

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>SHORE LINE OIL COMPANY, INC.</b>	:	DECISION
for Review of a Proposed Refusal to Register Petitioner	:	DTA No. 813859
as a Retailer of Heating Oil Only under Articles 12-A	:	
and 13-A of the Tax Law.	:	

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Petitioner Shore Line Oil Company, Inc., 94 First Street, New Rochelle, New York 10801, filed an exception to the determination of the Administrative Law Judge issued on November 30, 1995. Petitioner appeared by Carl S. Levine, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (James P. Connolly, Esq., of counsel).

Petitioner filed a brief in support of its exception, the Division of Taxation filed a brief in opposition and petitioner filed a reply. Petitioner's exception was received by the Tax Appeals Tribunal on December 20, 1995 which date began the 75-day period for the issuance of this decision. Petitioner's request for oral argument was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

***ISSUE***

Whether petitioner should be registered as a retailer of heating oil only.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge except for finding of fact "29" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

Petitioner, Shore Line Oil Company, Inc. ("Shore Line"), filed an application for registration as a retailer of heating oil only (a "ROHO" application) on September 13, 1994.

On or about January 20, 1995, the Division of Taxation ("Division") issued to Shore Line a Notice of a Proposed Refusal to Register as a Retailer of Heating Oil Only under articles 12-A and 13-A of the Tax Law. The notice states four grounds for denying Shore Line registration as follows:

- "A. You operated as a Distributor of Diesel Motor Fuel without being duly registered. (Tax Law Sec. 282-a(2)).
- "B. Your registration as a Distributor of Diesel Motor Fuel has been cancelled within the preceding five years. (Tax Law Sec. 283.2(f)).
- "C. Shore Line Oil Co., Inc. has finally determined liabilities for taxes imposed under Chapter 60 of the Tax Law which have not been paid in full. (Sec. 283.2(a)).
- "D. Shore Line Oil Co., Inc. failed to comply with provisions of Section 287 of the Tax Law relating to the filing of Petroleum Business Tax Returns and the payment of tax thereon. (283.4(v))."

On or about March 3, 1995, the Division issued to petitioner a second notice stating three more grounds for its proposed refusal to register as follows:

- "1) Louis Caposela [sic] is President and 100% owner of the stock of Standard Petroleum Corp., a corporation with liabilities for taxes imposed under Chapter 60 of the Tax Law which have been finally determined and which have not been paid in full (Tax Law Sec. 283.2(e)).
- "2) Louis Caposela [sic] was President and 100% owner of the stock of Westchester Hudson Petroleum Corp. at the time that Westchester Hudson Petroleum Corp. incurred liabilities for taxes imposed under Chapter 60 of the Tax Law which have been finally determined and which have not been paid in full (Tax Law Sec. 283.2(e)).
- "3) Shore Line Oil Co., Inc. operated as a Residual Petroleum products business without being duly licensed (T.L. Sec. 302(a))."

Shore Line's current president and sole shareholder is Louis Capossela who testified at hearing. Shore Line is a New York corporation founded in 1948 by Mr. Capossela's father. Mr. Capossela has worked for Shore Line since he was a teenager. He assumed the position of

president of the corporation when his father died in 1969. Mr. Capossela's son and daughter now work for Shore Line.

Until the 1980's, Shoreline was primarily in the business of selling diesel fuel as heating oil for residences and commercial establishments. Sometime before the mid-1980's, Shore Line entered the gasoline sales business. It owned a terminal in Mount Vernon, New York and apparently bought and sold gasoline as a distributor. Mr. Capossela testified that Shore Line "was more or less pushed out of [the gasoline business] by bootleggers because we couldn't compete with their pricing and it caused us substantial losses" (tr., p. 150). Mr. Capossela also testified that he purchased fuel from persons later indicted for bootlegging gasoline, but he stated that he did not know they were bootleggers until Federal authorities began investigating them. Mr. Capossela testified in a Federal trial concerning gasoline bootlegging under a grant of immunity.

Also in the late 1980's, Shore Line's facilities were found to be leaking gasoline. Shore Line suffered financial losses from the costs of cleaning up the damage caused by this leakage. Total costs were approximately \$500,000.00.

