STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **DIAMOND TERMINAL CORPORATION** :	
for Review of a Denial of a License under Article 12-A of the Tax Law. :	DECISION

Petitioner, Diamond Terminal Corporation, 160 East Railway Avenue, Paterson, New Jersey 07503, filed an exception to the determination of the Administrative Law Judge issued on July 21, 1988 with respect to its petition for review of a denial of a license pursuant to Article 12-A of the Tax Law (File No. 805249). Petitioner appeared by Kramer, Eisenberg and Fisherman (Marvin E. Kramer, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

Neither party filed briefs on the exception. Request for oral argument by the petitioner was denied.

This proceeding is governed by section 283-b(6) of the Tax Law, which provides that where an application for a license is refused, the applicant may request a hearing on such refusal and that within three months from the application for such hearing a decision either denying or granting the application must be rendered. The three month period is determined with regard to any postponements of any scheduled hearing or conference or other delay made at the request of the applicant.

An expedited hearing pursuant to Tax Law section 283-b(6) was held on March 10, 1988 and continued on March 11, 1988, March 28, 1988, March 29, 1988 and concluded on March 30, 1988.

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

ISSUES

I. Whether sufficient grounds exist to support the Division of Taxation's proposed refusal to license petitioner as a terminal operator.

II. Whether, on the day before the administrative hearing began, the Division was permitted to raise an additional ground for its denial of a terminal operator's license.

FINDINGS OF FACT

We find the facts of this case as determined by the Administrative Law Judge except that, at the request of the petitioner and with the concurrence of the Division, finding of fact "53" is stricken.

The stock of petitioner, Diamond Terminal Corporation ("Diamond"), is owned by its sole shareholder and president, Stanley Coven. Mr. Coven is also the sole shareholder and president of several other related corporations, including: A-1 Racefuel Transport, Inc., a licensed importing transporter; A-1 Racing Specialties, Inc. ("A-1 Racing"), a licensed distributor of motor fuel; and Milano Equities, Inc. ("Milano"), a former terminal operator which stopped doing business after June 25, 1987.

On July 17, 1987, Diamond filed an application for a license as a motor fuel terminal operator under Article 12-A of the Tax Law. The application was hand delivered to the Division of Taxation ("Division") by an attorney representing Diamond. At the same time, the attorney delivered an application for a license as a motor fuel terminal operator on behalf of Milano. Both applications were dated June 30, 1987.

On December 22, 1987, the Division issued to Diamond and Milano identical notices of a proposed refusal to license the applicants as terminal operators. The notices set forth two grounds for the Division's determination:

> "(1) Pursuant to Tax Law Sec. 283-b(2)(g), Stanley Coven, who is the President, 100% shareholder and/or a responsible employee of the applicant, has committed acts specified in Tax Law Sec. 283-b(4) within the last five years, specifically, he has failed to comply with provisions of Article 12A or Article 28 of the Tax Law with respect to motor fuel or rules or regulations adopted pursuant thereto, by failing to timely file returns and pay taxes.
>
> (2) Pursuant to Tax Law Sec. 283-b(2)(e), Stanley Coven, who is the President, 100% shareholder and/or a responsible employee of the applicant, was an officer, director, 100% shareholder and/or responsible employee of another corporation, specifically, A-1 Racing Specialties, Inc. at the time a tax was finally determined to be due from such other corporation, which tax has not been paid in f ull.

On February 22, 1988, Diamond timely filed a petition challenging the Division's determination, and an administrative hearing was scheduled on March 10, 1988.

By letter dated March 7, 1988, the Division advised Diamond that the second ground for denial of a license, as stated in the notice of December 22, 1987, was withdrawn, because the filing of a petition in bankruptcy by A-1 Racing had prevented a final determination of tax due from that corporation. However, the Division asserted an additional ground for its refusal to license Diamond as follows:

> "It is our position that Tax Sec. 283-b, subd. 2, par. (g) , is a basis for denial of the terminal operators license in that Stanley Coven, who is the President, 100% shareholder and/or a responsible employee of the applicant, has committed acts specified in Tax Law Sec. 283-b, subd. 4, within the last five years. Specifically, he is also the President, 100% shareholder and/or a responsible employee of Milano Equities, Inc., which
>
> corporation operated a motor fuel terminal without a terminal operators license as required by Tax Law Sec. 283-b, subd. 1, and did not file the terminal operators reports required pursuant to Tax Law Sec. 286, subd. 2. and 20 NYCRR 410.11. Operation of a terminal without a license and failure to file terminal operators reports are each failures to

comply with provisions of Article 12-A within the meaning and intent of Tax Law Sec. 283-b, subd. 4, and are, therefore, a proper basis for denial of a terminal operator's license in accordance with Tax Law Sec. 283-b, subd. 2, par. (g)."

At the hearing commenced on March 10, 1988, Diamond's representative moved to preclude the Division from submitting evidence regarding Milano's alleged operation of a terminal without a license, claiming that the Division's assertion of additional grounds for denial of a license denied Diamond adequate notice and due process of law.

The Administrative Law Judge denied Diamond's motion but offered to adjourn the proceeding to enable Diamond to prepare a response to the newly raised matter. Diamond declined the offer of adjournment, and the hearing proceeded.

A-1 RACING SPECIALTIES, INC.

In January 1987, A-1 Racing was a licensed motor fuel distributor engaged in importing and selling motor fuel in New York. Its volume of business was relatively small, and it had filed the minimum required bond of $50,000.00 as security for its payment of motor fuel taxes.

By letter dated February 18, 1987, the Division requested that A-1 Racing file a surety bond of $15,000,000.00. The amount of the bond was determined by the Division on the basis of its estimate of the six-month maximum potential tax liability of A-1 Racing.

In January 1987, the Division learned that A-1 Racing was to become the importer of record at several terminals in New York, including the Jenny Mount Vernon Terminal, the Inwood Terminal and Commander Oyster Bay Terminal. The source of this information was not disclosed in the record.

