter is hereby **VACATED**.

And it is **FURTHER ORDERED** that Respondent shall pay a civil penalty of $1000 for violations previously found, within forty-five (45) days from the date of service of this Order, by forwarding to the Regional Hearing Clerk a cashier's check or a certified check for the said amount payable to the United States of America which shall be mailed to:

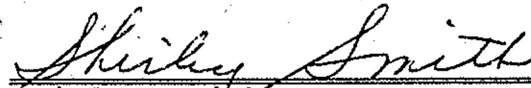
U. S. Environmental Protection Agency
Regional Hearing Clerk
P. O. Box 100142
Atlanta, Georgia 30384

J. F. Greene
Administrative Law Judge

November 30 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 30, 1994.



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

NAME OF RESPONDENT: **Sam Emani d/b/a Auto Stop of Godby Road**
DOCKET NUMBER: **CAA-IV-93-007**

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