By the beginning of 1989, Mr. Capossela decided that Shore Line could not operate profitably in the gasoline business. In January 1989 Shore Line sold those assets relating to the gasoline business, including its customer lists, equipment and gasoline service station leases, to Barrier Gasoline Company. Shore Line incurred losses of over \$1 million on this transaction. After 1989, Shore Line operated as a distributor of Diesel motor fuel, licensed under articles 12-A and 13-A of the Tax Law.

By 1993, Shore Line owed well over \$3 million to National Westminster Bank, approximately \$250,000.00 in back taxes to the Federal government and a substantial amount in overdue taxes to New York State.

By letter dated July 29, 1993, the Division informed Shore Line that its registration as a Diesel motor fuel distributor had been cancelled. The letter states, in relevant part:

"Your registrations are being cancelled for failure to satisfy  
outstanding liabilities finally determined to be due within ten (10)

days after the date the demand was sent by certified mail (Tax Law Sec. 283.5).

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"YOUR REGISTRATION AS A DISTRIBUTOR OF DIESEL MOTOR FUEL HAS BEEN CANCELLED. YOU MAY NO LONGER IMPORT OR CAUSE TO BE IMPORTED DIESEL PRODUCT, SELL DIESEL PRODUCT, PRODUCE, REFINED, MANUFACTURE OR COMPOUND DIESEL PRODUCT WITHIN THE STATE, ENGAGE IN THE ENHANCEMENT OF DIESEL PRODUCT IN THE STATE OR ACT IN ANY OTHER CAPACITY AS A DISTRIBUTOR OF DIESEL MOTOR FUEL."

The letter ends by advising Shore Line of its right to protest the cancellation by requesting a hearing, but it warns that the cancellation is in effect pending such a hearing. Shore Line did not request a hearing to protest the Division's cancellation of its registration.

The Division's registration and bond unit received a letter from petitioner's attorney, dated April 19, 1994, which states in pertinent part:

"Shore Line's Diesel License was surrendered on or about July 29, 1993. The purpose of this submission is to commence the process of releasing the bond and its underlying collateral to Shore Line."

Home heating oil, whether used for residential or commercial purposes, is a form of Diesel motor fuel. The two products are distinguished by their use and tax status more than by their physical properties. Retailers of heating oil and residual petroleum product are required to be registered with the Division as distributors of Diesel motor fuel. After July 29, 1993, Shore Line was not authorized to sell heating oil in New York State. Nonetheless, Shore Line continued to sell heating oil and residual petroleum product to residential and commercial customers after its registration as a distributor of Diesel motor fuel was suspended. Mr. Capossela testified that Shore Line employs 40 persons and has approximately 7,000 customers at this time.

From the time its registration was cancelled until the time of the hearing, Shore Line continued to file New York State petroleum business tax returns under articles 12-A and 13-A of the Tax Law. The Division placed in evidence monthly returns filed by Shore Line for the period

August 1, 1993 through January 31, 1995. On all returns except those filed for the months of December 1994 and January 1995, Shore Line indicated that it was registered as a distributor of diesel motor fuel. Shore Line listed its registration number as D-0536.

On its Petroleum Business Tax Return for August 1993, Shore Line reported that its Diesel motor fuel license was suspended as of July 29, 1993. On form PT-102 (Tax on Diesel Motor Fuel), Shore Line reported having purchased taxable gallons of Diesel motor fuel having paid the tax at the time of purchase. The amount of the tax paid was reported as \$4,861.10.

Thereafter, Shore Line consistently reported sales of Diesel motor fuel subject to the tax imposed by article 12-A. The number of taxable gallons sold was relatively small in comparison with the total number of gallons sold. Shore Line also reported selling relatively small quantities of residual petroleum product to customers for residential heating. Shore Line reported no sales of residual petroleum product subject to tax.

The Division received Shore Line's application for ROHO registration on September 13, 1994. A letter acknowledging receipt of the application was sent to Shore Line on or about September 21, 1994. The letter states, in pertinent part:

"Please be advised that the submission of an application does not permit you to engage in activities requiring registration. You may engage in activities only if and when your application is approved and you are duly licensed. Conducting any unauthorized business is grounds for denial of your pending license or pending registration and may result in felony prosecution."

