

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
BARRIER OIL CORPORATION	:	DECISION
for Review of a Denial, Suspension, Cancel-	:	
lation, or Revocation of a License, Permit or	:	
Registration under Article 12-A of the Tax Law.	:	

Petitioner, Barrier Oil Corporation, 184 West Main Street, Tarrytown, New York 10591, filed an exception to the determination of the Administrative Law Judge issued on May 2, 1990 with respect to its petition for review of a denial, suspension, cancelation, or revocation of a license, permit or registration under Article 12-A of the Tax Law (File No. 807303). Petitioner appeared by Levine, Robinson & Algios, P.C. (Kenneth L. Robinson, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

Both parties filed briefs in this matter. Oral argument was heard at the request of petitioner on November 14, 1990.

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

ISSUE

Whether sufficient grounds exist to support the refusal to register petitioner as a motor fuel distributor.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner, Barrier Oil Corporation ("Barrier"), was incorporated sometime in 1972 and has been doing business continuously since that time. Barrier's current president, Wayne Jeffers, entered the fuel oil business while still in high school, working for his father. The senior Mr. Jeffers owned a home heating oil service called Village Oil Heating which was operated on a part-time basis with a customer list of approximately 40. In 1972, with Wayne's older brother William Jeffers serving as president, Barrier purchased the assets of Village Oil and continued operating the business on a part-time basis.

Sometime between 1972 and 1979, Barrier began expanding its business by selling diesel motor fuel. Through 1975 Wayne Jeffers still worked full time in his father's construction business, operating Barrier on weekends and in the evening. In 1979, Barrier began selling motor fuel, or gasoline. Wayne Jeffers was primarily responsible for Barrier's expansion into this area. A second corporation, Barrier Gasoline Service, Inc., was formed in September 1980 to handle the gasoline business. A third corporation, Barrier Energy Systems, Inc., formed in 1979, performed energy audits and marketed services in the fields of energy conservation and environmental protection. A fourth corporation, Easy Auto Leasing, Inc., was formed in 1984; it owned the various trucks and vehicles used by the other corporations. Until October 1988, the shares of the four corporations were owned entirely by William and Wayne Jeffers who were also the corporations' officers. Although four corporations existed, they were operated as one enterprise with common ownership of assets, property and management.

During the 1980's Barrier expanded its business by purchase of contract rights, customer lists, equipment and real property from various competitors. Barrier's first acquisition was of Premium Petroleum Products sometime in 1983. On December 30, 1986, Barrier Gas, Easy Auto Leasing and the two owners (William and Wayne Jeffers) purchased certain intangible assets (customer lists, contract rights, etc.), trucks, equipment and real estate from Cole Petroleum, Inc. for \$1,500,000.00 in cash and notes. On January 4, 1988, Barrier Gas purchased intangible assets and equipment from Century Resources Corporation for

\$155,000.00 in cash. On January 11, 1988, Barrier Gas purchased intangible assets and equipment from Shore Line Motor Fuels, Inc. for \$650,000.00 in cash and notes. By December 1988, Barrier had total assets of over \$5 million, sales of over \$37 million and employed approximately 50 people.

Barrier is primarily in the business of supplying gasoline to branded gasoline service stations, supplying diesel fuel to commercial enterprises, supplying home heating oil and service to residential customers, leasing service stations to retail operators, and providing services in the area of environmental protection.

Barrier was registered by the Division of Taxation ("Division") as a distributor of motor fuels in February 1981. Effective September 1, 1982, the legal obligation to collect and remit sales taxes due on the retail sale of gasoline was shifted from service station operators to motor fuel distributors. By 1983, Wayne Jeffers learned that unregistered distributors were importing gasoline into New York and selling it to retail service stations without reporting or paying taxes due to the State. This illegal practice not only deprived the State of tax monies, it also placed severe competitive pressures on legitimate businesses like Barrier. Mr. Jeffers discovered that some of the service stations with which Barrier had contractual agreements to supply gasoline were purchasing from unregistered distributors in violation of their agreements with Barrier. In some cases, the station owners, unaware that the lower-priced gasoline was "bootlegged" into the State, accused Barrier of overcharging. Moreover, service stations not associated with Barrier were purchasing bootlegged gasoline and selling it to the ultimate consumer at a lower price than could Barrier's customers. This decreased the business of Barrier's clients and in turn hurt Barrier's business.

To combat the pressure placed on Barrier by unregistered distributors, Wayne Jeffers took action on several fronts. First, he advised Barrier's customers of his intention to take legal action against any company that violated its legal obligations to purchase its gasoline from Barrier and did in fact sue several companies for breach of contract or tortious interferences with contracts. Second, he informed government authorities, including employees of the

Division, of the illegal practices he observed. Sometime in 1984 or 1985, Wayne Jeffers met with Malcolm LaMore, at that time a senior excise tax investigator with the Division, to share what he knew about illegal bootlegging practices with the Division. Mr. Jeffers agreed to allow the Division to use a service station under his control to set up a purchase of bootlegged gasoline. In addition, Wayne Jeffers published an article in the January 1985 edition of Construction News, informing members of the construction industry of the problems caused by bootlegged gasoline and advising them of ways to protect themselves against illegal practices.