The previous importer of record at the three terminals had imported 107,104,778 gallons of motor fuel in the six-month period prior to January 1987. The tax liability on this number of

gallons was $15,423,088.00. The tax returns of the prior importer formed the source of this information.

The Division was aware that A-1 Racing had imported 4,736,635 gallons of motor fuel at the Inwood Terminal from January 31, 1987 through February 10, 1987 and 2,450,130 gallons of motor fuel at the Mount Vernon Terminal from January 10, 1987 through January 29, 1987. The source of this information was not disclosed in the record; however, the volume was consistent with the amount of business done by the prior importer. Based on the most recent figures for A-1 Racing and the history of the prior importer, the Division projected that A-1 Racing would import approximately 18,000,000 gallons of motor fuel per month.

By letter dated February 19, 1987, the Division demanded that A-1 Racing file a return and make payment of taxes due for January 1987. The letter stated, in pertinent part:

> "1. You are required to file your returns covering taxes due under Articles 12-A, 28 or 29 for January 1987 transactions involving the importation, manufacture, sale or use of motor fuel at 2:00 p.m., E.S.T. on February 20, 1987.
>
> 2. You will file the returns described in paragraph 1 above by hand delivering the returns to a messenger from this Department who will pick up the returns from your offices at 100 Merrick Road, Rockville Center, New York 11750, Room 302E.
>
> 3. You will make payment of the taxes covered by the returns described in paragraph 1 by certified check(s) and the certified check(s) must be hand delivered to the messenger who will pick up the check(s) and the returns as described in paragraph 2.
>
> This letter constitutes a demand for the payment of taxes due under Articles 12-A, 28 or 29 for January 1987 transactions involving the importation, manufacture, sale or use of motor fuel."

A-1 Racing filed a petition protesting the amount of the surety bond. An administrative hearing was commenced in the Tax Appeals Bureau and adjourned sine die in order to allow

the Division to recompute the required bond. A bankruptcy petition filed by A-1 Racing eventually resulted in a stay of this administrative proceeding.

By letter dated March 5, 1987, the Division directed A-1 Racing to file quarter-monthly motor fuel and sales tax returns and to make payments of the amounts shown on those returns by certified check. The following schedule was included in the letter:

PERIOD	DATE DUE
3/l/87 -3/7/87	3/11/87
3/8/87 -3/15/87	3/18/87
3/16/87 -3/22/87	3/25/87
3/23/87 -3/31/87	4/3/87
4/l/87 -4/7/87	4/10/87
4/8/87 -4/15/87	4/20/87
4/16/87 -4/22/87	4/27/87
4/23/87 -4/30/87	5/5/87
5/l/87 -5/7/87	5/12/87
5/8/87 -5/15/87	5/20/87
5/16/87 -5/22/87	5/28/87
5/23/87 -5/31/87	6/3/87

In addition to establishing a filing schedule, the letter required A-1 Racing to file motor fuel tax returns (MT-104) and sales tax prepayment forms (FT-945) for the first three quarters of each month by mailing them to Eugene Greco, a tax auditor in the District Office Audit Bureau. Returns for the fourth period of each month, covering all transactions for the calendar month, were to be sent to "Processing Unit, P.O. Box 1920, Albany, New York".

The returns filed by A-1 Racing in accordance with this schedule were not date stamped upon receipt by the Division. However, a check receipt log was maintained by the administrative bureau with whom the returns were filed, and it showed the date of receipt of each check. A-1 Racing sent the returns and checks via Federal Express which provided overnight delivery.

A-1 Racing filed its first returns under the quarter-monthly filing schedule on or about March 27, 1987. Included in the motor fuel tax return were two shipments of motor fuel made on March 2, 1987 and March 11, 1987, respectively. The second set of returns was filed on or about April 10, 1987. The motor fuel tax return showed one shipment of motor fuel made on March 14, 1987. On or about April 20, 1987, the Division received two sets of returns. One return showed shipments of motor fuel made on March 3, March 20, March 23, March 25, and March 27, respectively, and another return showed shipments of motor fuel made on April 2, and April 3, respectively. On April 22, 1987, the Division received a motor fuel tax return showing shipments made on March 18, March 21 and March 30, 1987.

The bookkeeper for A-1 Racing, Victor Trnka, prepared its tax returns. He would not report a shipment of motor fuel until he received all invoices, barge papers and inspection reports relative to the particular shipment. This generally occurred between four and seven days from the date of the shipment. Beginning in April, Mr. Trnka prepared and filed returns approximately every seven to 10 days. The motor fuel returns typically showed shipments of motor fuel made two to four weeks before the return was filed. Each form MT-104 provides a space where the month and year covered by the return is to be completed by the filer. Mr. Trnka completed this entry as indicated; however, he did not specifically enter the quarter-monthly period covered by the return.

Following this pattern A-1 Racing filed five sets of returns in the month of April and five sets of returns in the month of May. The MT-104 containing shipments of fuel made from May 22, 1987 through May 29, 1987 was filed on or about June 11, 1987.

Although the quarter-monthly schedule contained in the Division's letter of March 5, 1987 stopped after the period ended May 31, 1987, A-1 Racing continued filing returns approximately every seven to ten days. Throughout March, April, May, June and most of July, Mr. Trnka was steadily in contact with Mr. Greco of the Division. The Division did not inform A-1 Racing in writing that the pattern of filing which was established by April 1987 was insufficient or inadequate.

By letter dated June 26, 1987, the Division informed A-1 Racing that the previous request for a $15,000,000.00 bond was being withdrawn and replaced by a proposal for a $4,000,000.00 bond. The original bond determination was based on the Division's calculation of the potential six-month tax liability of A-1 Racing. The revised bond amount was based on the actual cash receipts of A-1 Racing for the months of January, February, March and April 1987 and estimated receipts for May and June 1987. The letter did not constitute a final determination. It stated, in pertinent part: "If you are not in agreement with the proposed security, a written reply within seven (7) days of the date of this letter is required citing your reasons. After reviewing your reply, we will advise you of our final determination."

