

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ROBERT C. SHAW	:	DECISION
D/B/A SHAW FUEL OIL & KEROSENE	:	DTA No. 810787
	:	
for Review of a Proposed Cancellation of Diesel Motor Fuel Registration under Article 12-A of the Tax Law.	:	

Petitioner Robert C. Shaw d/b/a Shaw Fuel Oil & Kerosene, P.O. Box 2149, Northern Pines Road, Wilton, New York 12866 filed an exception to the determination of the Administrative Law Judge issued on July 30, 1992 with respect to his petition for review of a proposed cancellation of diesel motor fuel registration under Article 12-A of the Tax Law. Petitioner appeared by Ronald L. Newell, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

Each party submitted a brief on exception. Petitioner's request for oral argument was withdrawn on October 8, 1992.

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 cancellation of petitioner's registration as a diesel motor fuel distributor under Article 12-A of the Tax Law.

II. Whether the Division of Taxation properly asserted an additional basis for its proposed cancellation of petitioner's registration as a diesel motor fuel distributor under Article 12-A of the Tax Law, when such basis was not set forth in its Notice of Proposed Cancellation dated February 12, 1991.

FINDINGS OF FACT

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

By letter dated February 12, 1991, the Division of Taxation, by its Fuel, Alcohol, Cigarette and Carrier Tax Section of the Transaction and Transfer Tax Bureau, notified Robert C. Shaw d/b/a Shaw Fuel Oil & Kerosene ("petitioner") of its proposed cancellation of petitioner's registration as a diesel motor fuel distributor under Article 12-A of the Tax Law. The letter stated, in pertinent part, as follows:

"[T]his proposed cancellation is based upon the following failures to comply with the provisions of Article 12-A or Article 28 of the Tax Law with respect to diesel motor fuel (Tax Law Sec. 282-a.5, 283.4):

1. You failed to report and remit sales taxes collected on the sales of diesel motor fuel.
2. You filed false sales tax returns relating to sales of diesel motor fuel.
3. You failed to collect sales tax on taxable sales of diesel motor fuel.
4. You delivered and disclosed to tax department representatives falsified sales invoices.
5. You failed to file returns or pay tax for the months of September, October and November, 1988 relative to excise tax on diesel motor fuel."

At hearing, the Division asserted an additional ground for cancellation, i.e., that petitioner submitted false residential use certificates to his suppliers with respect to diesel motor fuel tax. The documentation supporting said claim is contained in the audit report. The Division's attorney apprised petitioner's attorney of this additional ground on June 4, 1992 by letter and raised the ground again at hearing. The Administrative Law Judge allowed the asserted ground and urged petitioner to respond at hearing by way of testimony or documentation and to address the issue in a brief or memorandum of law following the hearing.

On or about August 30, 1988, Robert C. Shaw, petitioner herein, applied for registration as a distributor of diesel motor fuel under the trade name Shaw Fuel Oil & Kero. Mr. Shaw indicated that he was the sole owner of the business which had begun operation on October 1, 1980 selling diesel motor fuel. Item "12" on the application asked if the applicant was registered for sales tax purposes. Mr. Shaw answered that question in the affirmative, stating that his sales tax certificate of authority was filed under the name Robert C. Shaw, identification number 14-150-1220. Under subsection "d" to Item "12" on said application, Mr. Shaw stated that he had a tax account with the State of New York for motor fuel tax, identification number M-14-150-1220. Item "21" on the application requested Mr. Shaw to state the total gallons of diesel motor fuel he expected to sell or use each month in the State of New York. Mr. Shaw answered "22,507.99". Item "22" asked how many gallons of diesel motor fuel sold would be for specific exempt purposes and Mr. Shaw answered "15,000" gallons. Mr. Shaw made all statements on the application with the understanding that willfully false representations would be considered criminal and he affirmed that the statements were true, correct and complete.

On or about December 9, 1988, Mr. Shaw d/b/a Shaw Fuel Oil & Kero of Wilton, New York was issued his permanent distributor of diesel motor fuel registration certificate.