As a result of his attempts to inform others of bootlegging operations and his refusal to do business with illegal operators, Wayne Jeffers was subjected to threats and intimidation. On Easter Sunday of 1985, a building owned by Barrier was set on fire by unknown persons. Mr. Jeffers believes that this was intended to warn him against continuing his activities against illegal gasoline distributors. By this time, the Division was well aware that the evasion of motor fuel taxes was a major problem in the State, and it, along with the State Legislature and other legitimate members of the motor fuel industry, were framing legislative solutions to that problem.

In September 1984, the Division advised Barrier that it must post a surety bond in the amount of \$400,000.00. This followed a periodic review by the Division of the business operations of many registered motor fuel distributors. The bond was required primarily because Barrier did not provide the Division with a certified, unqualified financial statement. Barrier filed a petition with the State Tax Commission, requesting a stay of the bond requirement in order to allow Barrier the time necessary to provide the required statement. The Commission denied Barrier's petition and issued a decision on March 18, 1986 stating: "the requirement of a surety bond in the amount of \$400,000.00 as a condition of continued registration as a motor fuel distributor is sustained."¹

¹Pursuant to section 306(4) of the State Administrative Procedure Act, official notice is taken of Matter of Barrier Oil Corporation (State Tax Commission, March 18, 1986).

Barrier did not post the required bond or provide the Division with certified financial statements. Accordingly, by letter dated June 9, 1986, Mr. Stuart Hefter, representing the Division, advised Barrier as follows:

"Your registration is being cancelled for failure to file a surety bond in the amount of \$400,000.00 as required by the New York State Tax Commission in its determination made on March 18, 1986. As of the date of cancellation, you must surrender your registration documents by mailing them to me at the above address.

Please be advised that as of the date of cancellation, you no longer may purchase or sell motor fuel free of motor fuel tax as described in Section 410.7 of the State Tax Commission's Motor Fuel Registrations [sic]."

Wayne Jeffers denied that Barrier ever received Stuart Hefter's letter cancelling Barrier's registration. Barrier's attorney moved to exclude the letter on the grounds that the copy of the letter offered in evidence was unsigned and no one testified to its mailing. It is also noted that although the letter indicates that it was sent by registered mail no proof of mailing was offered in evidence.

At this time, the responsibility for maintaining Barrier's books and records, filing tax returns, applying for the licenses and registrations which were necessary to Barrier's continued operation and other accounting and bookkeeping functions rested with William Jeffers, Barrier's president. He was assisted by Barrier's chief accountant, Frank Persaud. Mr. Persaud was hired by William Jeffers acting with the advice of Barrier's accounting firm, Arthur Young & Co.

Although Barrier's registration as a motor fuel distributor was cancelled unequivocally, Barrier continued to purchase motor fuel in New Jersey and Connecticut, tax-free, and to import motor fuel into New York. Barrier timely filed motor fuel tax returns, reporting the import and sale of motor fuel in New York and paying the tax due. On each of its returns, Barrier referenced its cancelled motor fuel distributor's number, M-2207.

By letter dated September 8, 1986, signed by Suzanne Cornell on behalf of the Division, Barrier was informed that the Division received information that Barrier purchased motor fuel in New Jersey for import into New York. The Division requested Barrier to remit tax due on

these transactions. The letter also stated: "Our records do not show your company to be registered as a Motor Fuel Distributor in New York State.

* * *

Please advise us if you plan to continue exporting into New York State, and if so, it will be necessary for you to apply with us for registration as a Motor Fuel Distributor."

In response to Ms. Cornell's letter, Mr. Persaud sent the Division copies of Barrier's motor fuel tax returns for the months of May and August 1986 showing tax due was paid to the State on the questioned transactions and a letter, stating: "Finally, we do plan to continue importing motor fuel into New York State; our application for re-registration will follow shortly." Mr. Persaud's letter is dated September 18, 1986.

On October 6, 1986, the Division received from Barrier an Application for a License as an Importing Transporter and/or Terminal Operator. It was signed by William Jeffers as president of Barrier. The application indicated that Barrier was, at that time, a registered distributor of motor fuel, operating under registration number M-2207. In response to the question has the applicant owned or controlled a business at the time "within the last five years when the registration as a motor fuel distributor of such other business was cancelled or suspended", Barrier answered "No".