The Division offered the testimony of Bonnim Tanzman, an Audit Group Manager in the Transaction and Transfer Tax Bureau, to explain the basis for the Division's refusal to register Shore Line as a ROHO. Along with his other duties, Mr. Tanzman manages the Registration and Bond Unit which reviews applications for completeness and determines whether the applicant has any outstanding tax liabilities.

The Division maintains records of assessments on a computer system called the Case and Resource Tracking System ("CARTS"). The Division offered in evidence computer printouts

generated by CARTS showing assessments receivable from Shore Line. The printouts were generated on June 28, 1995. They are essentially hardcopy replicas of the computer screens which list all assessments issued to Shore Line in the period from 1986 through the date of the printout. Although numerous assessments are listed, only nine are shown as being open assessments with a balance due. Those assessments are as follows:

<u>Assessment No.</u>	<u>Tax Type</u>	<u>Period Ended</u>	<u>Assessment Stage</u>	<u>Case Type</u>
L 010118142 7	Petro	11/94	Notice & Demand	K
L 010096005 1	Sales	11/94	Notice & Demand	K
L 009859857 9	Sales	2/94	Notice & Demand	E
L 008816154 9	Petro	2/94	Notice & Demand	E
L 007951478 9	Oil Tax	5/90	Notice & Demand	K
L 007008661 8	Petro	1/92	Notice & Demand	E
L 006734085 4	WITHLD	12/91	Notice & Demand	E
L 002174185 9	GasDsl	M/89	Notice & Demand	K
L 002008447 2	GasDsl	M/88	Notice & Demand	K

Along with the listing of outstanding assessments, CARTS generated an assessment history of three assessments. Assessments L 009859857 9 and L 008816154 9 came about as the result of the dishonoring of two checks written by Shore Line in payment of taxes due. The current balance due on the first assessment is shown as \$64,193.16, and the current balance due on the second is shown as \$24,466.25.

The assessment history for Assessment L 007951478-9 shows a tax liability of \$99,689.15 for the period June 1, 1989 through May 31, 1990. The Division concedes that the CARTS information regarding this assessment is wrong in two respects. First, the letter "K" in the category "Case Type" indicates that an assessment has not been formally protested by either a request for a conciliation conference or a petition to the Division of Tax Appeals. Shore Line filed a petition with the Division of Tax Appeals protesting Assessment L 007951478 9, so CARTS is incorrect in indicating that the assessment was not formally protested. In addition, the parties reached agreement concerning the amount of tax due on that assessment and executed a

Stipulation for Discontinuance of Proceeding reducing the amount of the tax deficiency to \$70,000.00. CARTS records were not updated to reflect this stipulation.

Mr. Tanzman testified that the letter "E" in the category Case Type indicates that an assessment has not been protested in any manner, that the letter "K" indicates that the Division has received and is considering an informal protest and the letter "T" indicates that an assessment has been formally protested by the filing of an application for a conciliation conference or a petition for a hearing. Mr. Tanzman explained that where a case was formally protested before CARTS was implemented CARTS will show the case type as "K" rather than the appropriate "T".

The Division offered in evidence CARTS printouts showing assessments issued to Standard Petroleum Corporation and Westchester Hudson Petroleum Corporation. Mr. Capossela is the sole shareholder of both corporations and president of Standard Petroleum. Most of the assessments issued against Standard Petroleum have been closed, and the outstanding balance due on all such assessments was less than \$2,000.00 at the time of the hearing. All assessments issued to Westchester Hudson were for periods before May 31, 1989. CARTS shows outstanding assessments against Westchester Hudson in excess of \$400,000.00.

In the course of considering Shore Line's application for ROHO registration, Mr. Tanzman became aware that Shore Line was continuing to do business as a retailer of heating oil and residual petroleum product without registration. By letter to Mr. Capossela dated January 9, 1995, Mr. Tanzman informed Shore Line that it "may not engage within this state in the enhancement of Diesel motor fuel, [or] make a sale or use of Diesel motor fuel (including #2 heating oil) . . . within the state." Mr. Tanzman's letter notes that there are two exceptions to this rule, not relevant here. Mr. Tanzman also warned that "[t]he 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".