On or about February 1, 1988, the Division of Taxation began a field audit for sales and use tax liability of Robert C. Shaw d/b/a Shaw Fuel Oil & Kero for the audit period December 1, 1983 through February 29, 1988. The Division determined that the nature of Shaw Fuel Oil & Kero was the retail sale of fuel oil, kerosene and construction. It was immediately determined that said vendor was not registered.

After an examination of petitioner's records, it was found that his sales records were adequate and it was determined that all sales would be reviewed in detail. It was also determined that Shaw Fuel Oil & Kero did not file sales tax returns and, after a review in detail of sales records, it was determined that petitioner had additional taxable sales of \$424,766.86 on which additional tax was due and owing in the sum of \$29,733.68. A review of expense purchases

indicated that there was tax due on fuel consumed by the vendor and also materials used by him in capital improvement contracts in the sum of \$21,849.69 on which tax was due and owing in the sum of \$1,529.56. In summary, petitioner was found to owe additional tax of \$31,263.24. It was determined that besides being an unregistered vendor, petitioner made sales of fuel oil and kerosene to both residential and business enterprises, charging sales tax on his business sales. He also charged tax on taxable construction sales. Because sales tax returns were not filed and taxes not remitted, the auditor referred this case for fraud investigation.

On September 27, 1990, the Division issued to Robert C. Shaw d/b/a Shaw Fuel Oil & Kero two notices of determination and demands for payment of sales and use taxes due, the first in the sum of \$20,152.78 and the second demanding tax due in the amount of \$11,110.46, each also assessing fraud penalty and interest.

As a result of this sales and use tax audit, this case was referred to the Department of Taxation and Finance Office of Tax Enforcement which is responsible for criminal investigations. Investigators in this bureau obtained invoices and other records from one George Senecal and Bob Baker Pools, customers of Robert Shaw d/b/a Shaw Fuel Oil & Kero, reflecting their purchases from Shaw Fuel Oil. Petitioner also provided the Office of Tax Enforcement with several boxes of original records, including sales invoices, all of which were returned to Mr. Shaw with the exception of certain sales invoices which the enforcement staff believed were unlawfully altered or falsified by Mr. Shaw. These allegedly altered invoices were submitted into evidence herein.

There were invoices of Shaw Fuel Oil & Kero to "Bob Baker Pools" during 1986 and 1987 which had been altered with "white out", particularly areas on the invoices which stated sales tax included or excluded and also totals. A second item of evidence important to the enforcement investigation was the invoices to "George's Bar" and "George Senecal" on various dates during 1985, 1986, 1987 and 1988. The alterations on these invoices involved the person or entity to whom the fuel oil or kerosene was sold. Many were changed from "George's Bar" to "George

Senecal" in a very obvious manner. There were also two statements elicited from George Senecal by investigators from enforcement, the first dated December 13, 1988 which indicated that all deliveries to Mr. Senecal were for "George's Bar" and not for his residence since he heated his home with electric baseboard heat. In a second statement dated June 4, 1990, Mr. Senecal indicated that he was shown copies of the altered invoices from Shaw Fuel Oil & Kero to "George's Bar" or "George Senecal" and indicated that he never changed them or altered them to say "George Senecal". It was Mr. Senecal's statement that once the tanks were filled at the business, the invoices were made out to the business and not to "George Senecal" personally. Both "Senecal" statements were witnessed by investigators from tax enforcement.

With regard to "George's Bar", Mr. Shaw testified that he was not aware that the residence above the bar was heated by electricity and that his apportionment of the bills to George's Bar or George Senecal was in error.

Mr. Shaw also produced statements of other customers with allegedly similar circumstances. An unsworn statement by one Joseph Baldwin who resides above the Chez Pierre Restaurant in Wilton, New York indicated that at least one-half of the oil delivered to the Chez Pierre Restaurant by Shaw was used to heat the residence. Another unsworn statement by one Loren John Peoples indicated that Shaw Fuel Oil & Kero sold fuel oil to Mr. Peoples for use at his business, People's Automotive, but that the receipts given to Mr. Peoples included fuel oil delivered to his home at 20 Mount McGregor Road in Wilton, New York.