In November 1986, William Abbott, representing the Division, sent a certified letter to William Jeffers, president of Barrier, reiterating the Division's position that Barrier's continued importation of motor fuel after cancelation of its registration as a distributor was a violation of the law. The letter warned that if Barrier continued to operate as a registered motor fuel distributor the Division would enforce civil and criminal penalties as authorized by law. Finally, the letter stated: "In addition, we are notifying your out-of-state suppliers that you are not a registered motor fuel distributor and all sales must be made on a tax paid basis." The Division informed three of Barrier's out-of-state suppliers that Barrier's registration was cancelled effective June 8, 1986 and stated the Division's position that any sales of motor fuel to Barrier must be on a tax paid basis. Nonetheless, Barrier continued to purchase motor fuel out

of state tax-free and to import it into New York. It also continued to timely file motor fuel tax returns, paying the tax due on its imports.

The Division issued an importing transporter license to Barrier in March 1987. Its license number was T-5092.

On April 24, 1987, the Division received from Barrier an Application for Registration of a Petroleum Business under article 13-A of the Tax Law. The application was signed by Frank Persaud. The application stated that Barrier's petroleum related business activities included those of a distributor of motor fuel and those of a wholesaler. Barrier reported importing 3,926,580 gallons of gasoline and 917,405 gallons of fuel oils into New York in 1986. Finally, Barrier stated that its registration as a distributor was pending. The application states: "If pending, give date of application." To which Barrier responded, "date pending". The Division registered Barrier as a Petroleum Business on May 1, 1987, effective from July 1, 1987.

The Division periodically publishes booklets containing a listing of registered distributors of motor fuel and licensed importing transporters and terminal operators. These booklets are sent to all license holders and registrants. The published listing for November 1, 1987 shows Barrier as a licensed importing transporter but not as a registered distributor of motor fuel.

During the approximately two-year period in which Barrier acted as a distributor of motor fuel, while not registered to do so, its trucks were observed and stopped by employees of the Division engaged in routine inspections of tanker trucks bringing gasoline into New York State. These inspections did not result in any action being brought against Barrier. In addition, the Division conducted an examination of Barrier's motor fuel tax returns for the period June 1985 through January 1988. Based on this examination, the Division determined tax due from Barrier in the amount of \$10,337.20 plus penalty and interest for a total due of \$13,888.24. A letter to this effect, dated March 28, 1988, was sent to Barrier, referencing Barrier's cancelled distributor registration number M-2207. The letter made no mention of the fact that Barrier's registration was cancelled in 1986. Barrier paid the total due promptly.

On July 7, 1988, the Division seized a Barrier truck and gasoline. Malcolm LaMore and another Division employee were conducting a mobile roadblock on the Major Deegan expressway. They spotted and followed a Barrier truck from the expressway to Repetti Service Station in Mount Vernon, New York.

At the service station, the investigators reviewed various documents carried by the Barrier driver, including two bills of lading and a Uniform Manifest Form. The bills of lading indicated that Citgo Petroleum of Linden, New Jersey consigned two loads of gasoline totaling approximately 5,600 gallons to Barrier Oil Corporation for delivery in New York. The type of transaction was wholesale, and the license number shown for Barrier on the bills of lading was a New Jersey number. The Uniform Manifest showed the transporter of the gasoline, the firm ordering transportation and the owner of the gasoline after loading as Barrier Gasoline. The importing transporter number issued to Barrier Oil, T-5092, was listed as Barrier Gasoline's transporter license number. The distributor was shown as Citgo of Tulsa, Oklahoma with a New York State distributor number of M-2455. Mr. LaMore contacted his office to determine whether all motor fuel taxes had been paid on this gasoline. He was informed that the gasoline was purchased tax-free and that the gasoline had been imported unlawfully.

The driver was allowed to unload the gasoline into Repetti's tanks. After unloading, the driver completed a delivery ticket, showing delivery to Repetti of 3,501 gallons of gasoline. On the reverse side of the delivery ticket was a printed version of a required State form: Certification of Prepayment of Sales Tax and Payment of Motor Fuel Tax (form FT-935). Portions of the form contained pre-printed information: the seller was identified as Barrier Oil Corporation; and the seller's New York State motor fuel tax registration number was shown as M-2207. Alternative statements regarding the tax status of the gasoline sold were provided. The form was to be completed by placing a check mark in a box next to the statement that applied to the transaction shown on the delivery ticket. Pre-printed check marks were placed in selected boxes; therefore, the driver's only tasks were to write in the date of the transaction, to identify the entity paying the motor fuel tax (the choices were Citgo, Amoco, Sunoco, Shorco,

other, Century and Barrier), and to sign and date the form. As completed, the certification read: "I certify that: the selling price of the motor fuel delivered to the above purchaser on July 7, 1988 includes the New York State prepaid sales tax...and that the New York State prepaid sales tax...was included in my supplier's selling price, as indicated by his certification to me. I also certify that the selling price includes 8¢ per gallon New York State motor fuel tax which...my supplier has certified to me that to his knowledge the motor fuel tax was paid by Citgo".

After reviewing the delivery ticket, Mr. Lamore again contacted his office and relayed the contents of the ticket including the certification to his supervisor. He was instructed to seize the Barrier truck and the gasoline already delivered to Repetti's which he did.

