

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
PETERSON PETROLEUM OF NEW HAMPSHIRE, INC. : DECISION
for Review of a Denial, Suspension, Cancel- : DTA No. 813045
lation or Revocation of a License, Permit or :
Registration under Article 12-A of the Tax Law. :

The Division of Taxation and petitioner Peterson Petroleum of New Hampshire, Inc., Platt A. Paine House, P.O. Box 900, Main Street, Millerton, New York 12546, each filed an exception to the determination of the Administrative Law Judge issued on December 12, 1994. Petitioner appeared by DeGraff, Foy, Holt-Harris, Mealey & Kunz, LLP (James H. Tully, Jr. and Peter G. Barber, Esqs., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Patricia L. Brumbaugh and John E. Matthews, Esqs., of counsel).

Both parties filed briefs on exception. Petitioner also filed a reply brief. Oral argument was heard on November 9, 1995, which date began the 75-day period for the issuance of this decision.

The Tax Appeals Tribunal renders the following decision per curiam. Commissioner Donald C. DeWitt took no part in the consideration of this decision.

ISSUE

Whether sufficient grounds exist to support the proposed refusal to register petitioner as a distributor of diesel motor fuel under Article 12-A of the Tax Law.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "2," "8(c)," "8(d)," "8(f)," "8(g)" and "8(m)" which have been modified. We have also

made additional findings of fact. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional findings of fact are set forth below.

1. On October 19, 1992, the Division of Taxation ("Division") received from Peterson Petroleum of New Hampshire, Inc. ("PPNH") an application for registration as a distributor of diesel motor fuel. The application indicated that PPNH's president was James T. Metz, its vice-president was John Farr Simons III and its secretary was Lauren H. Simons.¹

We modify finding of fact "2" to read as follows:

2. On April 7, 1993, the Division issued a Notice of Proposed Refusal to Register as a Motor Fuel Distributor under Article 12-A of the Tax Law. The notice indicated that the basis for the refusal was that a responsible person listed on the application had unpaid liabilities finally determined to be due.

PPNH initially protested the refusal to register, but withdrew its protest after a Bureau of Conciliation and Mediation Services ("BCMS") conferee upheld the refusal.²

3. On July 30, 1993, the Division received another Application for Registration as a Distributor of Diesel Motor Fuel. This application differed from the initial one in that Alicia Metz (daughter of James T. Metz and sister of Lauren H. Simons) was listed as the president of PPNH.

The application further indicated that PPNH was a wholly-owned subsidiary of Huntington & Kildare, Inc. ("H & K"), a New York corporation with its principal place of business in Millerton, New York. The application stated that H & K's other officers were:

¹An Application for Registration as a Sales Tax Vendor (see, Exhibit "L") received from PPNH in September 1992 listed the same officers and also indicated that Lloyd Helm was a vice-president.

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We modified finding of fact "2" by deleting the footnote which read as follows:

"A memorandum from Al Ruth of the Division's Tax Enforcement Bureau stated that James T. Metz had an outstanding assessment for income tax, that the assessment had been referred to collection and that a warrant had been issued on April 24, 1991 (see, Exhibit "K").

We made this modification to reflect our decision, explained in the opinion, that the Al Ruth memorandum is not a part of the record.

Lauren H. Simons - vice-president; and Kathryn T. Metz - secretary/treasurer. The application also indicated that, in addition to PPNH, Peterson Petroleum, Inc. ("PP, Inc.") and Two Lincoln Advisory Corp. were other corporations wholly-owned by H & K.

4. In August 1993, correspondence was exchanged between PPNH's then-representative (Richard M. Koweek, Esq.) and personnel of the Division's Transaction and Transfer Tax Bureau ("TTTB") -- Fuel, Alcohol, Cigarette and Carrier Tax Section ("FACCTS") regarding PPNH's application. A letter to Mr. Koweek from Bonnim Tanzman of TTTB-FACCTS stated, in part, as follows:

"Finally, please be advised that Peterson Petroleum of New Hampshire is not registered as a Diesel Distributor in the State of New York and therefore may not sell diesel product, including heating oil, in New York State. If Peterson Petroleum of New Hampshire is currently selling diesel product, including #2 heating oil, for any purpose in New York State, it must immediately cease doing so. Conducting an unregistered diesel business in New York State is illegal and may constitute a felony."

5. A subsequent letter from Mr. Tanzman to Mr. Koweek, dated September 15, 1993, stated, in part, as follows:

"On another subject, it has come to my attention that Peterson Petroleum of New Hampshire has been purchasing diesel fuel and filing returns using Peterson Petroleum's registration number. I must again advise you that Peterson Petroleum of New Hampshire is not a registered Diesel Distributor in New York State and therefore may not, among other things, sell diesel product (including #2 heating oil) to any person for any purpose, other than a retail sale of previously tax-paid product at a gas station. The importation or distribution of diesel product while not properly registered is grounds for refusal to register and subjects the distributor to criminal prosecution under §1812-a of the Tax Law. Impersonating a registered distributor or allowing the use of your registration number by another are each violations of the Tax Law punishable by civil and criminal sanctions."

Both letters from Mr. Tanzman also requested that certain additional information be provided before the application could properly be considered.

6. On November 26, 1993, the Division issued to PPNH a Notice of Proposed Refusal to Register as a Distributor of Diesel Motor Fuel under Articles 12-A and 13-A of the New York State Tax Law which set forth the basis of the proposed refusal as follows:

"1. You failed to provide information as requested in our letters dated 8/16/93 and 9/15/93.

- "2. You failed to disclose that James T. Metz, Jr., and Kathleen Metz are each indirect owners of more than 10% of the stock of Peterson Petroleum of New Hampshire, Inc.
- "3. James T. Metz, Jr. and Kathleen Metz, each indirect owners of more than 10% of the stock of Peterson Petroleum of New Hampshire, Inc. are and/or have been shareholders or officers of other corporations have/had [sic] finally determined outstanding liabilities which have not been paid in full.
- "4. James T. Metz, Jr. and Kathleen Metz, each indirect owners of more than 10% of the stock of Peterson Petroleum of New Hampshire, Inc., each have finally determined outstanding liabilities under New York's Tax Law which have not been paid in full.
- "5. You failed to disclose that Lauren H. Simons, Secretary- Treasurer of Peterson Petroleum of New Hampshire, Inc. is an officer of New England Air Transport, Inc.
- "6. You failed to disclose that New England Air Transport, Inc., a corporation owned or controlled by Lauren H. Simons, Secretary-Treasurer of Peterson Petroleum of New Hampshire, Inc., has finally determined outstanding liabilities which have not been paid in full.
- "7. Lauren H. Simons, Secretary-Treasurer of Peterson Petroleum of New Hampshire, Inc. is an officer of New England Air Transport, Inc., a corporation with finally determined outstanding New York State tax liabilities which have not been paid in full.
- "8. You have operated as a Diesel Distributor in New York without being properly registered to do so, (Tax Law 283.4).
- "9. You have impersonated a registered distributor by using the registration of Peterson Petroleum, Inc. to conduct your diesel business while you were not, in fact, registered. (Tax Law 283.4(IV))."