Mr. Shaw also alleged that the sales tax auditor, Ms. Annette Carapellucci, suggested that he modify the invoices for sales of fuel oil to reflect an allocation for business and residential use. His secretary, Ms. Linda Petteys, did not corroborate the fact that the sales tax auditor told him to alter his invoices, even though Mr. Shaw said he was "sure she was" present.

On September 18, 1990, the investigation by the New York State Office of Tax Enforcement culminated in the conviction of Mr. Shaw in the Town of Wilton Justice Court, Saratoga County, State of New York, on one count of offering a false instrument for filing in the

second degree in violation of Penal Law § 175.30, a class A misdemeanor entailing a sentence of 30 days in the Saratoga County Jail, a fine of \$2,500.00 and a requirement that Mr. Shaw pay restitution in the sum of \$19,666.40.

On or about October 16, 1990, the Division of Taxation, by its Miscellaneous Tax Bureau, conducted a field audit of the diesel fuel tax and gross receipts tax liability of Shaw Fuel Oil & Kerosene. The audit period for diesel tax covered from September 1988 through August 1990 and the audit of Article 13-A, or gross receipts tax, covered the same period.

The initial review of petitioner's diesel tax returns, MT-1000's, indicated no returns filed for the months of September, October and November 1988 and one consolidated return filed for the months of December 1988 through August 1989. The auditor examined the receipts for sales of diesel fuel and obtained a list of nontaxable accounts.

The gross receipts tax audit was performed by examining petitioner's purchases of diesel fuel from registered Article 13-A suppliers. On audit, the Division examined exemption certificates provided by petitioner to its suppliers and where the percentage of residential sales was found to be incorrect a penalty was assessed equal to 5% of the difference between the estimate of residential sales and actual residential sales. Typically, suppliers received exemptions for certain sales based upon the percentage of residential sales listed on the exemption certificates provided by their purchasers. In turn, the suppliers used these certificates to justify exemptions from the gross receipts tax.

The audit conducted by the Division of Shaw Fuel Oil & Kero examined all records in detail for the audit period. As stated above, it was found that no returns for diesel fuel tax were filed for September, October and November 1988 and only one return was filed for the months beginning December 1988 through August 1989. Additionally, there were unreported taxable sales noted throughout the audit period and in many cases delivery invoices to customers showed that Federal excise tax and New York State sales tax were passed through, but there was no accounting for diesel tax.

With regard to the gross receipts tax under Article 13-A, the residential use certificates issued to suppliers by petitioner set forth average residential sales of 93%, while petitioner's records indicated an average of 66% residential sales. In one instance, a residential use certificate issued to a supplier named "Stratus Petroleum Corp." for the year 1990, dated February 1, 1990, indicated estimated purchases of 200,000 gallons of No. 2 oil of which 90% was claimed for residential use. The same certificate estimated purchases of 86,374 gallons of kerosene of which 100% was estimated for residential use.

Shaw Fuel Oil & Kero sold diesel motor fuel to customers located within the general area for both taxable and nontaxable purposes. Shaw Fuel Oil & Kero also operated a paving and excavating business and used fuel in its vehicles which was stored in petitioner's own tanker.

The ultimate finding with regard to additional tax due for unreported taxable use and sales was \$7,870.00, which was arrived at by multiplying the tax rate of .10 times the number of gallons of diesel fuel either sold and not reported or determined to have been sold for taxable purposes, to wit, 78,700 gallons. Penalty and interest were assessed as well.

With regard to the gross receipts tax, a penalty assessment of \$6,180.00 was made based upon a 5% penalty rate being applied to the difference between the estimated residential use per certificates provided to suppliers and the actual residential use percentage of 66% found on audit. The differential for the year 1988 was found to be \$49,906.00, yielding a penalty of \$2,495.00; the differential for 1989 was \$49,497.00, yielding a penalty of \$2,475.00; and the differential for 1990 through August 31 was \$24,204.00, for a penalty of \$1,210.00. The sum of these three penalties is the aforementioned \$6,180.00.