On May 22, 1995, the Division's Tax Enforcement Unit stopped a Shore Line truck and issued an appearance ticket to the driver, Louis S. Capossela, III. Mr. Capossela was charged with two offenses: (1) failure to produce a uniform manifest contrary to Tax Law § 1812(e) and (2) the retail sale of home heating oil without being registered contrary to Tax Law § 1812-a(b).<sup>1</sup>

At hearing, Shore Line's representative stipulated that Shore Line continues to sell Diesel motor fuel in the form of heating oil and residual petroleum product even after being advised not to by the Division. Petitioner's representative noted that the vast majority of Shore Line's sales are for residential purposes and are not subject to tax.

In reviewing an application, it is a standard practice for Mr. Tanzman's office to refer the matter to Field Audit Management to conduct a field interview with the applicant. In this case, an interview was held in the offices of Shore Line. Mr. Tanzman stated that he never received a written report of the interview which is contrary to the Division's standard practice. However, it is Mr. Tanzman's understanding that after conducting the interview, Field Audit Management decided to conduct a field audit of Shore Line before submitting a report to Mr. Tanzman's office. That audit was being conducted at the time of this hearing.

Mr. Tanzman testified that he considered financial statements on file for Shore Line in arriving at his decision to deny registration. Mr. Tanzman specifically referred to financial statements for the years 1988 and 1993. The Division placed in evidence a combined balance sheet for Shore Line and its subsidiaries for 1988. It shows total assets of \$4,920,566.00 and total liabilities of \$6,215,791.00. The Division also produced a statement of Liabilities and Stockholder's Equity as of April 30, 1993 which shows "Total stockholder's deficiency" of \$3,427,407.00. Mr. Tanzman drew the conclusion from these documents that Shore Line's

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<sup>1</sup>Petitioner stipulated to these facts but did not acknowledge that the truck driven by Mr. Capossela was a Shore Line truck. Such a conclusion can be drawn from the evidence in the record. After the record of hearing was closed, both parties submitted additional evidence regarding this event. Since neither party requested permission to submit additional evidence, before or after the hearing was closed, this evidence was not considered in arriving at a determination.



financial condition was worsening. Mr. Tanzman was unable to identify the source of these documents with any certainty.

Mr. Tanzman testified that he remembers that the Division received a notice of termination of a bond filed by Shore Line. He stated that "termination" means the bond will continue to cover past periods up to a certain point in time but would not cover future liabilities.

The Division and Shore Line entered into a deferred payment agreement dated January 23, 1995. It requires Shore Line to make minimum monthly payments of \$4,997.61 to satisfy six assessments issued to Shore Line. At the time of the agreement, Shore Line's tax liability under these six assessments totalled \$86,845.94. With penalty and interest accrued as of the date of the agreement, the amount due from Shore Line totalled \$125,021.94. Testimony from the Division's witnesses seemed to indicate that Shore Line was in default on this agreement. It seems that Shore Line either failed to make two payments or had checks dishonored. This situation was rectified, and, for all practical purposes, Shore Line was in compliance with its deferred payment agreement at the time of the hearing.

The deferred payment agreement includes four of nine assessments listed in above. They are the assessments identified as Case Type "E" by CARTS.

We modify the Administrative Law Judge's finding of fact "29" to read as follows:

The Division issued to Shore Line a Consolidated Statement of Tax Liabilities. It lists five assessments that are identified as being "currently under review". They correspond to the five assessments identified as case type "K" on the CARTS printouts. Joseph O'Dartei, a Tax Compliance Agent assigned to the Shore Line account, testified that a "K" identifier indicates that he is to inquire further to determine whether he can proceed with collection activities and a "T" identifier means that there is an absolute bar to collection.<sup>2</sup>

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<sup>2</sup>We modified the Administrative Law Judge's finding of fact "29" by deleting the parenthetical "apparently at its request" after the words "Shore Line" in the first sentence. We made this change, at petitioner's request, to more accurately reflect the record.

During the course of negotiating deferred payment agreements with the Division, Shore Line gave to Mr. O'Dartei a Consolidated Financial Statement for the Year Ended June 30, 1994 ("1994 Financial Statement"). The statement was prepared by L.H. Frishkoff & Company, Certified Public Accountants. In a statement dated December 2, 1994 which is a part of the 1994 Financial Statement, Frishkoff & Company explain that a consolidated statement is limited to presenting certain information. Frishkoff & Company averred that it had not audited or reviewed the financial statements. The Frishkoff & Company statement further provides:

"The owner has elected to omit substantially all of the disclosures and the consolidated statement of cash flows required by generally accepted accounting principles. If the omitted disclosures and consolidated cash flows were included in the financial statements, they might influence the user's conclusions about the Company's financial position, results of operations, and cash flows. Accordingly, these financial statements are not designed for those who are not informed about such matters.