A-1 Racing responded to the Division's request for a $4,000,000.00 bond by letter dated June 30, 1987. The letter conveyed A-1 Racing's disagreement with the amount of the bond requirement, It further noted that the administrative hearing to review A-1 Racing's protest of the Division's

initial determination of a $15,000,000.00 bond had been adjourned and that the outcome was still pending.

By letter dated July 30, 1987, the Division informed A-1 Racing that because A-1 Racing had failed to file the $4,000,000.00 bond as requested, it would be necessary to continue the quarter-monthly filing schedule. The July 30 letter contained a schedule which began on the date on which the prior schedule had ceased, namely, June 1, 1987.

As of July 30, 1987, the last set of returns filed by A-1 Racing had been received by the Division on or about July 24, 1987, and they included shipments of motor fuel made during the period July 1, 1987 through July 6, 1987. On or about August 5, 1987, the Division received a set of returns from A-1 Racing covering shipments made during the period July 7, 1987 through July 11, 1987. These filings were not in compliance with the filing schedule mandated by the Division,'but they were-consistent with the pattern of filing established by A-1 Racing over a period of several months.

On or about August 5, 1987, the Division sent A-1 Racing the following letter:

> "Our records indicate you have not filed Motor Fuel Tax Returns (MT-104) and Sales Tax form FT-945 for the period of July 7, 1987, to date. You were put on a quarter monthly filing until your bond is submitted to the State of New York for security.
>
> Failure to file these reports will result in a cancellation of your motor fuel license M-2254. This letter constitutes a demand for filing, as required by section 283.5 of the tax law."

On August 10, 1987, all records and books in the offices of A-1 Racing were seized by a government task force investigating tax evasion by members of the motor fuel industry. The Division was a member of the task force.

By letter dated and delivered August 12, 1987, the representative for A-1 Racing responded to the Division's letter of July 30, 1987. The letter states, in pertinent part: that A-1

Racing never received a final determination of the $4,000,000.00 bond requirement and thus was denied the right to protest such requirement; that under protest A-1 Racing agreed to continue quarter-monthly filing of returns with payment of tax; and that A-1 Racing considered itself to be in substantial compliance with the quarter-monthly filing schedule established by the Division.

Also on August 12, 1987, Mr. Greco received a letter from the representative of A-1 Racing stating that the seizure of its records had precluded A-1 Racing from "precisely complying with prior directives" of the Division. In the absence of records, A-1 Racing proposed to wire transfer $700,000.00 to the Division to satisfy any outstanding tax liabilities through the period July 31, 1987. Eventually, three payments were made for the month of July 1987: $700,000.00 was wire transferred to the Division on August 13, 1987; a second wire transfer of $250,000.00 was made on August 24, 1987; and a payment in the amount of $38,265.20 was sent to the Division with a cover letter dated September 2, 1987. Included with this last payment was a copy of the sales tax prepayment on motor fuel report for the month of July 1987.

On August 19, 1987, the Division sent a letter to A-1 Racing withdrawing the security bond determination of $4,000,000.00 and replacing it with a security bond determination of $13,000,000.00. The new bond determination was based on the volume of business done by A-1 Racing in the period June 6, 1987 through July 11, 1987 as shown on the motor fuel returns filed by A-1 Racing for that period.

On August 25, 1987, the Division issued to A-1 Racing a Demand for Filing of Returns and Payment of Taxes. The returns requested were motor fuel tax returns and sales tax prepayment on motor fuel returns for the following periods:

July 8, 1987 - July 15, 1987
July 16, 1987 - July 22, 1987
July 23, 1987 - July 31, 1987
August 1, 1987 - August 7, 1987
August 8, 1987 - August 15, 1987

The notice stated: "If the returns and payment are not received within 10 days of the date of this letter, your registration as a motor fuel distributor is cancelled pursuant to Tax Law Section 283(5) effective 10 days after the date of this letter."

On September 4, 1987, the Division hand delivered to A-1 Racing a Notice of Cancellation of Registration as a Motor Fuel Distributor. The notice explained that the registration was being cancelled because of the failure of A-1 Racing to file returns and make payment of taxes in accordance with the notice and demand dated August 25, 1987.

Also on September 4, 1987, A-1 Racing filed a bankruptcy petition in the United States District Court for the Eastern District of New York.

By an order dated September 18, 1987, the bankruptcy court vacated the Division's notice of cancellation as having been issued prematurely. It further ordered A-1 Racing to file tax returns pursuant to Article 12-A and Article 28 of the Tax Law on a weekly basis beginning at the date of the order. Each return with payment was to be submitted by Friday for the week ending on the prior Friday. A-1 Racing has filed returns in accordance with this schedule. Pursuant to Chapter 11 of the Bankruptcy Code, administrative

proceedings before the Division of Tax Appeals regarding the original $15,000,000.00 security bond have been stayed.

THE MOTOR FUEL TAX LAW

Before July 14, 1986, the Tax Law did not require the licensing of motor fuel terminal operators, although terminal operators were required, as of June 1, 1985, to file monthly information returns.

The law requiring licensing became effective on the date of its passage, July 14, 1986. The legislature set a target date of October 1, 1986 for the licensing of all terminal operators required to be licensed.

In order to implement the new legislation, the Division was required: to draft, print and distribute bulletins to interested parties summarizing the legal requirements for licensing; to draft various forms, including the license application form; to develop and implement administrative procedures within the Division for the processing of license applications; and to promulgate rules and regulations pursuant to Article 12-A as amended.

The first informational bulletins were issued in August 1986, and license applications did not become available until on or about September 29, 1986. Since it was impossible for the Division to license existing terminal operators by October 1, 1986, the Division adopted an informal policy of allowing terminal operators in operation to continue to operate if they submitted applications within one to two months after the applications became available. This policy was not reduced to writing or generally disseminated to terminal operators or other members of the motor fuel industry.