At various times in 1989 and 1990, the Division of Taxation wrote to Mr. Shaw with regard to delinquent returns of tax on diesel motor fuel. By letters dated December 27, 1989 and January 25, 1990, the Division made demands for returns of tax on diesel motor fuel referred to as "D-127163759" for the period December 1988 through August 1989. Petitioner paid \$2,594.37 for the period December 1988 through August 1989 by check dated February 12,

1990, presumably in response to the demand dated January 25, 1990. Another letter, dated April 24, 1990, was sent by the Division to Mr. Shaw with regard to returns of tax on diesel motor fuel for the period September 1989 through January 1990, "D-127163759SS". The Division issued a Demand for Return of Tax on Diesel Motor Fuel dated May 22, 1990 describing the same delinquency for the period September 1989 through February 1990.

Robert Shaw d/b/a Stage Coach Inn, located on Northern Pines Road in the Town of Wilton, New York, whose principal business activity is as a "bar", filed forms ST-100, sales and use tax returns, for the quarters ended February 28, 1985, May 31, 1985, August 31, 1985, November 30, 1985, February 28, 1986, May 31, 1986, August 31, 1986, November 30, 1986, February 28, 1987, May 31, 1987, August 31, 1987, November 30, 1987 and February 29, 1988.

For the year 1984, attached to petitioner Robert C. Shaw's U.S. Individual Income Tax Return, Form 1040, were two schedule C's for both his "bar" business, the Stage Coach Inn, and his contracting and fuel business known as Shaw Fuel Oil & Kero a/k/a Shaw Contracting & Fuel, indicating the following gross receipts or sales for each business respectively:

	<u>Stage Coach Inn</u>	<u>Shaw Fuel Oil & Kero</u>
1984 (per schedule C, Form 1040)	\$32,324.00	\$246,478.40
1985 (per schedule C, Form 1040)	27,495.08	419,813.71
1986 (per schedule C, Form 1040)	52,811.00	390,209.00
1987 (per schedule C, Form 1040)	57,198.65	568,324.70

With regard to the sales and use tax returns filed on behalf of Stage Coach Inn, it is noted that none listed gross sales and services in excess of \$18,900.00 for any one quarter. The gross sales and services claimed on behalf of Stage Coach Inn for the quarters December 1, 1984 through February 29, 1988 are as follows:

<u>Quarter Ended</u>	<u>Gross Sales and Services</u>
2/28/85	\$ 2,120.00
5/31/85	-0-
8/31/85	4,945.00
11/30/85	10,468.00
2/28/86	8,999.00
5/31/86	15,454.00
8/31/86	14,598.00
11/30/86	13,760.00
2/28/87	10,835.00
5/31/87	16,739.00
8/31/87	18,817.00
11/30/87	11,044.00
2/29/88	12,008.00

OPINION

The Administrative Law Judge concluded that petitioner had committed fraud and deceit in his operations as a distributor of diesel motor fuel and that the Division of Taxation (hereinafter the "Division") had correctly decided that petitioner's registration as a motor fuel distributor should be cancelled. With respect to sales tax, the Administrative Law Judge found the acts of fraud and deceit to include: the failure of petitioner to register as a vendor, file sales tax returns or remit tax between December 1983 and February 1988 despite the fact that petitioner was making retail sales of diesel fuel oil and kerosene and collecting tax on some transactions (as evidenced by invoices issued by petitioner); the alteration of invoices by petitioner to indicate the residential and nontaxable sale of fuel oil to certain customers, where the sale was not in fact a sale to a residence (in the case of the sale to George Senecal) or where petitioner was not able to substantiate that the amount claimed was actually for residential purposes; and the offering of a false instrument for filing, as evidenced by petitioner's guilty plea to a Class A misdemeanor for this act. The Administrative Law Judge dismissed petitioner's claim that he was innocent of this crime, holding that the record of conviction spoke for itself.

