

Opinion No. 73-50

June 25, 1973

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Mr. A.L. Porter, Jr. Secretary-Director Oil Conservation Commission Post Office
Box 2088 Santa Fe, New Mexico 87501

QUESTIONS

FACTS

Plateau, Inc. is a petroleum producer, refiner and marketer with its executive offices, and a full accounting office, in Farmington, New Mexico. Its refinery is located approximately 1 1/2 miles Southeast of Bloomfield, New Mexico. Plateau is a New Mexico corporation and is a subsidiary of Suburban Propane Gas Corporation located in New Jersey. Plateau has applied for a preference in the sale of state royalty oil pursuant to Sections 7-11-57 through 7-11-63, N.M.S.A., 1953 Comp. (P.S.).

QUESTIONS

Is Plateau, Inc. an independently owned and operated refiner within the meaning of Section 7-11-58, **supra**, so that it qualifies for a preference in the sale of state royalty oil?

CONCLUSION

Yes.

OPINION

{*100} ANALYSIS

Section 7-11-57, **supra**, states as follows:

"The purpose of this act [7-11-57 to 7-11-63] is **to assist small business enterprise within the state** by encouraging the establishment and operation of petroleum refineries not having an adequate supply of refinery charge stocks through granting a preference to such petroleum refineries in the sale of state royalty oil accruing {*101} from public land oil and gas leases." (Emphasis added)

"Small business" is defined in Section 7-11-58, **supra**, to be:

"An independently owned and operated concern primarily engaged in petroleum refining when it does not have more than thirty thousand [30,000] barrels per day of crude oil capacity from owned or leased facilities."

Beyond question Plateau, Inc. is engaged primarily in petroleum refining. The documentation furnished by this Company also establishes that the capacity of its refinery is 5200 barrels per day. Depending on the type of charge stock available, the thruput sometimes exceeds this capacity but is considerably less than thirty thousand barrels per day.

This brings us to the question whether Plateau, Inc. is an independently owned and operated refinery. Certainly it is independent in the sense that its own crude oil production represents a small fraction of its refinery requirements. This appears clear from the Affidavit of Mr. Cleo E. Wall, Manager of the Crude Oil Department of Plateau, Inc. See in this connection Docket No. OIAB 137-72 (1973).

This leaves us with this question: Does the fact that Plateau, Inc. exists as a subsidiary of Suburban Propane Gas Corporation, a New Jersey corporation, render the former incapable of being an independently owned and operated refinery as that term is defined in Section 7-11-58, **supra** ?

As Mr. Justice Cardozo said in **Berkey v. Third Ave. Ry. Co.**, 244 N.Y. 84, 155 N.E. 58:

"The whole problem of the relation between parent and subsidiary corporations is one that is still enveloped in the mists of metaphor."

We do know, however, that a subsidiary and parent corporation may have independent existence. **International Order v. Fridia**, Tex. Civ. App., 91 S.W.2d 404 (1936). It is not enough to call for adjudicating two corporations to be in legal effect one and the same that the parent corporation owns most or all of the stock of the other. The mere fact that the stockholders of two corporations are the same does not of itself make the subsidiary corporation a mere instrumentality of the parent corporation. **Perlman v. Great States Life Ins. Co.**, Colo. 436 P.2d 124; **Di Re v. Central Livestock Order Buying Co.**, 246 Minn. 279, 74 N.W.2d 518.

Many circumstances must be considered in overcoming or failing to overcome the indicia or separate entities. Sameness of members, officers and objects, and the absence of distinct interests are indicia of agency or identity. **Pan Pacific Sash and Door Co. v. Greendale Park, Inc.**, 166 Cal. App.2d 652, 333 P.2d 802; **Republic-Transcon Industries, Inc. v. Templeton**, Miss., 175 So.2d 185. Conversely, differences in officers, objects or conduct are indications of separate recognizable entities. **Wade & Wade v. Central Broadcasting Co.**, 227 Iowa 427, 288 N.W. 441.

Where a parent corporation exercises its control over its subsidiary, not as a majority stockholder in the usual and normal manner in due course of business, but to such an

extent that the subsidiary has become a mere instrumentality or adjunct in its business, or the properties or affairs of the two corporations have become so inextricably intertwined that it is impracticable to identify one from the other, then the parent corporation and the subsidiary are ordinarily treated as one entity. Powell, **Parent and Subsidiary Corporations**, Chapter 6 (1931).

The test then is whether there is submergence of independent management of the subsidiary by its own directors due to direct management by the principal corporation. **Kingston Dry Dock Co. v. Lake Champlain Transportation Co.**, 31 F.2d 265. You must look to see if the property rights of the two corporations are so commingled and their affairs so intimately related in management as to render it apparent that they are, in fact and intent, one and the same. **H.E. Briggs & Co. v. Harper Clay Products Co.**, 150 Wash. 235, 272 P. 962.

Applying these "tests" to Plateau, Inc. we find that the indicia of separateness considerably outweigh those of sameness of identity. Suburban Propane, the parent corporation, is concerned chiefly with {^{*102}} wholesaling and retailing liquefied petroleum gas on the East Coast. Some ninety percent of its revenues are generated through this facet of its operation. Suburban also maintains an exploration office in San Antonio, Texas, the primary interest of which is in finding natural gas sources for various small gasoline plants. Plateau's manager states that **its** president sets the policies for refining and marketing by Plateau, Inc.

Based on the information furnished this office, which we assume is factual, it is our conclusion that Plateau, Inc. is an independently owned and operated refinery within the meaning of Section 7-11-58, **supra**.

By: Oliver E. Payne

Deputy Attorney General