"The accompanying consolidated financial statements have been prepared assuming that the Company will continue as a going concern. The Company has suffered recurring losses from operations and its total liabilities exceeds its total assets. These conditions indicate that the Company may be unable to continue as a going concern. The consolidated financial statements do not include any adjustments that might result from the outcome of this uncertainty."

Shore Line has closed, by payment of taxes due, many of the original assessments issued to it. On October 15, 1993, Shore Line sold its Bronx customer list and a Mack truck to Atlas Fuel Oil Corp. for \$446,108.50. On December 21, 1993, Shore Line sold its customer list consisting of customers in certain towns in Westchester, Putnam, and Dutchess Counties to Lewis Oil Company for \$285,943.45. The sales prices were calculated by taking the number of gallons of heating oil sold annually to each customer and multiplying that amount by the gross profit realized by the seller on the sale of each gallon (70 cents per gallon on the Atlas sale and 65 cents per gallon on the Lewis sale). Shore Line used the proceeds from these sales to satisfy certain tax warrants which were docketed against it by the Division on April 22, 1993 and to pay other debts.

Mr. Capossela testified that Shore Line's financial condition is better than the 1994 Financial Statement makes it appear. The Financial Statement does not include Shore Line's customer lists in the category of assets. He stated that the value of Shore Line is over \$6 million if only customer lists, real estate and equipment is included in the valuation. He also stated that Shore Line's financial problems stem from cash flow and not assets. He testified that Shore Line is currently making payments on the bond which the Division claims has been terminated.

Asked why Shore Line continued to do business after its registration was cancelled in 1993, Mr. Capossela testified:

"Well, I thought that if I was able to pay up my obligations and continue, because if I went out of business, I would have put 40 faithful employees out of work. I would have disappointed 7,000 customers who depended on us for heat and service. And I just felt if I kept paying my obligations and caught up enough, that perhaps the State of New York would see that I was truly wanting to pay my obligations.

"And I could have went Chapter 11. I did not choose to do that because I want to pay everybody. And I could not see myself giving up, going out of business and giving up everything that my father worked for, I worked for and my children." (Tr., pp. 166-167.)

Mr. Tanzman testified that when Shore Line's application was considered the Division considered Shore Line's compliance with its deferred payment agreement and the fact that it has satisfied many outstanding assessments.

### ***OPINION***

Petitioner took exception to four of the Administrative Law Judge's findings of fact. Our review of the record indicates that three of the challenged facts were correctly stated by the Administrative Law Judge. We modified finding of fact "29" as requested by petitioner.

Turning to the legal arguments before us, relying on Matter of OK Petroleum Products Corp. (Tax Appeals Tribunal, November 1, 1990), the Administrative Law Judge held that the proper standard of review to be applied by an Administrative Law Judge reviewing a proposed

refusal to register is a de novo review of the application. Also relying on OK Petroleum, the Administrative Law Judge stated that:

"the ultimate question to be asked in a registration case is whether the applicant can be relied upon to properly exercise its responsibilities as a distributor. There are two circumstances which in themselves demonstrate that Shore Line cannot--its continued activity as a distributor of Diesel motor fuel after its registration was cancelled (Tax Law § 283[2][f]) and its failure to pay in full all taxes finally determined to be due (Tax Law § 283[2][a])" (Determination, conclusion of law "B").

The Administrative Law Judge added that "Louis Capossela's status as either the president or the 100-percent stockholder, or both, of two corporations [Standard Petroleum and Westchester Hudson] with liabilities for outstanding taxes finally determined to be due provides additional grounds for refusal to register Shore Line (Tax Law § 283[2][e])" (Determination, conclusion of law "C").