The driver, accompanied by the investigators, was then allowed to make a second delivery. Before completing the second delivery ticket, the driver telephoned his office. He completed the certification as before, except that he indicated that the motor fuel tax was paid by both Citgo and Barrier.

The seized truck was driven by Barrier's driver to City Line Towing where it was inventoried and placed in secure storage.

On July 8, 1988, a complaint was filed against Richard S. Perdew, the Barrier truckdriver, in the City of Mount Vernon City Court, accusing Mr. Perdew of violating section 1812-b of the Tax Law, a class E felony. The complainant, Malcolm LaMore, charged that Mr. Perdew, while not registered as a motor fuel distributor, imported, or caused to be imported, into the State motor fuel for use, distribution, storage or sale in the State.

The Division commenced a proceeding in Supreme Court, Westchester County, seeking confirmation of the seizure of the Barrier truck and motor fuel. On August 18, 1988, an order was issued by Judge Aldo A. Nastasi confirming the seizure on the ground that the Division had demonstrated that it would prevail on the issue of forfeiture. By the same order, Judge Nastasi denied Barrier's motion seeking release of the seized truck and trailer.

Following seizure of the Barrier truck, Barrier entered into negotiations with the State Attorney General's Office and the Division. A formal criminal proceeding was held before

Judge Barbara Gunther Zambelli in Mount Vernon City Court on September 16, 1988, with the State Attorney General's Office acting as the prosecutor. At that proceeding, Barrier Oil Corporation was substituted as the defendant in the criminal action, and the charge against Richard S. Perdew was dropped. Barrier's attorney, Thomas W. Maroney, placed the following statement on the record: "The defendant, Barrier Oil Corporation, will plead guilty to the reduced charge in full satisfaction of any and all criminal or civil actions pending or potentially pending against the defendant Corporation at this time and agree to pay the sum of \$1,000.00 in full satisfaction of it." Wayne Jeffers then admitted the factual allegations of the charge and pleaded guilty to a Class A misdemeanor. George DePico, an Associate Attorney representing the Division, was present at the criminal proceeding. The Assistant Attorney General noted Mr. Depico's presence and, in response to a statement made by Mr. Maroney regarding the return of the Barrier truck, he stated: "[Mr. DePico] will be handling the civil end of the matter, but it is correct, the Attorney General's Office is prosecuting the matter, and the truck seized as well as the gas will be returned and Mr. Maroney can make arrangements with Mr. Depico." No one at this hearing explicitly mentioned Barrier's pending application for registration as a motor fuel distributor. Mr. DePico has no recollection of discussing the matter of Barrier's registration with Mr. Maroney or Mr. Jeffers.

Wayne Jeffers and William Jeffers had significant disagreements regarding the management of the Barrier corporations. William Jeffers was reluctant to enter the motor fuel business at all, and Barrier did so only at Wayne Jeffers' urging. For the most part, Wayne Jeffers was responsible for sales, customer relations, contacts with suppliers and the expansion of the business. William Jeffers was responsible for accounting, bookkeeping, the filing of tax returns and the maintenance of the licenses and registrations necessary for Barrier to do business. By January 1988, the relationship between the brothers had reached such an impasse that William Jeffers physically moved Barrier's accounting offices to a location separate from the other Barrier facilities. Following the seizure of the Barrier truck, Wayne Jeffers made a decision to buy his brother's shares of the jointly owned corporations. This decision resulted in

an agreement, dated October 13, 1988, by which Wayne Jeffers purchased William Jeffers' entire investment in all of the related Barrier corporations. In December 1988, the operations and assets of the four corporations were merged into Barrier Oil Corporation. The Division was not informed of these corporate changes until after the commencement of this administrative proceeding.

Upon learning of the seizure of a Barrier truck, Wayne Jeffers took control of all licensing, registration and motor fuel tax matters which had previously been the province of William Jeffers. At Wayne Jeffers' direction, Barrier stopped purchasing motor fuel in New Jersey and Connecticut and importing it into New York. On July 12, 1988, Frank Persaud hand-delivered to the Division an Application for Registration as a Distributor of Motor Fuel. The entire application package submitted actually consisted of two applications: one application had a print date of February 1988, and one had a print date of July 1984. The older form was signed by Wayne Jeffers and is undated. The later application form was signed by Frank Persaud on July 11, 1988.

On August 25, 1988, Barrier filed an Application for Registration as a Distributor of Diesel Motor Fuel, including a consolidated financial statement for the four related Barrier corporations. This application was necessitated by changes in the legal requirements for registration of diesel motor fuel distributors which became effective on September 1, 1988. The changes in the law required changes in the Division's organizational structure and procedures. To implement the new law without causing major disruptions, the Division adopted a policy of issuing a temporary authorization to act as a distributor of diesel motor fuel to all applicants then registered who filed an application by the effective date of the new legislation. Barrier was issued a temporary authorization under this policy.