7. By letter dated August 29, 1994, the Division amended its notice of proposed refusal to register by asserting the following additional bases:

"10. Huntington and Kildare, Inc., the owner of 100% of the stock of Peterson Petroleum of New Hampshire, Inc., operated as a distributor of diesel motor fuel in New York State without being registered to do so.

"11. Huntington and Kildare, Inc., the owner of 100% of the stock of Peterson Petroleum of New Hampshire, Inc., failed to file returns required of a distributor of diesel motor fuel pursuant to Articles 12-A and 13-A of the Tax Law.

"12. Huntington and Kildare, Inc., the owner of 100% of the stock of Peterson Petroleum of New Hampshire, Inc., was also the owner of 100% of the stock of Peterson Petroleum, Inc. at the time that the registration of Peterson Petroleum, Inc. was cancelled by the Department of Taxation and Finance within the last five years.

"13. Alicia Metz and Lauren H. Simons, President and Secretary-Treasurer of Peterson Petroleum of New Hampshire, Inc. respectively, are each officers of and shareholders of 16 2/3% of the stock of Huntington and Kildare, Inc., a corporation which is the owner of 100% of the stock of Peterson Petroleum of New Hampshire, Inc. which operated as a distributor of diesel motor fuel in New York State without being registered to do so.

"14. Alicia Metz and Lauren H. Simons, President and Secretary-Treasurer of Peterson Petroleum of New Hampshire, Inc. respectively, are each officers of and shareholders of 16 2/3% of the stock of Huntington and Kildare, Inc., a corporation which is the owner of 100% of the stock of Peterson Petroleum of New Hampshire, Inc. which failed to file returns required of a distributor of diesel motor fuel pursuant to Articles 12-A and 13-A of the Tax Law.

"15. Alicia Metz and Lauren H. Simons, President and Secretary-Treasurer of Peterson Petroleum of New Hampshire, Inc. respectively, are each officers of and shareholders of 16 2/3% of the stock of Huntington and Kildare, Inc., a corporation which is the owner of 100% of the stock of Peterson Petroleum of New Hampshire, Inc. and which was also the owner of 100% of the stock of Peterson Petroleum, Inc. at the time that the registration of Peterson Petroleum, Inc. was cancelled by the Department of Taxation and Finance within the last five years."

In addition to the facts found by the Administrative Law Judge, we find the following:

At the beginning of the hearing in this matter, the Division's representatives informed the Administrative Law Judge that they had a procedural concern because their witness had looked into the tax files of taxpayers other than the taxpayers represented at the hearing. One of the Division's representatives stated that they were "not quite sure what to do about documentary evidence we have on these other entities, individuals and corporations" (Hearing tr., p. 11).

In response to this uncertainty, the Administrative Law Judge directed that an off-the-record discussion be held. When the Administrative Law Judge came back on the record he did not state what the positions of the parties had been with respect to this procedural question; he only stated his conclusion:

"So we may have a couple of unusual circumstances which take place. And I guess as I said off the record, the thing that concerned me was the fact that the Division's witness, Mr. Tanzman, might be asked to refer to certain documents, and these documents may also be offered into evidence. Yet, they cannot be turned over to the Petitioners because there's no power of attorney to permit the release of this tax information to them.

"This is at least a novel situation with respect to proceeding in my court. Maybe it's happened before. If so, maybe there is some precedent on how to deal with it; but if it's necessary to do, then that's what we will have to do.

"If you need your witness to refer to certain documents and you desire to offer them into evidence, I guess I'm going to have to do that, since it is a basis upon which you base the denial.

"If at some point [the petitioner's representative] can obtain power of attorney for either Peterson Petroleum, Inc. or Mr. Metz, then certainly, I can release that information to him upon presentation of such a document.

"Until that time I really am without power to do that because it would be, obviously, in violation of the secrecy provisions" (Hearing tr., pp. 12-13).

Throughout the course of the hearing the Administrative Law Judge determined that a number of exhibits could be introduced into evidence, but could not be seen by petitioner. Specifically, petitioner was not allowed to see: the Ruth report included as a part of Exhibit "K"; that portion of Exhibit "S" which related to assessments against Peterson Petroleum Inc., Two Lincoln Advisory Services, Inc. and NEAT (Hearing tr., pp. 45-57); Exhibit "U" which related to assessments against James and Kathleen Metz (Hearing tr., p. 50); and Exhibit "Z," a Petroleum Business Tax Return of Peterson Petroleum.

8. At the hearing, Bonnim Tanzman appeared and testified as to the procedures followed by the Division in reviewing petitioner's application and the bases for issuance of the notice of proposed refusal to register (and the additional grounds asserted pursuant to the issuance thereof). For clarity of reference, "Reason No. ____" shall refer to the 9 bases set forth in the notice of proposed refusal to register (see, Finding of Fact "6"; Exhibit "R") and the 6 additional bases contained in the amendment to the notice of proposed refusal to register (see, Finding of Fact "7"; Exhibit "D").

(a) Reason No. 1 - The testimony of Mr. Tanzman was that, at the time of the issuance of the notice of proposed refusal to register, PPNH had failed to provide the information requested in the Division's letters of August 16, 1993 and September 15, 1993 (see, Findings of Fact "4" and "5"; Exhibits "P" and "Q"). The Division concedes that the information was eventually obtained through the efforts of its own personnel and through submission by PPNH's current representative.

(b) Reason No. 2 - Mr. Tanzman stated that the Division had no information concerning the transfer of the stock of PPNH from James T. Metz and Kathleen M. Metz to their children. In addition, the 1990 New York State personal income tax return of James T. and Kathleen M. Metz (see, Exhibit "T") indicated that they owned H & K, which owned PPNH. Also, a letter dated December 13, 1989 from an attorney representing H & K to the Division's Real Property Transfer Gains Tax Unit (see, Exhibit "V") stated that James T. and Kathleen M. Metz each owned 20% of the stock of H & K. As further evidence of the Division's assertion that James T. and Kathleen M. Metz continued to own stock of PPNH was the fact that no change of business information had ever been reported to the Division as required (see, Exhibit "FF") and the original application for registration as a sales tax vendor filed by PPNH (see, Exhibit "L") listed James T. Metz as the president.

We modify finding of fact "8(c)" to read as follows:

(c) Reason No. 3 - Exhibit "S" is a CARTS (Case and Resource Tracking System) printout of open assessments against PPNH and H & K, each of which were corporations in which James T. Metz and Kathleen M. Metz had ownership (see, Exhibit "T", 1990 New York State income tax return).³

We modify finding of fact "8(d)" to read as follows:

(d) Reason No. 4 - The record contains no evidence to support this ground.⁴

(e) Reason No. 5 - A Client Account Agreement of New England Air Transport, Inc. and a Notice of Failure to File Returns of New York State, City of New York and City of

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We modified finding of fact "8(c)" by deleting references to PP, Inc., Two Lincoln Advisory Services, Inc. and New England Air Transport, Inc. We made this modification to reflect our decision, explained in the opinion, that portions of Exhibit "S" are not part of the record.

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The Administrative Law Judge's finding of fact "8(d)" read as follows:

"(d) Reason No. 4 - Exhibit "U" is a CARTS printout of certain open sales tax assessments against James Metz and Kathleen Metz.

We modified this finding of fact to reflect our decision, explained in the opinion, that Exhibit "U" is not in the record.