Applications for licenses were directed to the Processing Division which reviewed them for completeness and forwarded copies of the applications to the Audit Division and the Tax Enforcement Unit for their review.

The Audit Division reviewed each applicant's file to determine whether grounds existed to deny a license. Where deemed appropriate, the Audit Division would arrange to interview the principals associated with the terminal to obtain information. It might also conduct a field visit of the terminal operation.

In the fall of 1987, a working group consisting of representatives of the Processing Division, the Audit Division and the Tax Enforcement Unit began meeting to consider and act on outstanding license applications.

MILANO EQUITIES, INC.

Milano was incorporated in late December 1986. On February 3, 1987, Milano entered into a five-year lease agreement with Mt. Vernon Energy Terminals, Inc. ("Mt. Vernon Energy"). The subject of the lease was a motor fuel terminal located in Mt. Vernon, New York. The lease agreement contained the following provisions in paragraph 13:

> "2. That Landlord has applied for a Terminal Operator's License .... However, it shall be Tenant's responsibility to obtain all necessary license and permits to continue the operation of the premises on its behalf and to keep them in full force and effect. In the event that Tenant is enjoined from operating the facility by Administrative Order, Court Order, operation of law or otherwise until such time as it shall secure a Terminal Operator's License from the State of New York, then and under those circumstances, the performance of all of Tenant's obligations hereunder shall be abated until such time as Tenant secures said licenses. In the event Tenant is denied a Terminal Operator's License or is enjoined from operating the facility by reason thereof, or otherwise, after a reasonable opportunity to cure, in the event that the Tenant is unable to resume operations of the facility, then, and at that time, this Lease shall come to an end and terminate as if said time were the end of the term herein seto [sic] forth and Tenant shall be entitled to receive the return of its security on deposit hereunder."

The first documented contact between Milano and the Division occurred on February 24, 1987. Robert Gordon, an excise tax investigator, visited the business offices of Milano at 100 Merrick Road, Rockville Centre, New York to prepare an intelligence profile on Milano. A field visit and investigation of this nature was consistent with the Division's procedure for processing applications for terminal operator licenses.

Mr. Gordon interviewed Stanley Coven and his attorney, Marvin Kramer., He was told that Milano had filed applications for a terminal operator license in December 1986 and had applied for New York State and Federal employer identification numbers which were pending at that time. Mr. Gordon was also told that Milano did not intend to buy or sell motor fuel from the Mt. Vernon terminal, but merely to store motor fuel there.

Sometime before March 25, 1987, Santos Sfogliano, an excise tax investigator, visited the Milano business office and requested the following documents: a Terminal Operator's Monthly Report of Inventory (FT-941); Terminal Operator's Individual Customer Reconciliations (FT-941.1); Uniform Manifest's for Barges (FT-960); a current list of all thruput accounts (a thruputter rents terminal space for the storage of motor fuel); and a master list of all parties who removed fuel from the terminal under a thruput account. Although Milano's bookkeeper testified to mailing the tax forms to the Division, there was no evidence of receipt by the Division.

On the night of June 23, 1987, David Campbell, a Division investigator assigned to the Petroleum, Alcohol and Tobacco Bureau ("PAT-B"), conducted an inspection of the terminal operated by Milano. He observed several tank trucks on the premises and a barge unloading motor fuel. Mr. Campbell located the shift manager and asked to see Milano's

terminal operator license. He was informed that no license was available at the terminal, and he was directed to Mr. Coven for further information. Mr. Campbell searched the Division's records and discovered that Milano had never been issued a license and that the Division had no record of ever having received a license application or terminal operator's reports from Milano.

In the late afternoon of June 24, 1987, a meeting was held at the offices of the Division in New York City. Present were Mr. Campbell; Dennis Spillane, a lawyer for the Division; Stanley Coven; and Robert A. Eisenberg, an attorney representing Mr. Coven. Either before the meeting took place or during the meeting the Division dispatched two investigators who closed down the operation of Milano's terminal.

At the meeting, Mr. Spillane informed Mr. Coven and Mr. Eisenberg that Milano could not operate without a license. He was advised that Milano had filed an application for a terminal-operator license, and Mr. Coven provided Mr. Campbell with a photocopy of a worksheet copy of a terminal operator license application signed by Mr. Coven and dated February 9, 1987. Mr. Coven and Mr. Eisenberg expressed their belief that terminals were being allowed to operate with a license application pending. Mr. Coven admitted that Milano had been operating a terminal without a terminal operator license since early February 1987. Since Mt. Vernon Energy was a licensed terminal operator, Mr. Eisenberg requested that the terminal be allowed to reopen immediately and to operate under the landlord's license. At that time, Mr. Spillane denied that Mt. Vernon Energy was a licensed terminal operator and refused permission to allow the terminal to operate.

Mt. Vernon Energy was licensed as a terminal operator in May 1987. Pursuant to paragraph 13 of its lease agreement, Milano surrendered its lease to Mt. Vernon Energy effective as of the close of business June 24, 1987. Upon its receipt of the surrender of lease on June 25, 1987, the Division immediately allowed the terminal to reopen.

On June 25, 1987, Walter Slutsky, an investigator assigned to PAT-B, went to Milano's business offices where he received copies of Milano's terminal operator's reports for February, March and April 1987.

On or about July 6, 1987, Milano filed forms FT-941, and FT-941.1 for May 1987, and on July 28, 1987, Milano filed forms FT-941 and FT-941.1 for June 1987.

Diamond's license application of July 17, 1987 was hand-delivered to the Division. It was accompanied by a cover letter on the letterhead of its Albany, New York attorneys and a bank check made payable to the New York State Tax Commission in the amount of $10,000.00. Diamond's principal place of business was shown as 3631 Hampton Road, Oceanside, New York. A second address, 100 Merrick Road, Rockville Centre, New York, was also shown. The latter address was the business office of Stanley Coven.