During the last week of November 1988, the Division sent letters to all applicants with existing tax liabilities. Barrier was one of these. The Division informed Barrier that it had unpaid withholding tax liabilities which would prevent processing of its application.

By letter dated November 29, 1988, the Division informed Barrier that it would be required to post a surety bond of \$2,304,000.00 as a condition of its registration. The consolidated financial statement of the four Barrier corporations was deemed to be not acceptable for purposes of making a bond determination since it did not provide information regarding the net worth of Barrier alone. Consequently, the bond requirement was determined on the basis of Barrier's statement on its application that it expected to sell or use 3,600,000 gallons of diesel motor fuel in New York, each month.

On December 19, 1988, the Division issued to Barrier a Notice of Proposed Refusal to Register as a Distributor of Motor Fuel based upon two grounds: (1) that Barrier had not responded to earlier communications regarding unpaid withholding tax liabilities and (2) that Barrier had not filed the required surety bond. With this notice, the Division enclosed a 90-day extension of Barrier's temporary authorization.

By the end of December 1988, Frank Persaud, on behalf of Barrier, provided the Division with proof that the withholding tax liability was satisfied. Moreover, it established that the monthly gallonage figure shown on its application was, in fact, a projected annual figure. Based on information provided by Mr. Persaud, the Division made a finding that no bond was required. By letter dated December 22, 1988, the Division advised Barrier to disregard the letter of November 29, 1988 requiring a \$2,304,000.00 surety bond. Barrier was not issued a permanent authorization at this time, however. Instead, the Division issued a series of temporary authorizations which effectively extended Barrier's authority through May 20, 1989, pending processing of Barrier's application.

By letter dated February 27, 1989, Wayne Jeffers informed the Division that Barrier had ceased importing petroleum into New York in August 1988 and had no plans to import in the future. Barrier requested rescission of its registration as a petroleum business as soon as possible. Enclosed with this letter was a copy of a letter Barrier sent to all of its suppliers, informing them that as of February 27, 1989 Barrier ceased to be an importer of petroleum products into New York. The letter advised the suppliers that Barrier was "rescinding any

resale certificate that you have on file from us as they are no longer valid or applicable. Accordingly, you should now charge us gross receipts tax on all our purchases of petroleum."

In response to Wayne Jeffers' letter, the Division asked Barrier to file returns for 1988 and for the period January 1, 1989 through February 28, 1989. The returns were received on March 15, 1989, but they were filed without remittance of the tax shown as due. The Division issued notices and demands for the unpaid taxes. Barrier submitted a payment of \$25,000.00 and entered into a deferred payment agreement for the balance.²

Upon receipt of Barrier's application for registration as a motor fuel distributor in July 1988, a copy of the application was forwarded to the Tax Enforcement Unit for its review and recommendation. By memo dated August 1, 1988, the Tax Enforcement Unit recommended denial, essentially on the ground that Barrier continued importing gasoline into New York for a period of two years after its registration was cancelled.

The next documented action taken on Barrier's application was in December 1988. The Division calculated a bond requirement of \$2,262,000.00 based upon an analysis of Barrier's motor fuel returns for the period January 1986 through November 1988 and the combined financial statement submitted by Barrier in its application for registration as a diesel fuel distributor. No action was taken on Barrier's application at this time.

By memo dated March 23, 1989, the head of the unit in charge of licensing and registration requested an opinion of counsel regarding Barrier's application.³ In essence, the Division's Counsel was asked whether an application for registration could be denied on the ground that the applicant imported motor fuel into New York while unregistered, if, as here, the applicant had filed all required motor fuel returns, paying the tax shown as due and "the

²At the outset of this administrative hearing, the Division asserted Barrier's failure to pay taxes due under article 13-A of the Tax Law as a ground for refusing to register Barrier as a distributor. Upon learning of the deferred payment agreement, the Division's attorney withdrew the allegation of nonpayment.

³The memorandum of the unit head discussed two other applicants who operated as motor fuel distributors, while not registered. The names of those applicants were redacted. Barrier made several requests for information regarding the other applicants, including a Freedom of Information request, which were denied.

Department failed to take action during the lengthy period for which the returns were filed." It was the opinion of counsel that registration might be denied under these circumstances. Accordingly, on May 4, 1989, the Division issued to Barrier two notices of proposed refusal to register as a distributor. The notices were identical except that one applied to registration as a distributor of motor fuel and one applied to registration as a distributor of diesel fuel. The basis for the denials was set forth as follows:

"A review of our records shows that your registration as a distributor of motor fuel was cancelled July 1, 1986 and that you continued to import motor fuel into New York State without being properly registered after that date.

* * *

This proposed denial is based upon section 283.2(g) and section 283.4 of the Motor Fuel Tax Law."