On exception, petitioner argues that the Division's decision to deny Shore Line's ROHO application was an abuse of discretion because the Division failed to employ the requisite balancing test. Our response to this is that the Administrative Law Judge's determination properly applied a de novo review of the Division's decision to refuse to register; thus, the question before us is not whether the Division acted reasonably based on the information before it at the time of the registration application, but, is whether the Administrative Law Judge properly determined that petitioner should be denied a registration (see, Matter of Peterson Petroleum of New Hampshire, Tax Appeals Tribunal, January 18, 1996; Matter of OK Petroleum Products Corp., *supra*). Therefore, any challenges made by petitioner to grounds relied on by the Division are irrelevant to the issue before us if these grounds were not relied on by the Administrative Law Judge (e.g., the Division's reliance on financial reports of petitioner).

With respect to the Administrative Law Judge's determination, petitioner contends that "the Judge did not acknowledge the existence of a balancing test until page 29 of her 30 page

Determination. See Concl. of Law 'D.' By then, it was too late. She had already made up her mind to sustain the Tax Department's proposed refusal" (Petitioner's brief on exception, p. 4).

Petitioner's characterization of the Administrative Law Judge's determination completely misrepresents the determination. Before sustaining the refusal to register on the three grounds cited above, the Administrative Law Judge engaged in a thorough review of each of the mitigating circumstances advanced by petitioner with respect to each ground and any other arguments asserted by petitioner. It is obvious that the Administrative Law Judge performed the appropriate balancing test and her decision to sustain the refusal to register was made only after weighing the factors pointed to by petitioner.

Specifically, on exception, petitioner argues that "insufficient recognition" was given to petitioner's "on-going, consistent good faith efforts over the last several years to pay off its assessments" (Petitioner's brief on exception, p. 5).

We disagree. The Administrative Law Judge gave adequate consideration to the fact that petitioner had entered into a Deferred Payment Agreement and was making payments with respect to four of the nine outstanding assessments against petitioner, but found this insufficient to overcome petitioner's history of not paying its taxes when due. The Administrative Law Judge stated:

"I find it especially revealing that Shore Line incurred sales tax liabilities in two tax periods after its registration was cancelled (assessments L 010096005-5 and L 009859857-9). This means that Shore Line collected tax from its customers and failed to pay the monies over to the State. Under the circumstances, I do not find that the existence of deferred payment agreements with respect to these taxes should serve to bar the Division from denying registration to Shore Line" (Determination, conclusion of law "B").

The Administrative Law Judge also stated:

"[c]ertainly, Shore Line's attempts to satisfy its existing liabilities must be weighed against other factors. The deferred payment agreements and the satisfaction of certain tax warrants show that Shore Line has tried to pay its outstanding liabilities. However, I agree with the Division that these efforts are not sufficient in light

of Shore Line's flagrant disregard of the registration provisions of the Tax Law" (Determination, conclusion of law "D").

Clearly, the Administrative Law Judge's decision reflects a careful weighing of all of the circumstances. We agree with the Administrative Law Judge that petitioner's failure to pay over sales taxes collected from its customers, which petitioner collected as a trustee for the State (Tax Law § 1132[a]), is an especially weighty factor indicating that petitioner should not be registered. We also agree that petitioner's continued sale of diesel motor fuel after its registration had been revoked and after it had been informed that such activity was prohibited is also compelling evidence that petitioner is not a suitable candidate for registration (see, Matter of Peterson Petroleum of New Hampshire, supra). As we stated in Peterson Petroleum, "[t]he 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" (Matter of Peterson Petroleum of New Hampshire, supra).

It follows from the preceding conclusion that we also believe that the Administrative Law Judge correctly rejected petitioner's contention that the assessments that were the subject of the Deferred Payment Agreement should be treated as if they were paid in full. The assessments that were the subject of the deferred payment agreements were taxes, finally determined to be due, that petitioner had agreed to pay; however, so long as the assessments were not paid in full they were properly a ground, pursuant to section 283(2)(a) of the Tax Law, to refuse to register petitioner. Petitioner is not, as it suggests, being punished for having deferred payment agreements, it is being punished for not having paid its taxes when due and still having outstanding liabilities.

We also disagree with petitioner's claims that 1) "all 'finally determined' assessments that were outstanding against Petitioner at the time of its application have either been paid off in full or are covered under Petitioner's existing DPAs with the Tax Department" (Petitioner's brief on

exception, p. 6) and 2) the Division took into "consideration of non-finally determined, but fully protested assessments" when refusing to register petitioner (Petitioner's brief on exception, p. 12). The Administrative Law Judge concluded, based on the testimony of the Division's witness, that all of the assessments listed in finding of fact "16" (9 assessments) have been finally determined to be due and that only those marked with an "E" (four assessments) were the subject of a deferred payment agreement. Although petitioner apparently does not agree with the Administrative Law Judge's findings, it has presented no basis for us to alter the Administrative Law Judge's conclusion.