By letter dated August 3, 1987, the Processing Division advised Diamond that its application could not be processed because it had failed to include a completed Certificate of Registration Questionnaire. This letter was mailed to Diamond at 100 Merrick Road, and it was returned to the Processing Division by the postal authorities. Shortly thereafter, Diamond's attorney was orally advised that mail directed to Diamond had been returned. On September 2, 1987 a completed questionnaire was received by the Processing Division

On or about August 3, 1987, a $10,000.00 performance bond was deliver to the Tax Enforcement Unit on behalf of Diamond. The bond was returned to Diamond with a request that certain corrections be made: that the bond be signed by both principal and surety; that a corporate seal be affixed to the bond; and that the acknowledgments before the Notary Public include the date of expiration of the notary's commission.

Correspondence regarding the performance bond among representatives of the Division, Diamond and its representative and Diamond's surety continued until at least December 11, 1987. Several bonds were received, cancelled and reinstated in that time. As of December 12, 1987, an effective bond was not filed on behalf of Diamond. Diamond's $10,000.00 bank check remained with the Division.

PAT-B's review of Milano's license application file includes a finding that Milano was known to have operated a terminal without a license period of several months, ending in June 1987.

In October 1981, Diamond began an Article 78 proceeding seeking to compel the Division to issue it a license.

On about November 24, 1987, the working group formed to review terminal operator license applications met to consider the status of pending applications. The applications of Diamond and Milano were included in the discussion. Individuals in the group had reviewed the application reviews prepared by PAT-B, and some were generally aware of the events surrounding Racing and Milano. An attorney representing the Tax Enforcement Unit knew of the pending Article 78 proceeding. He recommended that the applications of Diamond and Milano be denied on the basis of the failure of A-1 Racing to timely file returns and pay taxes

due. The notice of December 22, 1987, proposing to deny Diamond a terminal operator license, was issued as a result of that recommendation.

OPINION

Petitioner contends that it was improper for the Division to consider the activities of A-1 Racing Specialties and Milano Equities, Inc. in denying petitioner's application for a terminal operator's license; that its right to due process under the law were violated by allowing the Division to assert the activities of Milano Equities, Inc. as a basis for denial of its application since the original notice of proposed refusal issued December 22, 1986 was not based on Milano's activities but solely on the activities of A-1 Racing Specialties; and that generally the activities and conduct of the Division in implementing and administering the licensing statute were an abuse of discretion.

The Division contends that it is proper for it to consider the activities of Milano Equities, Inc. and A-1 Racing Specialities with regard to petitioner's application for a terminal operator's license because Stanley Coven was president and sole shareholder of all three corporations. Further, it contends that its activities in implementing and administering the law were proper.

The Administrative Law Judge determined that the Division was within its statutory authority in denying petitioner's application because Milano Equities, Inc. operated a terminal without a license in violation of the Tax Law. Further, the Administrative Law Judge determined that it was not a violation of petitioner's due process rights to allow the Division to assert the activities of Milano as a basis for denial of petitioner's application subsequent to the issuance of the notice of proposed refusal to license.

We affirm the determination of the Administrative Law Judge with respect to Kilano Equities. Inc. and modify it with respect to A-1 Racing Specialities. A brief review of the reasons for legislative action in 1985 and 1986 concerning petroleum products and various activities in connection with the sale and distribution of such products will be helpful in understanding the issues in this case.

Since 1929, the State of New York has imposed a tax on motor fuels (L,1929, ch 364). The Tax Law defines the components of the distribution system for both regulatory and taxing purposes.

One who produces or imports or causes to be imported into the State any motor fuel for use, distribution, storage or sale in New York is a "distributor" (Tax Law § 282(i)). A "transporter" is any person who controls or uses any means of transportation including a barge, truck or pipeline to transport motor fuel (Tax Law 1 282[121). When the motor fuel is being imported into New York the transporter is an "importing transporter" (Tax Law 282[12]). A motor fuel storage facility with a storage capacity of 5O,OOO gallons or more is a "terminal", except that such a facility at which motor fuel is stored solely for its retail sale at the facility is not considered a "terminal" (Tax Law § 282[13]). A terminal operator is one who controls or uses a terminal, or has the right to control or use a terminal (Tax Law § 282[13]).

Tax Law section 283-b was enacted by Laws 1986, chapter 276 and was the culmination of legislative and executive efforts to combat massive evasion of the excise and sales taxes imposed on motor fuel by Articles 12-A and 28 and pursuant to the authority of Article 29 of the Tax Law. Chapter 276 followed a restructuring of the imposition and enforcement of these taxes a year earlier by Chapter 44 of the Laws of 1985.

The Memorandum in Support of Chapter 44 discussed the large revenue loss caused by evasion of the taxes on motor fuel:

> This bill is aimed at deterring tax evasion with respect to motor fuel sold in this State. This evasion has promoted unfair competition and erosion of the State and local tax bases for which the Governor's Task Force on Administration of Taxes on Petroleum Products and Businesses estimates an annual State local loss of at least $90 million. Industry estimates of the combined State and local revenue loss range as high as $200 million annually. (Memorandum in Support, Governor's Bill Jacket, L 1985, ch 44; see Memorandum of Senator James J. Lack, New York Legis Ann, 1985, p. 55).

Two basic methods of evasion were identified: (1) the daisy-chain scheme whereby multiple tax-free sales of motor fuel were made to obfuscate liability and the taxable event was a sale by a non-existent distributor and (2) the bootlegging scheme whereby motor fuel was imported into the State and sold without being reported (see Memorandum in Support, Governor's Bill Jacket, L 1985. ch 44; Memorandum of Senator James J. Lack, New York Legis Ann, 1985, p. 55; Governor's Approval Memorandum, New York Legis Ann, 1985, p. 57).

Chapter 44 combatted the daisy-chain scheme by eliminating tax-free sales between registered distributors and imposing the excise tax and a prepaid sales tax on the importation of motor fuel into the State (Tax Law §§ 284, 1102). Thus, with respect to motor fuel imported into the State, the first person in the distribution chain in the State, the importer, is liable for the taxes. In order to import and distribute motor fuel in the State, a business must be registered as a distributor under Tax Law section 283. Chapter 44 amended Tax Law section 283 to set forth grounds upon which the Department may refuse to issue a registration as a distributor to an applicant (Tax Law § 283, subd. 2) or may cancel or suspend a registration (Tax Law § 283, subd. 4).

Chapter 276 of the Laws of 1986 made technical and clarifying amendments with respect to the taxes on motor fuel and sought to further enhance the enforcement of these taxes by addressing the problem of bootlegging. In recognition of the fact that third parties such as transporters and terminal operators perform an integral and essential role in the process of importing and distributing motor fuel (see, Memorandum of Department of Taxation and Finance, McKinney's Session Laws, 1986, p. 2882, at 2890), the Legislature provided for licensing of importing transporters and terminal operators (Tax Law §§ 283-a, 283-b, as added by L 1986, ch 276). Among the important responsibilities of terminal operators under the Tax Law and regulations are the keeping of records and the filing of information reports (Tax Law § 286; former 20 NYCRR 410.9[b], 410.11, 413.3[b] [repealed eff. April 4, 1988, similar requirements now set forth in 20 NYCRR 418]). Although terminal operators are not necessarily taxpayers, their records and reports, which must indicate, among other things, the persons for whom motor fuel is stored and the quantity of motor fuel stored, provide valuable information regarding the importation and distribution of motor fuel in New York State and serve as one means of verifying information provided by taxpayers, i.e., distributors. The Legislature has deemed these reports sufficiently important that, as with distributors' returns, the making of a false report by a terminal operator constitutes a felony regardless of any intent to evade tax (Tax Law 1812[c][11).

In connection with the licensing of terminal operators, the Legislature enacted section 283-b which provides for an examination of the suitability of responsible officers and employees, directors, partners and ten percent shareholders of the terminal operators and enumerates acts which reflect negatively on the suitability of the terminal operator. The

standards are similar to those applied to distributors. In this regard, Tax Law section 283-b sets forth the grounds upon which the Division may refuse an application for a license or may cancel or suspend a license.

We turn now to the Division's authority to deny a license. Tax Law section 283-b, subdivision 2 lists the activities of specific-individuals which can form the basis for refusal of the application for a terminal operator's license. The individuals are defined as the applicant's officers, directors, partners, shareholders directly or indirectly owning more than 10 percent of the applicant's voting shares of stock, and the employees responsible for complying with the provisions of Article 12-A of the Tax Law. These activities include the failure to pay a tax finally determined to be due (Tax Law § 283-b, subd. 2, subpar. [a]); the failure to pay the penalty provided in Tax Law section 289-b, subd. 2 [relating co penalty for responsible officers, directors, shareholders, employees and partners) which has been finally determined to be due; the conviction of a tax crime (Tax Law § 283-b, subpar. [d]), and the cancellation or suspension of the license (Tax Law § 283-b, subd. 2, subpar. [f]).

Tax Law section 283-b, subdivision 2, subparagraph (e) provides for refusal of an application where the applicant or an officer, director, partner, more than 10 percent shareholder or responsible employee of the applicant served in any of the foregoing capacities with another entity which 1) failed to pay tax finally determined to be due, 2) which was convicted of a tax crime or 3) whose license was cancelled or suspended.

Tax Law section 283-b, subdivision 2, subparagraph (g) provides that the Department may refuse an application where the applicant, an officer, director, partner, more than 10 percent shareholder, or responsible employee of the applicant has committed any of the acts

specified in Tax Law section 283-b, subd. 4 within the preceding five years. Among the acts specified in Tax Law section M3-b, subd. 4, which relates to grounds for cancelling or suspending the license of a terminal operator, is the:

> "failure . . . to comply with any of the provisions of this article or article twenty-eight of this chapter with respect to motor fuel or any rule or regulation with respect to motor fuel adopted pursuant to such articles by the department of taxation and finance or by the tax commission or..... knowingly aiding and abetting another person in violating any of the provisions of such articles or of any such rule or regulation with respect to motor fuel . . . ."

This language is in the first sentence of the subdivision. The second sentence goes on to provide that:

> "A license may also be cancelled or suspended if the tax commission determines that a licensee or an officer, director, shareholder, employee or partner of the licensee who as such officer, director, shareholder, employee or partner is under a duty to act for such licensee:
>
> "(i) commits fraud or deceit in his operations as a terminal operator or has committed fraud or deceit in procuring his license;
>
> "(ii) has been convicted in a court of competent jurisdiction, either within or without the state, of a felony, within the meaning of subdivision eight of section two hundred eighty-three of this article, bearing on such terminal operator's duties and obligations under this chapter;
>
> "(iii) has knowingly aided and abetted a person who is not registered as a distributor in the importation, production, refining, manufacture or compounding of motor fuel; or
>
> "(iv) has knowingly aided and abetted the distribution of motor fuel which he has knowledge of as being imported, caused to be imported, produced, refined, manufactured or compounded by a distributor who is not registered by the department of taxation and finance." (Emphasis added.)

Tax Law section 283-b, inter alia, prohibits the operation of a terminal without a license. A person who operates a terminal without a license is guilty of a Class E felony (Tax Law § 1812-c). The legislation became effective on July 14, 1986.

The first issue is whether, as petitioner asserts, the Division's authority for refusal to issue a license to the petitioner was limited solely to the grounds that the applicant or a person under a duty to act for the applicant has committed one of the four acts enumerated in Tax Law sections 283-b(4)(i) through (iv). We find no validity in petitioner's argument.