Yonkers Income Tax Withheld, both of which are contained in Exhibit "W", indicate that Lauren H. Simons, PPNH's secretary-treasurer, was the secretary of New England Air Transport, Inc.

We modify finding of fact "8(f)" to read as follows:

(f) Reasons No. 6 and 7 - The record contains no evidence to support these grounds.⁵

We modify finding of fact "8(g)" to read as follows:

(g) Reason No. 8 - Exhibit "X", a sales tax return of PPNH for the quarter ending May 31, 1993, indicates gross sales of \$803,258.00, as a gasoline wholesale distributor. Exhibit "Y", a New York State Petroleum Business Tax Return for the month of April 1993, has a preprinted label containing the name "Peterson Petroleum, Inc.". Handwritten thereon is "of New Hampshire". Bonnim Tanzman testified that a review of the Division's records disclosed that the ID number (141465316-9) used by PPNH is the diesel distributor's license number belonging to PP, Inc. The employer identification number (02-0425787) on Exhibits "X" and "Y" are the same.

Exhibit "10", petroleum business tax and diesel motor fuel tax returns for various months in 1992, 1993 and 1994, indicates that PPNH sold diesel motor fuel in New York during these periods.

PPNH's president, Alicia Metz, testified (see, tr., p. 92) that PPNH operates and distributes fuel in New Hampshire and in New York. Lauren H. Simons, vice-president of PPNH, admitted (see, tr., p. 140) that PPNH distributed diesel fuel in New York without being registered to do so.

Exhibit "AA" consists of photocopies of checks from PPNH to New York State Sales Tax for the months of March and April of 1993 which evidence that PPNH was doing business in the State during these periods. Exhibit "BB", a handwritten sheet prepared by the auditor in the course of his interview with Lauren H. Simons on May 13, 1993, states that the taxpayer (PPNH) makes sales of heating oil to local customers and that product is picked up from Sun Oil in Rensselaer and distributed in Albany, Rensselaer, Columbia, Greene and Dutchess Counties. Also as part of Exhibit "BB" is an invoice

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The Administrative Law Judge's finding of fact "8(f)" read as follows:

"(f) Reasons No. 6 and 7 - Exhibit "S," the CARTS printout relating to assessments against corporations at issue herein, reveals open corporation and sales tax assessments against New England Air Transport, Inc.

We modified this finding of fact to reflect our decision, explained in the opinion, that portions of Exhibit "S" are not in the record.

from Sun Oil billed to PPNH in May 1993 for Fuel 2 which Mr. Tanzman testified (see, tr., p. 66) is No. 2 fuel oil.⁶

(h) Reason No. 9 - The Sun Oil invoice (see, Exhibit "BB") indicates that the product purchased from Sun Oil and billed to PPNH was shipped to PP, Inc. At that time, PP, Inc. was a registered distributor; PPNH was not.

(i) Reason No. 10 - Schedule K of H & K's 1992 Federal return (see, Exhibit "DD") states that H & K was engaged in sales of petroleum products, yet it was not registered to do so in New York.

(j) Reason No. 11 - Mr. Tanzman testified that, for the years 1989 through 1992, H & K had been selling fuel oil. A review of the Division's records revealed, however, that no diesel motor fuel or petroleum business tax returns had been filed by H & K during these years.

(k) Reason No. 12 - It is conceded that H & K owns 100% of the stock of PPNH. As of July 1, 1991, PP, Inc. became a wholly-owned subsidiary of H & K (see, Exhibit "EE"). On November 26, 1993, the Division cancelled the registration of PP, Inc. as a diesel motor fuel distributor (see, Exhibit "CC"). As of November 26, 1993, PP, Inc. was still owned by H & K.

(l) Reason No. 13 - Exhibit "DD", the New York State franchise tax return of H & K, indicates (on the Federal income tax return attached thereto) that Alicia Metz and Lauren Metz (a/k/a Simons) were each owners of 16.67% of H & K's stock.

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We modified this finding of fact by deleting the last sentence of the first paragraph which read as follows:

"Exhibit 'Z,' a New York State Petroleum Business Tax Return filed by PP, Inc. for May 1993, contains the same ID number as the one used by PPNH on the return filed for April 1993 (see, Exhibit 'Y')."

We deleted this sentence because it was based on Exhibit "Z" which we have decided is not included in the record.

We also modified finding of fact "8(g)" by deleting the second paragraph which had read as follows:

"Exhibit 'K' containing the Al Ruth memo (see, footnote to Finding of Fact '2') states that PPNH had been operating as a 12-A distributor within New York State since May 1, 1992.

We deleted this paragraph because of our decision that the Ruth memorandum is not part of the record.

We modify finding of fact "8(m)" to read as follows:

(m) Reason No. 14 - As set out in Exhibit "D", this ground should be amended (see, tr., p. 72) to read that Peterson Petroleum, Inc. (not Peterson Petroleum of New Hampshire, Inc.) failed to file returns required of a distributor of diesel motor fuel. It is unclear from the record as to the periods for which returns were not filed by PP, Inc.⁷

(n) Reason No. 15 - See Reasons No. "12" and "13", supra.

9. Exhibit "GG", consisting of certain sales tax returns filed by PP, Inc. between June 1, 1993 and February 28, 1994, contains, on some of these returns, somewhat illegible signatures which bear a degree of similarity to the signature of James T. Metz found on a contract of sale wherein James T. Metz and Kathleen Metz sold to H & K their 40 shares in H & K for \$500,000.00 (see, Exhibit "HH") on or about December 24, 1990.

10. Bonnim Tanzman testified that a review of H & K's 1992 franchise tax return (Exhibit "DD"), when compared with the 1990 personal income tax returns of James T. and Kathleen Metz, reveals a common ownership in corporations and assets. From this, Mr. Tanzman concluded that James T. Metz was still involved in the operations of H & K and PPNH during periods subsequent to his alleged disassociation therefrom. The 1992 franchise tax return of H & K sets forth the names of each of its officers; the names of James T. Metz, Jr. and Kathleen Metz do not appear thereon.

11. Alicia Metz, daughter of James T. and Kathleen Metz, became associated with PPNH in early 1991 and became its president in May 1993. Since 1988 or 1989, she was also associated with H & K. Ms. Metz is involved with the financing, capital improvement and banking portions of PPNH's business.

Shortly after H & K purchased PPNH (in late 1990 or early 1991), Sun Oil became engaged in corporate restructuring. Because their distributors were graded and monitored by

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We modified this finding of fact to delete the words "a return was filed for May 1993; see, Exhibit 'Z'" because we have concluded that Exhibit "Z" is not a part of the record.

their quantity of sales, Sun Oil requested that the gallonage of the New Hampshire location and the New York location be combined, i.e., they wanted the accounts of PP, Inc. and PPNH to be operated as one account.

H & K, which owns both PP, Inc. and PPNH, is owned by Alicia Metz and her five brothers and sisters. As indicated in Finding of Fact "9", her parents each owned 20% of H & K until December 1990. Pursuant to the agreement by which her parents sold their shares of stock in H & K, they were each to receive the sum of \$250,000.00 for the shares. Alicia Metz testified that, to her knowledge, there is no outstanding obligation to her parents for H & K's purchase of their shares, although no proof of payment or other evidence of the satisfaction of this obligation was presented.