In lieu of a formal answer to Barrier's petition in this matter, the Division sent a letter to Barrier's attorney, dated September 29, 1989, elaborating on the Division's position with regard to the denials of registration and interposing a third ground for denial: "Conviction of a crime under the Tax Law within the preceding five years (§ 282.2[c])."

OPINION

In the determination below, the Administrative Law Judge found that the Division's refusal to register Barrier as a motor fuel distributor was reasonable in light of all the circumstances. The Administrative Law Judge, however, directed the Division to register Barrier as a diesel motor fuel distributor, conditioned upon Barrier's filing of a surety bond in the amount of \$50,000.00.

On exception, petitioner challenges only that portion of the determination which sustained the Division's refusal to register Barrier as a distributor of motor fuel into the State. Petitioner argues that it was arbitrary and capricious and an abuse of discretion for the Administrative Law Judge to allow registration of Barrier as a diesel motor fuel distributor but to refuse to license Barrier as a motor fuel distributor. It is also argued that it was an abuse of

discretion to deny Barrier registration pursuant to Tax Law § 283(2)(c) based upon Barrier's guilty plea to a misdemeanor charge. Petitioner further argues that it did not unlawfully import motor fuel into the State. Petitioner also contends that its due process rights were violated because the Division failed to give Barrier proper and adequate notice of its proposal to refuse to register petitioner. Petitioner asserts that the Tribunal is required by section 283(6)(a) of the Tax Law to immediately register Barrier as a motor fuel distributor because over three months have elapsed since its application for a hearing. Lastly, petitioner alleges that the refusal to register Barrier discriminates against interstate commerce and imposes an undue burden upon such commerce in violation of the Commerce Clause of the United States Constitution.

In response, the Division asserts that the refusal to register petitioner as a motor fuel distributor was proper in view of petitioner's operation without registration and without payment of the required bond and in light of petitioner's conviction of a misdemeanor under the Tax Law. Secondly, the Division argues that it is not estopped from asserting petitioner's conviction as a basis for the refusal to license petitioner. The Division further contends that petitioner's claim that its due process rights were violated as a result of certain procedural irregularities is unfounded. The Division argues that the registration requirements of section 283 of the Tax Law do not violate the Commerce Clause of the United States Constitution. Lastly, the Division contends that if petitioner is registered as a motor fuel distributor, a surety bond in the amount of \$1,683,936.00 is required.

We affirm the determination of the Administrative Law Judge.

We first address the issue of whether the Administrative Law Judge properly sustained the Division's refusal to register petitioner as a motor fuel distributor.

Petitioner asserts that it was arbitrary and capricious and an abuse of discretion for the Administrative Law Judge to sustain the Division's refusal to register petitioner as a motor fuel distributor, while at the same time, to grant petitioner's request for registration as a diesel motor fuel distributor. Specifically, petitioner contends that because the grounds for denial of a diesel motor fuel distributor license are similar to the grounds for the denial of a motor fuel distributor

license, logic requires the granting of a motor fuel license here. This contention does not withstand scrutiny.

Tax Law § 283(2) and (4) enumerate certain grounds which may form the basis for the Division's refusal to license a distributor of motor fuel. Pursuant to Tax Law § 282-a(2), the grounds set forth in section 283 are applicable as well to applicants for registration as a diesel motor fuel distributor. As relevant here, Tax Law § 283 provides that the Division may refuse to register an applicant as a distributor if such applicant was convicted of a Tax Law crime within the preceding five years (Tax Law § 283[2][c]). In addition, the registration of any distributor may be cancelled or suspended for a failure to file a bond when required or a failure to "comply with any of the provisions of [article 12-A] or article 28 . . . with respect to motor fuel" (Tax Law § 283[4]). The record in this matter establishes that all of these acts specified above are present in this case; that is, petitioner failed to pay the required bond of \$400,000.00 as a condition of its registration as a motor fuel distributor (see, Matter of Barrier Oil Corp., State Tax Commn., March 18, 1986), petitioner continued to operate as a motor fuel distributor without paying such bond as required by section 283(3) of the Tax Law and continued to operate after its registration had been cancelled due to its nonpayment of such bond. In addition, the record also establishes that petitioner consented to its substitution as defendant in a criminal prosecution against one of its drivers for unlawful importation of motor fuel into the State and entered a plea of guilty to a reduced misdemeanor charge (see, Exhibit 16). By statute, each of these grounds would independently be sufficient to justify the refusal to register petitioner as a motor fuel distributor. As noted by the Division, collectively these grounds present an overwhelming basis on which to deny registration to petitioner as a motor fuel distributor.