With respect to the diesel fuel tax, the Administrative Law Judge noted that the acts of fraud and deceit included: not filing tax returns for the months of September, October and November of 1988 and filing a single return covering the period December 1988 through August

1989; not accurately reporting taxable sales; and not accounting for the diesel motor fuel tax on invoices provided to customers.

With respect to the gross receipts tax imposed by Article 13-A, the Administrative Law Judge found that petitioner had overestimated, by 27%, his percentage of residential sales on the exemption certificates provided to his suppliers and that this error was due to petitioner's reckless disregard for providing accurate information to the Division.

The Administrative Law Judge concluded that these acts, which took place over a period of almost seven years, made it clear that petitioner was deceitful in his operations as a distributor within the meaning of section 283(4)(i) of the Tax Law. The Administrative Law Judge rejected petitioner's argument that petitioner's acts were not sufficient to justify revocation of the license, noting that section 283(4)(i)¹ did not state the level of fraud or deceit required.

The Administrative Law Judge also concluded that the Division had properly asserted an additional basis for its proposed cancellation of petitioner's registration, i.e., that petitioner submitted false Article 13-A residential use certificates, even though this ground was not asserted until five days before the hearing. The Administrative Law Judge noted that petitioner did not take advantage of any available methods to challenge the additional ground and stated that petitioner appeared to have withdrawn his opposition to the additional ground. Relying on Matter of Diamond Terminal Corp. v. New York State Dept. of Taxation & Fin. (158 AD2d 38, 557 NYS2d 962, lv denied 76 NY2d 711, 563 NYS2d 767), the Administrative Law Judge concluded that petitioner was not prejudiced by the delay in asserting the additional ground.

¹Section 283(4) of the Tax Law provides, in pertinent part, as follows:

"[a] registration may also be cancelled or suspended if the tax commission determines that a registrant or, if the registrant is a corporation or a partnership, an officer, director or partner thereof who as such officer, director or partner is under a duty to act for such corporation or partnership:

"(i) commits fraud or deceit in his operations as a distributor or has committed fraud or deceit in procuring his registration" (Tax Law § 283[4]).

On exception, petitioner contends that: his conviction for filing a false instrument, standing alone, cannot be sufficient grounds for revocation of his diesel motor fuel registration; he did not alter the fuel oil invoices to indicate residential purposes for fraudulent purposes, but, rather, made these alterations following the advice of the Division's auditor; the law changed in October 1988, requiring taxpayers to file monthly diesel fuel tax returns, he had difficulty preparing the returns, and this failure hardly amounts to fraud. Petitioner argues that it would be a grossly disproportionate punishment to revoke his registration. Petitioner also asserts that the additional ground for the proposed cancellation was not timely asserted and that, as it was not the subject of the conciliation order, the Administrative Law Judge could not properly pass on it.

In response, the Division asserts that neither the record nor the law require the finding of fact that petitioner was advised by the Division's auditor to alter the fuel invoices. The Division also argues that petitioner was apprised of the additional grounds for revocation in advance of the hearing, but made no request for an adjournment or continuation of the hearing and advanced no procedural or substantive argument with respect to the additional ground in the post-hearing brief. The Division also contends that the conciliation order is not the subject of review in the Division of Tax Appeals; rather, in this case of proposed cancellation, the notice is. For this reason, the Division argues that the additional ground for cancellation was properly subject to the Administrative Law Judge's review.

With respect to petitioner's plea of guilty to filing a false instrument, we need not determine whether this plea in itself would be sufficient to justify cancelling petitioner's registration because, as the Administrative Law Judge held, the record reveals so much other evidence of deceit by petitioner in his operation as a motor fuel distributor, i.e., not registering as a sales tax vendor; not reporting or remitting sales tax although showing it on invoices to customers; not filing Article 12-A returns; and substantially overstating the percentage of his residential sales on Article 13-A residential use certificates. We agree with the Administrative Law Judge that, considered together, petitioner's acts exhibit a pattern of deceit, covering a large

period of time, that justifies the cancellation of petitioner's registration. We see no merit to petitioner's claim that this punishment is out of proportion to his many, persistent acts of misconduct.