The officers of H & K are Alicia Metz, president; Lauren Simons, vice-president; and Kathryn Metz, secretary-treasurer.

12. Alicia Metz stated that her father, James T. Metz, Jr., was, at one time, the president of PPNH but that he resigned his position on April 10, 1993 (see, Exhibit "2"). Since that time, he has not served as an officer, director or salaried employee of PPNH, although he has, from time to time, provided consultation to Ms. Metz and to Ms. Simons and her husband.

The affidavit of James T. Metz, Jr. (Exhibit "3") corroborates Ms. Metz's testimony regarding his association with H & K and PPNH and, in addition, states, in pertinent part, as follows:

"6. In 1991, H & K purchased PPNH, a distributor of gasoline and diesel fuel in New Hampshire. PPNH is the former Hartnett Oil Company, an entity that I and my wife purchased on October 1, 1988. Given my prior experience in operating Peterson Petroleum, Inc., I was elected president of PPNH. During the entire time that I had a role in operating PPNH and Peterson Petroleum, Inc., all sales and excise taxes were paid in full without exception.

"7. On October 19, 1992, PPNH submitted its application for registration as a distributor of diesel motor fuel. On that application, I was listed as president, my son-in-law John Simons III was named as vice-president, and my daughter Lauren was listed as secretary.

"8. In a Notice of Proposed Refusal to Register, dated April 7, 1993, I was advised that the application would be denied because a responsible party on the application had outstanding tax liabilities. I was subsequently advised by the Tax Division that I was the responsible party with outstanding tax liabilities and that

new application by PPNH would be favorably acted upon if I no longer had an interest in PPNH.

"9. At a meeting of the directors of PPNH in May, 1993, my wife's and my resignation as directors and officers of PPNH was acknowledged and my daughter Alicia was elected president. My son-in-law John Simons III and my daughter Lauren continued to hold the offices of vice-president and secretary, respectively.

* * *

"13. Since my resignation, I have not exercised any degree of control, whether direct or indirect, over PPNH, Peterson Petroleum, Inc., or H & K. Indeed, as noted above, in December 1990, my wife and I had sold our interest in H & K, the parent of PPNH."

13. Alicia Metz testified (see, tr., pp. 104, 105) that she did not realize that separate registration numbers were needed for PPNH and PP, Inc. and that the accountants for the corporations said that it was proper to use one registration number. When she learned that it was not proper, an application for registration as a diesel motor fuel distributor was made on behalf of PPNH.

14. As to the outstanding assessments against PPNH (see, Exhibit "5"), Ms. Metz testified that a Division employee visited the business approximately two to four weeks prior to the hearing in regard to a sales tax assessment (Assessment ID #L009117467 for the quarter ended August 31, 1993). Ms. Metz stated that this employee reviewed the books and records of PPNH and informed Lauren Simons that everything was in order and that no tax was due. Ms. Metz stated that, until reviewing the CARTS printouts (Exhibit "5") at the hearing, she had never received written notification from the Division concerning these assessments.

As to the outstanding assessments against H & K (see, Exhibit "5"), a balance of \$5,250.00 was due on Assessment ID #L004817499, an assessment for real property transfer gains tax. Ms. Metz testified that the attorney who handled the transaction for H & K was disbarred for having stolen \$200,000.00 to \$300,000.00. A portion was subsequently returned in June 1993 by the Lawyers' Fund for Client Protection of the State of New York (see, Exhibit "4"). Ms. Metz stated that the attorney's theft resulted in the gains tax not having been timely remitted. Tax and interest were subsequently paid. Only penalty remained unpaid because

H & K was under the impression that, because of the extenuating circumstances, it would be waived (see, Exhibit "5"). The Division did not waive the penalties asserted to be due.

The other outstanding assessment against H & K (Assessment ID #L001876940) resulted, according to the testimony of Alicia Metz, from the Division's aggregation, for gains tax purposes, of two parcels of land. A petition contesting a Conciliation Order (see, Exhibit "6") was filed with the Division of Tax Appeals (DTA No. 810879) but was, on January 14, 1994, withdrawn by the attorney for H & K (see, Exhibit "II").

15. Alicia Metz testified that H & K's principal business is the operation and management of income-producing real estate. She stated that H & K sells some heating oil on a very limited basis. On an application for an extension for filing a franchise tax return filed in March 1992 (see, Exhibit "7"), the principal business activity of H & K was listed as "fuel oil sales". Ms. Metz testified that after H & K purchased co-ops in Long Island in 1991, the principal business activity changed to operation and management of real estate.

16. Alicia Metz stated that PPNH started doing business in New York State in 1990 or 1991 (at that time she was a director). Originally, PPNH sold gasoline to service stations. In 1992 or 1993, PPNH began selling diesel motor fuel.

Ms. Metz testified that PP, Inc. continued to file diesel returns after PPNH was doing most of the business because PP, Inc. was already registered as a diesel motor fuel distributor, while PPNH was applying for registration.

17. Lauren H. Simons became involved with PPNH in 1992 and, in early 1993, became its vice-president. Her primary function with PPNH is in the dispatching of gasoline and in contacts with Sun Oil representatives involving both gasoline and diesel fuels. Ms. Simons is also a shareholder in and is the vice-president of H & K.

In June 1992, at the request of Sun Oil, the two distributorships (PP, Inc. in New York and PPNH in New Hampshire) were combined so that the gallonage would remain above the minimum amount required to remain a Sunoco distributor.

Exhibit "BB" (see, Finding of Fact "8[g] and [h]"), the Sunoco invoice, was a purchase of gasoline by PPNH and of diesel fuel by PP, Inc. Ms. Simons stated that she thought it was proper to do it in this manner because H & K owned both corporations. In an attempt not to use PP, Inc.'s license improperly or to defraud the State, she requested that Sun Oil list the name of both corporations on the invoice.

As to the sales tax assessment against PPNH (see, Finding of Fact "14"), Ms. Simons testified that a Ms. Gerard, a Division employee, spoke with her sister, Kathryn T. Metz. After looking at PPNH's books and records (including checks and returns) and meeting with the bookkeeper, Kathryn was told that no additional tax was owed by PPNH.

Subsequent to the hearing, petitioner's representative (James H. Tully, Jr.) submitted an affidavit, sworn to on September 26, 1994, which stated, in pertinent part, as follows:

"2. After the Tax Division presented indication of assessments against Peterson Petroleum of New Hampshire, Inc. for the periods including August, 1993 and September, 1993, I discussed the matter with my client. They said that a Compliance Agent had come down, had examined the matter and determined that the indications were that Peterson Petroleum of New Hampshire, Inc. did not owe the taxes involved and filed a protest for Peterson Petroleum of New Hampshire with the Protest Unit. I asked them who was the Compliance Agent involved and they said it was one Dawn Gerard. They gave me her card which indicated that she was from the Capital Region Office in Schenectady.

"3. I called Ms. Gerard last week but she was out of the office most days and she wasn't able to return my call until this morning. She confirmed what I had been told by Ms. Metz and Mrs. Simons, the two officers of Peterson Petroleum of New Hampshire, Inc. who appeared at the hearing. She said she filed the matter with the Protest Unit; that she picked up copies of the amended returns that were filed in June; Ms. Gerard indicated she did not understand why the amended returns hadn't appeared on the printout but that at the present time there are no outstanding assessments against Peterson Petroleum of New Hampshire, Inc. and that if there was any problem with the matter, Peterson Petroleum of New Hampshire, Inc. would hear directly from the Protest Unit."

An affidavit of Kathryn T. Metz (secretary of PPNH and H & K), sworn to September 22, 1994, was also submitted after the hearing. This affidavit stated, in pertinent part, as follows:

"3. In late July 1994, I was visited unannounced by Dawn Gerard, Tax Compliance Agent I, regarding two sales tax assessments against PPNH. PPNH never received copies of these assessments. I understand that both assessments,

L009117467-6 and L009023428-5, concern sales tax for the periods June 1 through August 30, 1993, and September 1 through November 30, 1993, respectively.

"4. Ms. Gerard advised me that the Tax Department was unable to reconcile PPNH's monthly sales tax returns for this period with its ST-100 Quarterly Sales and Use Tax Returns. See Exhibit A attached hereto. I advised Ms. Gerard that PPNH had mistakenly transferred wrong figures from internal spreadsheets to the quarterly returns. When the mistake was discovered in July, 1994, amended quarterly returns were submitted and minor underpayments were tendered. See Exhibit B attached hereto. This unintentional reporting error, which was corrected by PPNH on its own initiative, apparently triggered the visit by the Tax Division's Compliance Section.

"5. Apparently, Ms. Gerard was not aware that the amended quarterly returns had been filed. During her visit to PPNH, Ms. Gerard was provided access to all records of PPNH and consulted with our financial officer, Raymond Li-De Yang. Ms. Gerard's review of PPNH's records took about 2 hours. At the conclusion of her review, Ms. Gerard advised me that PPNH's records were in order and that the assessments would be cancelled. Ms. Gerard also expressed her complete satisfaction with PPNH's performance of its sales tax collection responsibilities.

* * *

"7. I have also been advised that there are two assessments, L004817499 and L001876940, pending against H & K. The first assessment results from the illegal acts of our prior attorney who absconded with escrowed tax funds. The taxes were later paid from the Lawyers' Fund for Client Protection and the remaining assessment is for penalties only which, under the circumstances, should be cancelled. At the time of hearing on the petition, it was my understanding that the second assessment was under protest. I have no idea why the protest was withdrawn. Even though the protest was apparently withdrawn, H & K has not received any documentation from the Tax Division demanding payment for this assessment. I have discussed this newly discovered issue with my sister, Alicia Metz, President of H & K, and can state that this assessment will be satisfied."

In response thereto, the Division submitted an affirmation by Donald C. DeWitt (one of the attorneys representing the Division in this matter) which stated, in part, as follows:

"4. The Department has investigated the status of these sales and use tax assessments and, at this time, the assessments are still open of record. However, they have been marked for 'informal protest', which means that they will be reviewed by members of the Tax Compliance staff and, if warranted, adjustments will be made. No such review has been undertaken at this time nor have they been cancelled of record."

Ms. Simons also testified concerning her involvement with New England Air Transport, Inc. ("NEAT"). She stated that, in 1988, she was running her own business in Hamilton, New York and shared an office with NEAT. She was asked by NEAT to be its secretary and to help

with telephones and sign for documents. Her father, James T. Metz, Jr., was a part-owner of NEAT. She was subsequently assessed, as a responsible officer of NEAT, for sales taxes owed by the corporation. However, the assessment was cancelled by a BCMS conferee on August 8, 1994 (see, Exhibit "8").

Lauren Simons admitted that PPNH distributed diesel motor fuel without being registered to do so. She stated that, initially, she did not realize that a separate license was needed to distribute diesel fuel. She explained how Sun Oil requested that the gallonage for both distributorships be combined (see, Finding of Fact "17"), but stated that there was never any intent to defraud the State or to deprive the State of its proper tax revenues. In furtherance of this contention, checks and sales tax returns for 1993 and 1994 (see, Exhibit "9") and petroleum business tax and diesel motor fuel returns for periods between May 1992 and June 1994 (see, Exhibit "10") were submitted.

Ms. Simons stated that, as of the date of the hearing, PPNH was no longer selling diesel fuel, but that it had sold diesel fuel within the State of New York between October 1992 and January 1994.

In addition to the facts found by the Administrative Law Judge, we find the following.

The determination of the Administrative Law Judge was mailed to petitioner on December 12, 1994 at petitioner's last know address at P.O. Box 900, Millerton, New York 12546. A copy of the determination was also mailed to petitioner's representative James H. Tully, Jr., Esq., DeGraff, Foy, Holt-Harris & Mealey, at 90 State Street, Albany, New York 12207. A standard notice was issued with the determination stating that the parties had 30 days from the date of the notice to either file an exception or a request for an extension of time to file an exception.

The determination of the Administrative Law Judge was also mailed to the New York State Taxation and Finance Department, Terrence Boyle, Director of the Law Bureau, Law Bureau, Room 100, Building 9, W. A. Harriman Campus, Albany, New York 12227 on December 12, 1994. A standard notice was issued with the determination stating that the parties had 30 days from the date of the notice to either file an exception or a request for an extension of time to file an exception.

Petitioner's request for an extension of time to file an exception to the determination of the Administrative Law Judge was received by the Office of the Secretary to the Tribunal on January 3, 1995. The

envelope containing the request for an extension of time to file an exception bears a machine metered postmark of December 30, 1994. At that point in the proceedings, it was believed that the parties could file a request for an extension of time to file an exception. In addition, at that point in the proceedings, the application for an extension of time was thought to be timely filed.

By letter dated January 5, 1995, the Secretary to the Tribunal granted an extension of time to file an exception until February 10, 1995.

Petitioner's exception to the Administrative Law Judge's determination was hand delivered to the office of the Secretary to the Tribunal on February 10, 1995. Based on what was believed to be a timely filed request for an extension of time to file, the exception was thought to be timely filed.

The Division of Taxation's request for an extension of time to file an exception to the determination of the Administrative Law Judge was received by the Office of the Secretary to the Tribunal on January 6, 1995. The envelope containing the request for an extension of time to file an exception bears a machine metered postmark of January 5, 1995. At that point in the proceedings, it was believed that the parties could file a request for an extension of time to file an exception. In addition, at that point in the proceedings, the application for an extension of time was thought to be timely filed.

The Division of Taxation's exception to the Administrative Law Judge's determination was received by the Office of the Secretary to the Tribunal on February 7, 1995. The envelope containing the exception bears a machine metered postmark of February 6, 1995. Based on what was believed to be a timely filed request for an extension of time to file, the exception was thought to be timely filed.

By letter to both parties dated February 14, 1995, the Secretary to the Tribunal acknowledged receipt of the exceptions and set a briefing schedule.

By letter dated March 16, 1995, the Secretary to the Tribunal informed the parties that: (1) it appeared that the extension requests in this matter should not have been granted, (2) notices of intent to dismiss should have been issued upon receipt of the exceptions, (3) notices of intent to dismiss would be issued shortly and (4) the parties would be given an opportunity to review Tax Law § 283(6)(a) to determine if they wanted to proceed with their cases before the notices of intent to dismiss were issued.

By letter dated March 21, 1995, the Division of Taxation informed the Secretary to the Tribunal that it agreed that the exceptions of both parties should be dismissed.

By letter dated March 24, 1995, petitioner advised that it intended to oppose the Tribunal's Notice of Intent to Dismiss the exceptions.

On April 20, 1995, the Tax Appeals Tribunal issued a Notice of Intent to Dismiss both exceptions on the ground that neither was timely filed. The Notice stated that section 283(6)(a) of the Tax Law required that exceptions to a determination of an Administrative Law Judge upholding the Commissioner's refusal to register or ordering the Commissioner to register the applicant under Article 12-A of the Tax Law be filed within 15 days after notice of the Administrative Law Judge's determination was given. The Notice stated alternative grounds for dismissal: that the exceptions were not timely filed because extensions to file could not be granted and the extension requests were not made within the statutory 15-day period.

By letter dated September 22, 1995 the Tribunal informed the parties that it had decided, based on a further review of the matter and of the parties' comments, not to dismiss the exceptions. This letter stated that the reasons for not dismissing the exceptions would be set forth in its decision on the substance of the exceptions. The letter also explained that the processing of this matter had been delayed because the file could not be located as it had been accidentally forwarded to the Division. The letter further stated that the Division would be allowed to file a brief in opposition to the one already filed by petitioner, that petitioner would be allowed to file a reply brief, due by November 3, 1995 and that oral argument, requested by both parties, would be held on November 9, 1995. Finally, the letter stated that this decision would be issued 75 days from the date of oral argument and asked the parties to submit their interpretation of the section 283(6)(a) time limits which required the Tribunal decision to be issued within 75 days after the filing of the notice of exception.

OPINION

We will first address the procedural issues in this case.

Tax Law § 283(6)(a) provides in pertinent part as follows:

"In the case of a person applying to register, a notice of proposed refusal to register shall be issued promptly after application for registration is received by the commissioner. Upon timely application therefor, a hearing shall be scheduled in the division of tax appeals, and within three months from such application for hearing (determined with regard to any postponements of any scheduled hearing or conference or other delay made at the request of the applicant) the administrative law judge shall render a determination either upholding the commissioner's refusal to register or ordering the commissioner to register the applicant. Within fifteen days after the giving of notice of the administrative law judge's determination, the applicant or the commissioner may take exception to the determination. If an exception is taken, the tax appeals tribunal, within seventy-five days from the date of notice to the tribunal that exception is being taken to an administrative law judge's determination, shall issue a decision either affirming or reversing such determination."

First, we will explain the rationale for our decision not to dismiss the parties' exceptions in this case.

The Division of Tax Appeals erroneously informed the parties, through the cover letter issued with the Administrative Law Judge's determination, that they had 30 days within which to either file an exception or to file a request for an extension of time to file an exception. This letter was at odds with section 283(6)(a) which limits the exception period to 15 days and does not provide for extensions of time to file an exception. Because the parties were misled by a Division of Tax Appeals' error, we concluded that it would be a manifest injustice to dismiss the parties' exceptions for their failure to comply with section 283(6)(a) (see, Matter of Eastern Tier Carrier Corp., Tax Appeals Tribunal, December 6, 1990).

Next, we must address the effect of our failure to issue this decision within 75 days from the date the exceptions were filed. Petitioner argues that the statutory time period is mandatory, not merely directory, and our failure to timely issue our decision requires that the petition be granted.

Prior to its amendment by Chapter 57 of the Laws of 1993, section 283(6)(a) of the Tax Law provided that "[i]f the tax commission fails to issue a notice of refusal to register within such three month period . . . the tax commission shall register the applicant immediately upon the conclusion of such period." In Matter of Janus Petroleum v. New York State Tax Appeals Tribunal (180 AD2d 53, 583 NYS2d 983), the Appellate Division, Third Department, was called upon to determine whether this statutory result was mandatory or directory if the three month time period was not met. The Court concluded that the result was mandatory stating:

"[i]n contrast to those cases involving statutes which impose mere time limitations within which an administrative determination is to be made [citations omitted], Tax Law § 283(6)(a) requires the performance of one or the other of two specified acts within a three-month period and provides that, upon the failure to perform one of the specified acts within that three-month period, the other act shall be performed. The Legislature's inclusion of the specific consequence to flow from the administrative agency's failure to act within the time limit establishes that the limit was not a mere unessential particular and, therefore, cannot be viewed as directory [citations omitted]" (Matter of Janus Petroleum v. New York State Tax Appeals Tribunal, *supra*, 583 NYS2d 983, 984).

The Court's analysis, concentrating as it does on the fact that former section 283(6)(a) stated the specific consequences that would flow from not meeting the statutory time period, indicates to us that section 283(6)(a) in its present form, which does not prescribe a specific consequence for failure to meet the 75-day period, is directory, rather than mandatory in nature.

We find further support for this conclusion in the fact that the Legislature amended section 283(6)(a) shortly after the decision in Janus (the Janus decision was issued on May 14, 1992 and the amendment to section 283(6)(a) applied to hearings held on and after April 15, 1993 [L 1993, ch 57, §§ 132 and 418(15)]) to delete the specific requirement that the applicant be registered if the refusal to register was not timely issued. This act suggests that the Legislature intended to eliminate this consequence.⁸

For these reasons, we conclude that our failure to issue our decision in the required time period does not require us to grant the petition. Our decision not to grant petitioner the remedy it seeks does not mean that we consider the 75-day time period unimportant. We believe that we erred in this case in extending the 75-day time period for the submission of briefs and oral argument. We will not repeat this error in the future. Instead, the parties will be required to submit their briefs on an accelerated schedule so that we may issue our decision within the 75-day time period, calculated without any extensions of time. The other error that contributed to the delay in issuing this decision was misplacing the file. We have revised our office procedures to avoid a similar mishap in the future. We remain committed to meeting the time constraints placed on the issuance of our decisions.

Petitioner has also argued that the Administrative Law Judge's determination was not issued within the 90-day time period. The undisputed lateness of our decision has made it

⁸Contrary to petitioner's assertions, we find nothing in the legislative history that indicates that the Legislature intended to retain in the amended section 283(6)(a) the result reached in Janus, i.e., that the petition be granted. The material cited by petitioners indicates only that the Legislature intended to apply the 90-day time period at issue in Janus to the first level of review in the Division of Tax Appeals, the issuance of the Administrative Law Judge's determination.

unnecessary for us to determine whether the Administrative Law Judge's determination was also late.

We turn next to the substantive aspects of petitioner's exception.

The Administrative Law Judge sustained the Division's refusal to register petitioner on the basis of Reasons Nos. 5-15. Petitioner has taken exception to the Administrative Law Judge's rulings on these reasons.

With respect to Reasons Nos. 5, 6 and 7, petitioner contends that Lauren Simons was not an officer of NEAT, that Ms. Simons has already established to the satisfaction of a BCMS conferee that she was not a responsible officer of NEAT and that it was unfair for the Division to allege that Ms. Simons was an officer of NEAT but at the same time to refuse to provide Ms. Simons with a copy of the document relied upon to show the open assessments.

The Division responds to the last point, referring to pages 10-13 of the transcript, by stating that it did not refuse to provide petitioner with hearing documents. Rather, the documents were presented to the Administrative Law Judge who determined that the documents could not be provided to petitioner.

Section 306(1) of the State Administrative Procedure Act requires an administrative adjudicatory decision to be based upon the record created in the proceeding. The requirement that the administrative decision be based exclusively on the record "is one of the 'rudiments of fair play' assured to every litigant by the Fourteenth Amendment as a minimal requirement" (Ohio Bell Tel. Co. v. Public Utilities Commn. of Ohio, 301 US 292, 304). The exclusivity of the record requirement exists so that "the party against whom [the evidence is] offered may see the evidence or hear it and parry its effect" and so that a reviewing court may determine whether the agency decision was supported by the evidence (Ohio Bell Tel. Co. v. Public Utilities Commn. of Ohio, *supra*, at 302).

By depriving petitioner of the opportunity to see evidence that was being used against it in this matter, the Administrative Law Judge eliminated an essential function of the exclusivity of the record rule, i.e., petitioner was not able to parry the effect of the documents used against

it. Because these documents have not functioned as part of the record, we conclude that these documents and the testimony of the Division's witness based on these documents cannot be considered a part of the record.

The Division's only proof that there were outstanding assessments against NEAT was a portion of Exhibit "S" that was not provided to petitioner and the testimony of the Division's witness based on this exhibit. Because we have excluded these from the record, the Division's Reasons Nos. 5, 6 and 7 have no support in the record and do not provide a basis to refuse to register PPNH.

It is true, as the Division suggests, that the record makes it appear that it was the Administrative Law Judge, not the Division, who prevented petitioner from obtaining copies of certain exhibits. It was also the Administrative Law Judge's conduct of the hearing that prevents us from knowing whether the record accurately reflects the manner in which the Administrative Law Judge arrived at his ruling. The Administrative Law Judge directed that an off-the-record discussion be conducted and came back on the record without describing exactly what was discussed off the record and obtaining the parties' agreement to his description. In Matter of Capital District Better TV (Tax Appeals Tribunal, September 5, 1991, mod on other grounds Matter of Capital District Better TV v. Tax Appeals Tribunal, 200 AD2d 911, 606 NYS2d 930, lv denied 83 NY2d 758, 615 NYS2d 875), we attempted to remedy a similar Administrative Law Judge error, which had also prevented us from ascertaining what role the Administrative Law Judge had in causing certain evidence not to be introduced, by remanding the matter to allow the petitioner to introduce the evidence. Given the time limitations which have already been exceeded in this proceeding, we conclude that a remand to allow the Division to provide the evidence to petitioner is not possible.

Petitioner next challenges the Division's refusal to license on Reasons Nos. 8, 9 and 13, i.e., that petitioner operated in New York without being registered to do so, that PPNH impersonated a registered distributor and that Alicia Metz and Lauren H. Simons, officers of

petitioner, were officers and shareholders (each 16 2/3%) of H & K and that H & K owned 100% of PPNH which operated as a diesel motor fuel distributor without being registered.

The Division relies on sections 283(2), 283(4) and 283(1) for its authority to refuse to register petitioner on the basis of its unlicensed distributor activities, Reason No. 8. With respect to Reason No. 9, section 283(4)(iv), in combination with section 283(2), establishes that the Division may refuse to register an applicant that "has impersonated any person represented to be a distributor under this article but not in fact registered under this section." We interpret this phrase to mean that a person is prohibited from impersonating a registered distributor.⁹ With respect to Reason No. 13, section 283(e) provides grounds to refuse to register where an officer or shareholder owning more than 10% of the stock of the applicant was an officer or shareholder owning more than 10% of the stock of another corporation at the time the other corporation committed one of the acts specified in section 283(4). As we understand petitioner's argument, petitioner does not challenge the Division's statutory authority to refuse to register on the bases enumerated in Reasons Nos. 8, 9 and 13, but argues that the Division should not exercise its authority because petitioner's failure to register was not part of a tax evasion scheme and was instead the result of an innocent misunderstanding of the law.

Petitioner has directed us to no authority, and we have found none, for the proposition that guilty knowledge is a required element to refuse to register for Reasons Nos. 8, 9 or 13. In the absence of any such authority, we will not read such a limitation into the statutory framework.

⁹The Administrative Law Judge interpreted this section to mean that the prohibited act was impersonating an unregistered distributor and concluded that petitioner had committed this act for the period after PPNH's registration had been cancelled. This is not the interpretation placed on the section by the Division which is seen in its statement of Reason No. 9: "You have impersonated a registered distributor by using the registration of Peterson Petroleum, Inc. to conduct your diesel business while you were not, in fact, registered. (Tax Law 283.4(IV))." Nor is it the interpretation placed on it by petitioner: "In Reasons Nos. 8, 9 and 13, the Division asserts that PPNH operated as a diesel distributor without a license and impersonated PP, a registered distributor, by using PP's registration to conduct diesel business" (Petitioner's brief on exception, p. 13). Because the Administrative Law Judge's interpretation does not make sense, and because neither of the parties have adopted this interpretation, we will not address it further.

In any event, we agree with the Administrative Law Judge that petitioner's failure to register cannot convincingly be characterized as an innocent misunderstanding of the Tax Law. By its letter dated August 16, 1993, the Division at the very least put petitioner on notice that it should inquire about its registration responsibilities. By its letter dated September 15, 1993, the Division explicitly informed petitioner that PPNH could not use PP, Inc.'s registration number. Lauren H. Simons admitted that PPNH continued to sell motor fuel in New York State until January 1994. The fact that petitioner continued to sell diesel motor fuel after it had been informed that its actions were not in compliance with the Tax Law belies petitioner's contention that its actions were taken based on an innocent misunderstanding of the Tax Law.

We also think that these facts contradict petitioner's general contention that "[n]othing in the record reflects negatively upon Ms. Metz and Ms. Simons' trustworthiness or their ability to perform properly their tax collection obligation" and for this reason petitioner should be registered (Petitioner's brief in support, p. 1).

The registration of diesel motor fuel distributors is essential to the Division's ability to prevent tax evasion on the sale of diesel motor fuel. Registration is not a technicality that is punishable only when it has been determined that tax has actually been evaded. Thus, we conclude that the failure of Ms. Metz and Ms. Simons to adequately investigate, determine and comply with their responsibility to register PPNH are important failures that do reflect negatively upon their suitability to be distributors. Therefore, we agree with the Administrative Law Judge that the Division properly refused to register petitioner as a motor fuel distributor on the basis of Reasons Nos. 8, 9 and 13.

Because the testimony of Lauren H. Simons (Hearing tr., pp. 140, 147) and Alicia Metz (Hearing tr., p. 92) establishes that petitioner sold diesel motor fuel in New York without being registered and the testimony of Lauren H. Simons (Hearing tr., p. 140) and Exhibit "BB" establishes that petitioner utilized the registration number of PP, Inc. to purchase diesel motor fuel, our decision that certain exhibits cannot be considered a part of the record does not affect the Division's refusal to register on Reasons Nos. 8, 9 and 13.

Next, petitioner challenges the Division's refusal to register on Reasons Nos. 10, 11 and 14. Petitioner argues that the Division initially asserted that H & K was operating as a distributor of diesel motor fuel without being registered to do so. Petitioner contends that the record establishes that H & K distributed home heating fuel, but never distributed diesel motor fuel. Petitioner asserts that the Division abandoned the diesel motor fuel distribution ground and contended for the first time in its post-hearing letter reply brief that H & K was not registered to distribute home heating fuel.

The Division responded to this argument in its post hearing letter reply brief asserting that petitioner was put on notice, through the testimony of the Division's witness, that this basis for refusal was the sale of home heating fuel by H & K. The testimony relied on by the Division is "[i]t came to our attention that Huntington & Kildare, Inc. had been dealing in No. 2 Fuel Oil" (Division's post hearing letter reply brief, p. 2).

The Division may modify its grounds for a refusal to license but "[f]undamental due process requires reasonable notice sufficient to allow a party to adequately prepare and present a defense to charges that will be the subject of a hearing" (Matter of Diamond Terminal Corp. v. New York State Dept. of Taxation & Fin., 158 AD2d 38, 557 NYS2d 962, appeal denied 76 NY2d 711, 563 NYS2d 767). The Division specifically informed petitioner in Reasons Nos. 10 and 11 that the acts of H & K which formed the grounds to refuse to licence petitioner related to the distribution of diesel motor fuel. The testimony relied on by the Division does not specifically change this ground and is insufficient to have put petitioner on notice that the Division was asserting a different factual basis to support Reasons Nos. 10 and 11 (see, Matter of Angelico, Tax Appeals Tribunal, March 31, 1994; Matter of Clark, Tax Appeals Tribunal, September 14, 1992). The need to have specifically informed petitioner of the change of grounds is made especially compelling in this case as petitioner explicitly informed the Division, by letter dated September 1, 1994, prior to the hearing (Exhibit "G") that petitioner was specifically challenging Reasons Nos. 10 and 11 on the basis that H & K had sold some

heating fuel oil, but not diesel motor fuel. Therefore, we reverse the Administrative Law Judge's determination sustaining the refusal to register on Reasons Nos. 10 and 11.

We note that the Administrative Law Judge treated Reasons Nos. 10, 11 and 14 as a group, but this appears to be an error. Reasons Nos. 10 and 11 relate to the alleged misconduct of H & K, while Reason No. 14, as modified by finding of fact "8(m)," is based on the allegation that PP, Inc. failed to file required returns. As stated in finding of fact "8(m)," we are not able to identify a period for which PP, Inc. failed to file a return. Therefore, we agree with the Administrative Law Judge's conclusion that Reason No. 14 cannot sustain the refusal to license.

Finally, petitioner challenges the refusal to license on Reasons Nos. 12 and 15, that H & K was the 100% owner of PP, Inc. at the time that PP, Inc.'s registration was cancelled and that Alicia Metz and Lauren Simons were officers and each 16 2/3% shareholders of H & K at that same time. Petitioner argues that PPNH's use of PP, Inc.'s registration was an innocent mistake and that all taxes were timely remitted.

As with Reasons Nos. 8, 9 and 13, petitioner does not appear to challenge the Division's statutory authority to refuse to register on these grounds but argues that the Division should not exercise this authority due to the nature of petitioner's error. Section 283(2)(e) of the Tax Law provides, inter alia, that the Division may refuse to register an applicant if a shareholder, directly or indirectly owning more than 10% of the shares of the applicant was an officer or a shareholder owning more than 10% of the shares of another corporation at the time the registration of the other corporation was cancelled within the preceding five years. It is undisputed that the registration of PP, Inc. was cancelled on November 26, 1993, that H & K owned 100% of both PP, Inc. and PPNH and that Lauren H. Simons and Alicia Metz were each 16 2/3% owners of H & K at the time of the cancellation. In addition, as stated earlier, we find unconvincing petitioner's characterization of its use of PP, Inc.'s registration as innocent because this activity continued after petitioner was explicitly informed by the Division that it was improper. As a result, petitioner has not developed a convincing argument that would

justify limiting the Division's authority to refuse to register in the instant circumstances. Therefore, we sustain the Division's refusal to register on Reasons Nos. 12 and 15.

We turn next to the Division's exception which challenges the Administrative Law Judge's rejection of Reasons Nos. 2, 3 and 4 relating to the involvement of James T. Metz, Jr. in H & K. The Administrative Law Judge concluded that the grounds relating to the outstanding liabilities of James T. Metz, Jr. and Kathleen Metz and of corporations in which they indirectly owned more than a 10% interest could not sustain the refusal to register because at the time of the second application the Metzses had sold their stock in H & K and James T. Metz, Jr. had resigned as president. The Division argues that "[b]ased upon the information available to it at the time it issued the Notice of Proposed Refusal to Register" (Division's brief in support, p. 4), the Division reasonably concluded that James T. Metz, Jr. fell within the scope of Tax Law § 283(2).

We sustain the Administrative Law Judge's ruling on Reasons Nos. 2, 3 and 4. However, because of our ruling that the documents not provided to petitioner cannot be considered part of the record, our decision relates only to the outstanding liability of H & K.

With respect to the liability of H & K, we conclude that the Administrative Law Judge properly based his determination of whether James T. Metz, Jr. and Kathleen Metz owned an interest in H & K on the facts as they actually existed at the time of the second application. We perceive our task to be to determine whether petitioner should be denied a registration, not to determine whether the Division acted reasonably based on the information in its possession at the time of the application. At the hearing, petitioner established that before the date of the second application James T. Metz, Jr. and Kathleen Metz had sold their interest in H & K and that James T. Metz, Jr. had resigned his position as president of PPNH. Therefore, we agree that the involvement of James T. Metz, Jr. and Kathleen Metz in H & K cannot sustain the Division's refusal to license.

The Division argues that even if James T. Metz, Jr. and Kathleen Metz divested themselves of their stock in H & K, we should find that James T. Metz, Jr. continued to have an

indirect ownership interest in H & K. To support this conclusion, the Division relies on the attribution rules of sections 302(c)(2) and 318(a)(1)(A) of the Internal Revenue Code which according to the Division would treat James T. Metz, Jr. as the owner of 20% of the shares of H & K even after the sale of the stock because James T. Metz, Jr. continued as an officer of H & K after the sale.

The attribution rules relied on by the Division are an extremely technical, detailed scheme of rules for determining the constructive ownership of stock for purposes of the Internal Revenue Code. The Division has directed us to nothing that suggests the Legislature intended to graft this technical, specific set of rules onto the registration scheme of Article 12-A. Therefore, we decline to do so and find no basis to hold that James T. Metz, Jr. indirectly owned 20% of H & K following his sale of the stock in this corporation.

In summary, of the 15 grounds advanced by the Division, we sustain the refusal to register on Reasons Nos. 8, 9, 12, 13 and 15.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Peterson Petroleum of New Hampshire, Inc. is granted to the extent that Reasons Nos. 5, 6, 7, 10, 11 and 14 are not sustained as grounds to refuse to register, but is otherwise denied;
2. The exception of the Division of Taxation is denied;
3. The determination of the Administrative Law Judge is modified to the extent indicated in paragraph "1" above, but is otherwise affirmed; and

4. The petition of Peterson Petroleum of New Hampshire, Inc. is denied and the Notice of Proposed Refusal to Register as a Distributor of Diesel Motor Fuel issued November 26, 1993 is sustained.

DATED: Troy, New York
January 18, 1996

/s/John P. Dugan

John P. Dugan
President

/s/Francis R. Koenig

Francis R. Koenig
Commissioner