There is uncontroverted evidence that Milano Equities, Inc. operated a terminal without a license from early February 1987 until the terminal was closed by the Division on June 24, 1987. Terminal operator's monthly reports prepared by Milano show that fuel was stored in the terminal for various accounts and was not stored only for Milano's own use and consumption. Milano's operation of a terminal without a license contravened the unambiguous wording of the statute. Stanley Coven was the sole shareholder and principal officer of Milano. He signed the application for the terminal operator's license submitted to the Division, and was principally responsible for its operation and conduct. . Stanley Coven is the sole shareholder and principal officer of petitioner, Diamond Terminal Corporation. His failure and the failure of Milano to comply with Tax Law section 283-b(l) provide sufficient grounds for the Division's refusal to license Diamond.

First, the authority granted by section 283-b(g) to refuse to issue a license incorporates as grounds for such refusal "...any of the acts specified in subdivision four of this section ..." The grounds for cancellation in items (i) through (iv) of such subdivision four are in addition to the grounds in the first sentence, not exclusive thereof. The acts specified in the first sentence of the subdivision include a failure to comply with any provision of Article 12-A or Article 28 of the Tax Law.

Second, Mr. Coven was an officer of "another entity" within the meaning of paragraph (e) of section 283-b(2). Operation of a terminal without a license is a Class E felony. While the specific grounds for denial include cancellation or suspension of a license, it would be an anomalous result if an application could be denied if the applicant served with another entity whose license was cancelled or suspended but could not be denied if such other entity was closed down for operating without a license.

We turn next to petitioner's assertion that the Division's implementation and enforcement of the new licensing requirement was so arbitrary and inconsistent as to amount to an abuse of discretion. We disagree. We see no abuse of the authority vested in the Division by the Legislature.

Tax Law section 283-b(2) and (4) set forth specific criteria for the Division's consideration in making a licensing determination. Once the Division has ascertained that any of the criteria set forth in Tax Law section 283-b(2) or (4) apply to a particular applicant, it then may grant or not grant a license to that applicant (Tax Law § 283-b[2]).

The power to refuse a license must be exercised in conformity with the express or implied purposes of the licensing law (Matter of Bologno v. O'Connell, 7 NY2d 155, 159). The limits of the licensing authority's discretion are determined by reference to the applicable statute. The licensing authority may deny a license only upon those grounds found in the statute, and its determination must be supported by the evidence. The burden is then upon the party seeking the license to show that he has a clear legal right to it (see, Matter of Maytum v. Nelson, 53 AD2d 221, 227, and cases cited therein).

Tax Law section 283-b became effective on July 14, 1986. The enabling legislation contained the following provision:

> "This act shall take effect immediately except that sections one through twenty-four of this act shall apply on or after such effective date (and provided that the department of taxation and finance shall immediately undertake all necessary steps and application review to insure that on October first,, nineteen hundred eight-six all terminal operators and transporters, required to be licensed by the provisions of this act, are so licensed by such date." (L 1986, ch 276, § 37.)

The Division found it impossible to take all the actions necessary to put in place a program that would enable it to properly review license applications for terminals in operation on the effective date of the new law (July 14, 1986) and applications for new terminal operators by the target date of October 1, 1986. The Division adopted a policy of allowing terminal operators in business before the effective date of the legislation to continue to operate pending the outcome of the review of their license applications. Petitioner argues that new applicants could not commence terminal operations until applications were approved and licenses issued and that this policy unfairly discriminated between those in business and those not in business on July 14, 1986. We disagree. The Division's decision was reasonable under the circumstances, namely that it could not meet the October 1, 1986 target date.

The distinction between operators in business who were already required to file reports with the Division (Tax Law § 286; former 20 NYCRR 410.9[b], 410.11, 413.3[b], repealed effective April 4, 1988, similar requirement now set forth in 20 NYCRR 418) and known therefor to the Division, from new operators is a rational one. A contrary course of action by the Division would have resulted in the cessation of operations of all terminal operations in the State.

The specific issue is whether the Commissioner has the authority to deny Diamond a license on the ground that Stanley Coven and Milano failed to comply with Article 12-A by operating a terminal without a license. The Division had a statutory duty to receive, review and act on terminal operator license applications. It was mandated to carry out this duty even in the absence of specific regulations, and it was authorized to implement the licensing law through case by case decision-making as long as it utilized some ascertainable standard (Patchogue Nursing Center v. Bowen, 797 F2d 1137, 1143). Here, the statute gave the Commissioner the authority to deny a license on the basis that an applicant (or other person enumerated in Tax Law § 283-b[2][g]) operated a terminal without a license. It did so with respect to Milano.

Petitioner's contention that the Division was aware of and acquiesced in Milano's conduct is without merit. Even if individual employees of the Division were aware that Milano was operating without a license, this would not justify Milano's continuing to operate in violation of the law nor would it nullify the Commissioner's authority to deny Diamond a terminal operator's license.

We deal next with petitioner's assertion that the Division's actual policy during the licensing law implementation period was to allow anyone to operate a terminal as long as an application was filed and pending. There was no evidence that this was in fact the Division's policy. Furthermore, even if such a policy has existed, petitioner did not prove that Milano filed an application before July 17, 1987. Therefore, Milano could not have been operating in reliance on such a policy since the record indicates it operated from February 1987 until closed down in June 1987.

The next issue is whether, as petitioner asserts, the Division should be precluded from raising Milano's conduct as a ground for refusing to license petitioner since that conduct was not originally charged in the notice of proposed refusal issued on December 22, 1986.

Due process requires that a person be fully informed of the nature of the charges to be asserted at hearing so as to permit the person to adequately prepare and present a defense (Multari v. Town of Stony Point, 99 AD2d 838). An administrative agency may be permitted to lodge additional grounds for its action even after a hearing is commenced as long as the petitioner is given an adequate opportunity to respond to the agency's allegations (see, Matter of Heckt v. City of Lackawanna, 44 AD2d 763). Accordingly, in determining to refuse to grant a license to petitioner, the Division was not confined to the grounds set forth in its first notice of proposed refusal to license but could amend its notice of proposed refusal, even at the time of hearing as long as the petitioner had an adequate opportunity to rebut the new allegations. Here, while the Administrative Law Judge denied petitioner's motion to preclude the Division from submitting evidence regarding Milano's alleged operation of a terminal without a license, she did afford the petitioner the opportunity to prepare a response to the newly raised matter. Petitioner declined the offer of adjournment and the hearing proceeded and was held on March 10, 1988 and continued on March 11, 1988, March 28, 1988, March 29, 1988 and concluded on March 30, 1988. There is no showing by the petitioner that it was denied the opportunity to adequately prepare and present a defense on the issue (Kuhn v. Civil Aeronautics Board, 183 F2d 839).

The final issue concerns A-1 Racing Specialties, Inc. The Administrative Law Judge determined that since Milano's operation of a terminal without a license in and of itself

constitutes sufficient ground for the Division's refusal to license Diamond, it was not necessary to determine whether the filing and payment record of A-1 Racing provides additional grounds for the Division's determination.

Petitioner asserts on exception that the Administrative Law Judge erred in not rendering a conclusion of law with regard to A-1. In its reply to petitioner's notice of exception, the Division took the position that the decision not to deal with A-1 as a ground for denial (conclusion of law "H") was clearly within the proper discretion of the Administrative Law Judge. There is no requirement that other issues be addressed if a decision on a particular issue fully decides and disposes of a matter."

We disagree. The activities of Milano are separate and independent from the activities of A-1 Racing. The activities of each were asserted by the Division as separate and independent grounds for denial of Diamond's application for a terminal operator's license. Disposition of the Milano issue does not resolve the A-1 issue. Accordingly, this Tribunal will address the contentions as listed in petitioner's exception.[1]

Stated succinctly, petitioner's contentions are that 1) the Division was without authority to impose special filing requirements on petitioner and not the Industry a whole; 2) the

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[1] The Tribunal's enabling legislation contains no statutory limitations such as those contained in Article 78 of the CPLR which are applicable to judicial review of administrative decisions (see, CPLR §§ 7803[3] and [4] which limit judicial review of administrative decisions to questions of whether the administrative action was arbitrary and capricious or supported by substantial evidence).
The Tribunal's enabling legislation, in contrast, provides broadly that the Tribunal "shall issue a decision either affirming, reversing or modifying" the determination of the Administrative Law Judge or "the Tribunal may remand the case for additional proceedings before the Administrative Law Judge" (Tax Law § 2006.7). The regulations adopted by the Tribunal implement this standard by providing in pertinent part that "the Tribunal shall review the record and shall to the extent necessary or desirable, exercise all power which it could have exercised if it had made the determination" (20 NYCRR 3000.11[e][1], emphasis added).

Division can only exercise its authority in this regard by regulation; and 3) In any event, petitioner did "substantially comply," with the filing schedule prescribed by the Division.

Tax Law section 287(l) requires motor fuel distributors to file a return on or before the twentieth day of each mouth "except that the tax commission may if it deems it necessary in order to insure the payment of taxes imposed by this article, requires returns to be made at such times and covering such periods as it may deem necessary..." Similar language is contained in Tax Law section 1136(l) concerning sales tax.

We find nothing in the language of the statutes which provides that such requirements be Imposed by regulation or on an industry-wide basis only. Given the interrelationship between special filing requirements and bonding requirements in this case, it seems quite apparent that the authority granted the Division almost necessarily must be tailored to the fiscal situation of the particular applicant. In this regard, we note that regulations adopted by the Division April 1, 1988 specifically deal with filings on both a general and specific basis (20 NYCRR 413.1[b]).

Here, in order to insure payment of taxes the Division placed A-1 Racing on a quarter monthly filing schedule because of a very substantial increase in volume of motor fuel imported into the State by A-1 and its inability to meet increased bonding levels. Petitioner does not deny the substantial increase in volume during the period at issue or offer to prove the precise volume, but merely contests the dollar amount of the bond. We find the Division's action clearly within the authority granted it by section 287(l).

Petitioner's argument that a taxpayer can "substantially comply" with filing deadlines is without basis.

> "Filing deadlines, like statutes of limitations, necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them but if the concept of a filing deadline is to have any content, the deadline must be enforced. 'Any less rigid standards would risk encouraging a lax attitude toward filing dates,' United States v. Boyle, 469 US, at 249, 83 L Ed2d 622, 105 S Ct 687. A filing deadline cannot be complied with substantially or otherwise, by filing late--even by one. day." (United States v. Locke, 471 US 84, 101.)

The crux of the matter is whether under the facts and circumstances the pattern of filing returns by A-1 constitutes sufficient grounds for denial of petitioner's application. We conclude in the negative. The record indicates that throughout March, April, May, June and most of July A-1, through its bookkeeper, was steadily in contact with the Division. Three different bonding levels were set for A-1 during this period of time ($15 million on February 18, 1987; $4 million on June 26, 1987; and $13 million on August 19, 1987). Two different quarter-monthly filing schedules were prepared by the Division and forwarded to A-1. Ultimately, on September 4, 1987 the Division hand delivered to A-1 Racing a Notice of Cancellation of Registration as a Motor Fuel Distributor. On September 18, 1987 the Bankruptcy Court vacated that notice as having been issued prematurely.

We conclude that based on the facts and circumstances the activities of A-1 formed an insufficient basis to deny petitioner's application for a terminal operator's license.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner, Diamond Terminal Corporation, is granted to the extent that finding of fact "53" of the Administrative Law Judge's determination is stricken and conclusion of law "H" is modified with respect to the filing and payment record of A-1 Racing as grounds for the Division's determination and except as so granted, the exception is in all other respects denied;

2. the determination of the Administrative Law Judge is modified to the extent indicated in paragraph "1" above and except as modified is in all other respects affirmed; and

3. the petition of Diamond Terminal Corporation is denied, and a Notice of Refusal to License may be issued immediately by the Division of Taxation.

Dated: Albany, New York
SEP 22 1988

John P. Dugin
President

Francis R. Koenig
Commissioner