Likewise, we agree with the Division that petitioner's claim that the Administrative Law Judge was required to find that petitioner altered invoices based on the advice of the Division's auditor, is totally without merit. The Administrative Law Judge rejected petitioner's testimony on this point as incredible.² It is the responsibility of the Administrative Law Judge, the person who has the opportunity to view the witnesses first hand, to make this evaluation (see, Matter of Spallina, Tax Appeals Tribunal, February 27, 1992, citing Matter of Berenhaus v. Ward, 70 NY2d 436, 522 NYS2d 478). Although we are not absolutely bound by the Administrative Law Judge's assessment of credibility, this assessment is entitled to great weight (see, Matter of Auriemma, Tax Appeals Tribunal, September 17, 1992; Matter of Jericho Delicatessen, Tax Appeals Tribunal, July 23, 1992; see also, Matter of Stevens v. Axelrod, 162 AD2d 1025, 557 NYS2d 809). There is nothing in the record before us that would justify modifying the Administrative Law Judge's conclusion that petitioner falsified certain invoices in order to deceive the Division as to his residential sales of motor fuel and not because he was advised by the Division's auditor to do so. Therefore, we reject petitioner's contention that the invoices were modified by petitioner in "a good faith effort to correct the overstatement of sales to commercial businesses . . ." (Petitioner's brief on exception, p. 9).

We also find totally unpersuasive petitioner's argument that his failure to file diesel motor fuel tax returns for the months of September, October and November 1988 was due to a change in the reporting requirements mandated by law, effective October 1988. Petitioner has not described specifically what reporting requirements were so troublesome, but we find it impossible to imagine that any such difficulty could justify the failure to file any returns and pay

²In response to petitioner's claim that the testimony of the Division's auditor would have corroborated his own testimony, we remind petitioner that he could have secured the appearance of the auditor at the hearing, with a subpoena, pursuant to 20 NYCRR 3000.6(c).

any tax throughout the period from the time the returns were due (the twentieth day of the following month, pursuant to section 287 of the Tax Law) to the date on the notice of the proposed cancellation of petitioner's registration (February 12, 1991). Therefore, we agree with the Administrative Law Judge and the Division that petitioner's failure to file these returns and pay tax for these months is another act of deceit that justifies the cancellation of his registration.

Turning to the last issue, petitioner has not asserted on exception, and we find no evidence in the record, that he was in any way disadvantaged or prejudiced by the Division's assertion of the additional ground for cancellation five days before the hearing. Although petitioner objected to this additional ground at the hearing, he did not request an adjournment or postponement (Tr., p. 10). On the record before us, we conclude that the Division's delay in asserting the additional ground did not impair petitioner's ability to respond effectively to the additional charge (Matter of Diamond Term. Corp. v. New York State Dept. of Taxation & Fin., *supra*; Matter of Barrier Oil Corp., Tax Appeals Tribunal, January 4, 1991).

The argument that petitioner does raise on exception with respect to the additional ground is that the Administrative Law Judge did not have authority to rule on this ground because it was not the subject of the conciliation order. As the Division points out, section 170(3-a)(f) of the Tax Law provides, in pertinent part, that: "[c]onciliation conference orders . . . shall not be considered as precedent or be given any force or effect in any subsequent administrative proceeding with respect to the person who requested the conference or in any other proceeding." Since the conciliation order cannot be given any force or effect in this, the subsequent administrative proceeding, it seems quite clear that the Administrative Law Judge's review cannot be limited to the conciliation order. Therefore, we find no basis for petitioner's contention that the additional ground could not be asserted after the issuance of the conciliation order.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Robert C. Shaw d/b/a Shaw Fuel Oil & Kerosene is denied;
2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Robert C. Shaw d/b/a Shaw Fuel Oil & Kerosene is denied; and
4. The Notice of Proposed Cancellation of Diesel Motor Fuel Registration under Article 12-A of the Tax Law, dated February 12, 1991, is sustained.

DATED: Troy, New York
November 12, 1992

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

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

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