Petitioner also presents the novel argument that petitioner was not given sufficient credit for the fact that neither Shore Line, its sole shareholder, nor any of its affiliates were ever indicted or convicted of any crimes provided for in Chapter 40 of the Tax Law or under the tax or penal laws of any other state or of the United States. We see absolutely no merit to the contention that we must evaluate petitioner's application in terms of bad acts petitioner has not committed and we will refrain from doing so.

Next, petitioner argues that the Administrative Law Judge erred in considering the assessments against Westchester Hudson because, petitioner contends, that "in order to be used as a ground for denial, the act or omission specified in §283(2) must have occurred or been omitted within five years of the person's application" (Petitioner's brief on exception, p. 13). Petitioner fails to respond to the careful analysis given to the statute by the Administrative Law Judge. The Administrative Law Judge found that section 283(2)(e) contained three grounds to refuse to register and that the language "within the preceding five years" modified two of these grounds but did not modify the failure to pay tax ground. For this reason, the Administrative Law Judge concluded that the outstanding assessments against Westchester Hudson could be considered as a ground to refuse to register petitioner. We affirm the determination of the Administrative Law Judge on this issue for the reasons stated in the determination.

Next, petitioner reiterates its argument made to the Administrative Law Judge that the doctrine of laches bars consideration of the Westchester Hudson assessment. The Administrative Law Judge held that this argument raised issues of fact and because petitioner had not raised this issue until after the hearing, petitioner was precluded from raising it. We agree with the Administrative Law Judge that the defense of laches raises questions of fact, e.g., whether the Division ever attempted to collect on these assessments, and that petitioner may not raise such factual issues after the record is closed (see, Matter of Howard Enterprises, Tax Appeals Tribunal, August 4, 1994).

Further, we do not agree with petitioner's assertion that it did raise this issue during the hearing. Petitioner relies on the following statement of its representative at the hearing:

"Second, even if Mr. Connolly is correct, that would mean then from at least 1989 until Shore Line's license was cancelled in 1993, that the Department permitted Shore Line to be licensed in the face of very substantial alleged assessments at that time, which Mr. Connolly suggests were fixed and final.

"So not only is it more than five years from the events that we are talking about, but it was four years from the events of the time they cancelled his license only on lache grounds. This is stale and highly prejudicial to a decision being made now based on what they decided to do in 1995" (Tr., p. 42).

We find this statement inadequate to have apprised the Division of the laches defense.

Finally, we agree with the Administrative Law Judge that even if the laches defense was properly raised, petitioner has failed to show that it applies on these facts. The Administrative Law Judge held that petitioner had failed to prove "that it would be manifestly unjust to allow the liabilities of Westchester Hudson to be considered in determining Shore Line's fitness to act as a Diesel motor fuel distributor" (Determination, conclusion of law "C"). We affirm the Administrative Law Judge's determination on this issue for the reasons stated in the determination.

Next, petitioner argues that the Division is estopped from asserting the cancellation of petitioner's registration as a Diesel motor fuel distributor as a basis for denying the ROHO



registration. Petitioner claims that "[u]nder the circumstances, there can be no question that the Tax Department knew or should have known that Shore Line was continuing to operate despite being unregistered" (Petitioner's brief on exception, p. 19). The Administrative Law Judge rejected petitioner's contention stating "[t]he Division's acquiescence in Shore Line's unregistered operation cannot be inferred from the mere receipt and processing of tax returns" and "[a]lthough the evidence shows that one or more tax compliance agents were aware of Shore Line's continuing operations, Shore Line has not proven that those agents knew or should have known that Shore Line was operating while unregistered" (Determination, conclusion of law "B"). The Administrative Law Judge concluded that "[e]ven if individual employees of the Division were aware that Shore Line was operating without registration, this would not justify Shore Line's continuing operation after it received notice of the cancellation of its registration" (Determination, conclusion of law "B").

The only new argument made by petitioner on exception with respect to this estoppel argument is to rely on our decision in Consolidated Rail Corp. (Tax Appeals Tribunal, August 24, 1995). We find this reliance misplaced. At the request of the Division, the taxpayer in Consolidated Rail had accurately completed a detailed questionnaire describing its activities. The Division specifically responded to this questionnaire by informing Consolidated Rail that it was not subject to the Article 13-A tax. We held that Consolidated Rail was entitled to rely on this specific response to the specific, accurate information it had provided to the Division. There is no comparable specific inquiry by petitioner here, nor a specific response by the Division advising petitioner that it could distribute diesel motor fuel without a registration. In fact, the specific advice received by petitioner from the Division was, through the registration revocation letter of July 29, 1993 and the application acknowledgement letter of September 21, 1994, that petitioner was not allowed to distribute diesel motor fuel without a registration. Therefore, we find petitioner's reliance on Consolidated Rail unavailing. Because the Administrative Law

Judge adequately addressed the remainder of petitioner's estoppel argument, we affirm her rejection of this argument based on the reasons set forth in the determination.

Petitioner's last argument on exception is that the denial of the ROHO registration produces a harsh, inequitable result. Petitioner contends that if registered as a ROHO it would not be entrusted with substantial tax monies because:

"as a ROHO, the overwhelming portion of Shore Line's sales would be sales of heating oil for residential purposes. Tr. 55-56. These sales would be free of Article 28, 29, 12-A and 13-A taxes. See Tax Law section 282(b)(3)(i). Shore Line might also sell a minimal amount of heating oil for commercial purposes. Tr. 57. Such sales would be subject to the Article 13-A non-automotive diesel motor fuel tax, less all applicable credits. See Tax Law section 301-a(1)(2) and 301-K. There is no evidence that Shore Line has been selling or would sell, automotive diesel fuel, if it is registered as a ROHO" (Petitioner's brief on exception, p. 21).

Based on these contentions, petitioner concludes that concerns that it would not properly exercise its responsibilities are irrelevant.

First, we do not find persuasive petitioner's basic contention that because it will not be responsible for a large amount of taxes, it does not matter whether it will be responsible with respect to these taxes. In the registration scheme of sections 282-a(2) and 283(2), we see nothing to indicate that the Legislature intended different standards to apply to the registration of distributors depending on the amount of tax they might be handling.

Second, as the Division notes, petitioner understates the potential for tax evasion with a ROHO registration. The Division points out that "as a Roho, petitioner will be in a position to practice a notorious type of tax fraud, under which a distributor will buy No. 2 fuel oil, tax-free, allegedly for resale as home heating fuel and instead make a taxable sale of it, while keeping the taxes collected" (Division's brief on exception, pp. 39-40).<sup>3</sup> We agree with the Division that this is a significant risk properly taken into account when considering an application for a ROHO registration. Also pertinent, as the Division argues, is the potential liability of a ROHO for

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<sup>3</sup>In contrast to Matter of Peterson Petroleum of New Hampshire (*supra*), the record in this case establishes, as indicated in the facts, that home heating oil is the same product as diesel motor fuel.

Article 13-A taxes on fuel sold to businesses for heating purposes. For these reasons, we reject petitioner's claim that the refusal to register petitioner as a ROHO is too harsh given the amount of taxes it would be handling.

As part of its argument that the refusal to register is too harsh, petitioner asserts that this decision will force petitioner's employees into unemployment and its customers will be without a heating oil supplier. We agree that this is an unfortunate outcome, but petitioner's assertions fail to recognize its part in causing this result. Petitioner made business decisions that resulted in its failure to pay taxes due and ultimately in the cancellation of its registration as a diesel motor fuel distributor on July 29, 1993. Petitioner elected not to protest this cancellation, but instead made the decision to engage in the unregistered distribution of diesel motor fuel even though it had been specifically advised that it could not do so. During this period of unregistered distribution, petitioner made more business decisions that resulted in its failure to pay over sales taxes collected from its customers. It is this series of decisions by petitioner that has resulted in the refusal to register.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Shore Line Oil Company, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Shore Line Oil Company, Inc. is denied; and

4. The Division of Taxation's notice of proposed refusal to register is sustained.

DATED: Troy, New York  
February 15, 1996

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

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

/s/Donald C. DeWitt  
Donald C. DeWitt  
Commissioner