Contrary to petitioner's contention, the decision to grant to petitioner a diesel motor fuel registration and to refuse to register petitioner as a motor fuel distributor is not an arbitrary or inconsistent exercise of administrative action. The logic of petitioner's argument could just as easily be used to argue that consistency of administrative action requires that both licenses be

denied here. Obviously, that result is not one desired by petitioner. In our view, the Administrative Law Judge's decision to grant the license in one instance but not in the other does not represent an arbitrary and irrational decision. Rather, we find that it reflects a balanced and judicious attempt to avoid a harsh and inequitable result. The blanket refusal to register petitioner would exact too harsh a penalty in light of the facts and circumstances here, including the consequences to petitioner of a refusal to register, its filing and payment record, and the change in petitioner's corporate structure. That this is a reasoned conclusion is further borne out by the Division's acquiescence to that part of the determination granting petitioner a diesel motor fuel license. Accordingly, we find this contention by petitioner to be without merit.⁴

Petitioner next asserts that it was improper for the Division to deny registration to Barrier based solely upon Barrier's guilty plea to a misdemeanor charge. Additionally, petitioner suggests that the conviction should not be considered here because the plea bargain "is premised on a charge levied against an individual" rather than against Barrier itself. Petitioner also asserts that the Department and petitioner agreed that the plea bargain would resolve all pending civil and criminal matters against Barrier. We are not persuaded by these arguments.

Contrary to petitioner's assertion, Barrier's license to operate as a motor fuel distributor was not denied on the sole ground of petitioner's conviction of a Tax Law crime. As noted above, petitioner's unregistered activity as a motor fuel distributor, its continued operation without payment of the required bond, as well as petitioner's conviction of a crime under the Tax Law, together provided sufficient justification pursuant to the statutory grounds outlined in Tax Law § 283(2) and (4) to deny petitioner's registration.⁵ Petitioner's argument that criminal charges were not issued against Barrier is totally unfounded and directly contradicts evidence

⁴We note that the Administrative Law Judge applied the correct standard of review in reaching her determination. Although the Administrative Law Judge cited Matter of Pell v. Board of Education (34 NY2d 222, 356 NYS2d 833), a review of the Administrative Law Judge's conclusions as a whole indicates that she did not limit her review to the Article 78 standard of review (see, Matter of OK Petroleum Prod. Corp., Tax Appeals Tribunal, November 1, 1990).

⁵Because petitioner's conviction was only one of several grounds which formed the basis for denial of petitioner's license, there has not been any violation of Corrections Law § 752 (see, Executive Law § 296[15]). Moreover, there is a clear relationship between petitioner's offense and the specific license requested here (see, Corrections Law § 752[1]). Accordingly, denial of petitioner's request for licensing here was proper.

placed in the record by petitioner itself. Petitioner's Exhibit 16, which is a transcript of the criminal proceeding against Barrier, clearly indicates that Barrier, through its President, agreed to substitute Barrier as defendant in the criminal prosecution (Exhibit 16, p. 2). The transcript further indicates that Barrier, through its President, admitted the following facts: that on or about July 7, 1988 Barrier "was not licensed as a distributor of motor fuel pursuant to the provisions of Article 12-A of the Tax Law" and proceeded to off-load motor fuel into a facility in the State "where said motor fuel was being imported or caused to be imported into the State for use, distribution, storage or sale in the State" (Exhibit 16, p. 4). After admitting these facts, Barrier pleaded guilty to a reduced misdemeanor charge pursuant to Tax Law § 1812-b of importing motor fuel without an Article 12-A registration (Exhibit 16, pp. 4-5). Petitioner's attempt to deny such facts now is futile. Lastly, petitioner has not pointed to and we cannot find anything in the transcript of the criminal proceeding indicating that the Division agreed that the plea bargain was to encompass licensing and registration matters.

Petitioner asserts that it did not know it was operating without a valid registration because it was not aware that Barrier's registration had been cancelled. Petitioner argues that since the Division failed to prove that it mailed the letter to petitioner dated June 9, 1986 notifying petitioner of the cancellation (see, Exhibit O-2), such cancellation was invalid. Although the Division's failure to introduce any evidence with respect to the mailing of the June 9, 1986 letter is inexplicable, we note that the decision of the former State Tax Commission in Matter of Barrier Oil Corp. (supra), put petitioner on notice that the posting of a surety bond in the amount of \$400,000.00 was a condition required for petitioner's continued registration. Since petitioner failed to satisfy this condition, it must have known that its registration ceased. Further, we find nothing in the law in effect at that time that required a separate notice of cancellation in addition to the issuance of the State Tax Commission decision. Finally, the record establishes that petitioner received and, in fact, responded to other communication from the Division which indicated that Barrier's registration had been cancelled. Accordingly, we

reject petitioner's arguments that its registration was not effectively cancelled and that it did not know of this cancellation.

Petitioner next claims that the notice of proposed refusal to register petitioner as an Article 12-A distributor was defective on procedural grounds and inadequate as a matter of law. We do not agree.

The notice of proposed refusal to register petitioner was issued on May 4, 1989, approximately ten months after petitioner's application for registration. Contrary to petitioner's contention, that period cannot be said to be in clear violation of the directive of Tax Law § 283(6)(a) that the notice shall be "issued promptly" after the application. Petitioner also contends that the notice is defective because it did not allege all the grounds asserted against petitioner for denial of the licence and further that the Division is estopped from raising petitioner's conviction as a ground for denial of the license since that ground was not asserted until the Division's letter in lieu of an answer dated September 29, 1989. These contentions are without merit.

We have held that the Division is not confined to the grounds set forth in a notice of proposed refusal to license and may raise additional grounds, even at the hearing, so long as the petitioner has the opportunity to adequately prepare and present a defense (Matter of Diamond Term. Corp., Tax Appeals Tribunal, September 28, 1988; see, Matter of Heckt v. City of Lackawanna, 44 AD2d 763, 354 NYS2d 245, lv denied 35 NY2d 643, 361 NYS2d 1027). Here, the Division raised petitioner's conviction as a new ground in its letter in lieu of an answer to petitioner. Petitioner then requested and was granted an adjournment of the hearing until October 26, 1989. If this time period was insufficient to allow petitioner to adequately respond, petitioner certainly could have requested additional time. Petitioner did not do so. We find that the notice, supplemented by the Division's letter in lieu of an answer, adequately and with sufficient specificity apprised petitioner of the grounds for the denial of petitioner's motor fuel license.

Accordingly, we find that petitioner has failed to show that it was denied notice or the opportunity to prepare and present a defense on the new matter raised (see, Matter of Diamond Term. Corp., supra). Petitioner has therefore failed to make a colorable argument that its due process rights were violated in this matter.

Petitioner next asserts that the time requirements set forth in Tax Law § 283(6)(a) and in the applicable regulations relating to expedited hearings (see, 20 NYCRR 3000.12) have been violated in this matter and that as a result, the Tribunal is required to immediately register Barrier as a motor fuel distributor. We do not agree.

As an expedited matter, the applicable regulations require that the Administrative Law Judge render a determination within 30 days from the date of the petition for the expedited hearing (20 NYCRR 3000.12[b]). The Tribunal is required to issue its decision within three months from the date of the petition for the expedited hearing (20 NYCRR 3000.12[b]). In determining the applicable time period, the regulation specifies that "[a]ny request by the petitioner which delays the expedited hearing process shall extend the time limitations imposed on the Tribunal or the Administrative Law Judge" (20 NYCRR 3000.12[b]). Taking into account petitioner's request for an adjournment of the originally scheduled hearing and request for an extension of the briefing schedule, the determination rendered by the Administrative Law Judge fell two days outside the 30-day period. Petitioner's argument that this two-day delay was prejudicial to petitioner is specious, particularly in light of petitioner's own numerous requests both to the Administrative Law Judge and to the Tribunal which have resulted in much more significant delays in the expedited hearing process. Moreover, the issuance of this decision of the Tribunal by January 11, 1991 is within the three-month deadline of 20 NYCRR 3000.12(b) and cures the slight procedural irregularity which occurred below.

The final contention raised by petitioner is that the five-year bar in Tax Law § 283(2)(c) discriminates against and imposes an unreasonable burden upon interstate commerce in violation of the Commerce Clause of the United States Constitution. Petitioner's argument, though phrased in part as a challenge to the application of that statute, is in actuality a broad

based challenge to the facial validity of the statute. Petitioner has not provided any evidence or specific argument that the statute as applied to Barrier's particular circumstances violates the Commerce Clause.

The jurisdiction of this Tribunal, as prescribed in its enabling legislation, does not encompass such constitutional challenges. The Division of Tax Appeals is without authority to declare an act of the Legislature unconstitutional on its face (see, Matter of Allied Grocer's Coop., Tax Appeals Tribunal, November 30, 1989, confirmed ___ AD2d ___, 557 NYS2d 707; Matter of Fourth Day Enter., Tax Appeals Tribunal, October 27, 1988). At this administrative level, the constitutionality of statutes is presumed (see, Matter of Fourth Day Enter., supra).

Lastly, we find it appropriate to comment briefly upon the handling of this matter by the Division. Given the importance of the registration requirements under Article 12-A, we find it puzzling that the Division did not follow a more aggressive approach toward petitioner's failure to register. While we cannot condone the Division's failure to pursue a more vigorous enforcement policy toward petitioner, we likewise cannot agree with petitioner that the appropriate remedy is to immediately register Barrier as a motor fuel distributor. Granting that remedy here would directly contradict the statutory directive of Tax Law § 283(2) and (4) which authorize the Division to refuse to license a motor fuel distributor in such circumstances as those present here.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner, Barrier Oil Corporation is denied;
 2. The determination of the Administrative Law Judge is affirmed;
 3. The petition of Barrier Oil Corporation is granted to the extent indicated in conclusion of law "G" of the Administrative Law Judge's determination but is in all other respects denied;
- and

4. The proposed Notice of Refusal to Register as a Motor Fuel Distributor issued on May 4, 1989 is sustained.

DATED: Troy, New York
January 4, 1991

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner