

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JANUS PETROLEUM, INC.	:	DECISION
	:	DTA No. 814466
for Review of a Denial, Suspension, Cancellation or	:	
Revocation of a License, Permit or Registration under	:	
Articles 12-A and 13-A of the Tax Law.	:	

Petitioner Janus Petroleum, 56-15 58th Street, Maspeth, New York 11378, and the Division of Taxation each filed an exception to the determination of the Administrative Law Judge issued on May 23, 1996.¹ Petitioner appeared by Uncyk, Borenkind & Nadler, L.L.P. (Norman R. Berkowitz, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (John E. Matthews, Esq., of counsel).

Each party filed a brief in support of its exception, a brief in opposition to the other party's exception and a reply brief. Petitioner's request for oral argument was denied.

Commissioner Jenkins delivered the decision of the Tax Appeals Tribunal. Commissioner Pinto concurs. Commissioner DeWitt took no part in the consideration of this decision.

ISSUES

I. Whether sufficient grounds exist to support the proposed cancellation of petitioner's registration as a diesel motor fuel distributor under Articles 12-A and 13-A of the Tax Law.

II. Whether the answer of the Division of Taxation ("Division") was an improper pleading because it includes excessive information in the form of affirmative statements as well as attached documents, and if so, whether the answer should be struck from the record and the

¹The hearing in this matter was consolidated with the hearing in Matter of Terminelle Corporation (DTA No. 814478). Like the determination below, this decision is being issued separately, but simultaneously, with our decision in Matter of Terminelle.

Division defaulted or, alternatively, whether the documents attached to the answer should be struck.

III. Whether petitioner was properly notified of the additional grounds for cancellation of its registration by the Division's answer and subsequent letter of the Division's attorney such that it could review and respond to such additional charge at hearing.

IV. Whether the Division should be precluded from asserting at some future time a basis for proposing to cancel petitioner's registration as a diesel motor fuel distributor when that basis was voluntarily withdrawn by the Division at the hearing held in this matter.

V. Whether an officer of a corporation can continue to be regarded as a responsible officer of that corporation even after it has become inactive.²

VI. Whether the Commissioner of Taxation and Finance failed to exercise proper discretion in this matter.

VII. Whether the Commissioner of Taxation and Finance has been shown to have improperly delegated his authority to cancel petitioner's registration.

VIII. Whether the Administrative Law Judge erred in determining that Tax Law § 283(6)(a) was inapplicable herein.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "10" which has been modified. We have also made additional findings of fact. The Administrative Law Judge's findings of fact, the modified finding of fact and the additional findings of fact are set forth below.

Petitioner, Janus Petroleum, Inc. ("Janus Petroleum"), is in the business of buying and selling petroleum products, in particular, diesel fuel.

The Division issued a Notice of Proposed Cancellation of Your Registration as a Diesel Motor Fuel Distributor Under Article[s] 12-A and 13-A of the Tax Law dated February 13, 1995 against petitioner. The notice stated six grounds for cancelling Janus Petroleum's

²We note that to properly make this argument, the officer would need to be a party to the proceeding.

registration as follows:

"1) Trevor Wisdom, President, and owner of two-thirds of the stock of Janus Petroleum Inc., was an officer and 50% owner of Wizard Corporation at the time that Wizard Corporation committed fraud in its operations as a distributor.³

2) Ashley Jarwood, Secretary, Treasurer, and owner of one-third of the stock of Janus Petroleum Inc., was an officer and 50% owner of Wizard Corporation at the time that Wizard Corporation committed fraud in its operations as a distributor.

3) Trevor Wisdom, President and owner of two-thirds of the stock of Janus Petroleum Inc., is an officer and 50% owner of Wizard Corporation, a corporation which has failed to comply with provisions of Articles 28 and 29 of the [T]ax [L]aw with respect to automotive fuel.

4) Ashley Jarwood, Secretary, Treasurer, and owner of one-third of the stock of Janus Petroleum Inc., is an officer and 50% owner of Wizard Corporation, a corporation which has failed to comply with provisions of Art. 12-A, 28 and 29 of the [T]ax [L]aw with respect to automotive fuel.

5) Ashley Jarwood, Secretary, Treasurer, and owner of one-third of the stock of Janus Petroleum Inc., is an owner and officer of Terminelle Corporation[,] a corporation which knowingly aided and abetted Wizard Corporation in violating the provisions of Articles 28 and 29 of the Tax Law with respect to automotive fuel.

6) Trevor Wisdom, President and owner of two-third[s] of the stock of Janus Petroleum Inc., is an owner and officer of Terminelle Corporation[,] a corporation which knowingly aided and abetted Wizard Corporation⁴ in violating the provisions of Articles 28 and 29 of the Tax Law with respect to automotive fuel."

The Division in its answer dated November 30, 1995 (Division's Exhibit "D")

"affirmatively" stated that:

"6. The tax, interest and fraud penalty found owing in Wizard remain unpaid as of the date of this answer. . . .

7. The returns which were found to be unfiled in Wizard remain unfiled as of the date of this answer."

The Division's representative, John E. Matthews, by his letter dated December 4, 1995 to petitioner's representative, Norman Berkowitz, (Division's Exhibit "E") views the two "affirmative statements" in his answer noted above as "additional grounds for cancellation" of petitioner's registration. In this letter, Mr. Matthews sought "to clarify the additional grounds"

³Statutory references have been omitted.

⁴Hereinafter "Wizard."

as follows:

"First, Wizard currently has open liabilities in excess of \$15 million. The failure to pay these amounts is a continuing violation of the Tax Law which is, therefore, within the five years preceding the date of the Proposed Notices of Cancellation.⁵ As Wizard, Janus and Terminelle have identical officers and owners, this violation of Wizard is a sufficient ground to cancel the registrations of Janus and Terminelle.

Second, Wizard has failed to file the sales tax returns for the audit period covered by the Tribunal's 1994 decision in DTA #809923. This again is a continuing violation on the part of Wizard which falls within the five years preceding the Proposed Notices of Cancellation. In addition, the failure to file those returns could be construed as a continued effort to conceal the fraud which the Tribunal found had occurred."

In addition to the six grounds set forth in the notice of proposed cancellation and the two additional grounds raised by Mr. Matthews in the Division's answer, at the hearing, Mr. Matthews initially sought to add one further ground to support the cancellation of petitioner's registration:

"I have one final set of documents which I only obtained this morning and these are Division computer printouts showing open assessments against Janus Petroleum so this is a new ground which was not set forth until this morning" (tr., p. 39).

However, late in the hearing, Mr. Matthews decided to withdraw the additional ground concerning open assessments against petitioner:

"So the Division is withdrawing that exhibit ["F"] and withdrawing the two grounds, one for each corporation [for petitioner and Terminelle Corporation]⁶ based on that exhibit" (tr., p. 195).

Petitioner, in its petition dated November 1, 1995 (Division's Exhibit "C"), alleged "that the Commissioner of Taxation and Finance made the following errors and assert[ed] the following facts":

"1. The proposed cancellation of the Petitioner's Registration as a Diesel Motor Fuel Distributor by the Department of Taxation and Finance is based on erroneous and incorrect facts.

⁵Mr. Matthews' letter also referenced the proposed cancellation of the terminal operator's license at issue in the matter concerning Terminelle Corporation.

⁶Mr. Matthews had initially asserted that the open assessments against Janus Petroleum was another ground for cancelling the terminal operator license of Terminelle Corporation "because the officers are the same" (tr., p. 60).

2. The proposed cancellation . . . does not meet the statutory requirements of the Tax Law.

3. The individual shareholder-officers of the Petitioner were not shareholder-officers of any related corporate taxpayers which committed any acts prohibited by statute during the statutory period in question.

4. The related corporate taxpayer (Wizard Corporation) did not commit any acts prohibited by statute during the statutory period in question."

The Division's answer dated November 30, 1995 denied the above four paragraphs set forth in the petition. In addition, the Division in paragraph "5" of its answer referenced the decision of the Tax Appeals Tribunal in Matter of Wizard Petroleum (March 24, 1994) and described the Tribunal's holding in that matter as follows:

"a) Wizard had committed fraud in its operations with respect to its state tax obligations, b) Wizard had failed to file numerous tax returns, c) Wizard owed tax, interest and fraud penalties, d) the officers of Wizard were Ashley Jarwood and Trevor Wisdom, e) these officers had taken part in the fraud, f) these officers were also officers of Terminelle Corporation and g) Terminelle aided and abetted Wizard in the acts of fraud."

The Division also "affirmatively" asserted the following additional facts in its answer:

"6. The tax, interest and fraud penalty found owing in Wizard remain unpaid as of the date of this answer. . . .

7. The returns which were found to be unfiled in Wizard remain unfiled as of the date of this answer.

8. Ashley Jarwood and Trevor Wisdom were, at all relevant times, officers and major owners of Wizard. . . .

9. Ashley Jarwood and Trevor Wisdom were, at all relevant times, officers and major owners of Petitioner. . . ."

ATTACHMENTS TO THE DIVISION'S ANSWER

In his letter transmitting the Division's answer to petitioner's representative, attorney Matthews noted that "Referenced in the answers [in Janus Petroleum and in Terminelle Corporation], and attached thereto, are all the documents which I intend, at this point, to introduce at the hearing." Mr. Matthews also informed attorney Berkowitz that he did "not intend to call any witnesses to testify on behalf of the Division but will rely, instead, upon the documentary evidence."

With reference to its affirmative statement that tax plus interest and fraud penalty remained unpaid by Wizard Petroleum, Inc. ("Wizard Petroleum") as of November 30, 1995, the date of the answer, the Division attached as an "Attachment 3" a photocopy of three separate computer records, each dated November 16, 1995 and labelled "CARTS - Assessments Receivable, Assessment History" for Wizard showing balances due as follows:

<u>Assessment ID</u>	<u>File Period</u>	<u>Tax Due</u>	<u>Penalty Due</u>	<u>Interest Due</u>	<u>Balance Due</u>
S900720800M	6/1/86-7/31/87	\$4,204,879.96	\$2,102,439.98	\$7,848,528.52	\$14,155,848.46
S900720801M	6/1/87-9/30/87	234,707.39	117,353.70	387,075.22	739,136.31
S900720802M	6/1/86-11/30/87	-0-	443,958.72	-0-	443,958.72

With reference to its affirmative statement that Ashley Jarwood and Trevor Wisdom were officers and major owners of Wizard Petroleum, the Division attached to its answer as "Attachment 4" photocopies of 16 separately identified documents summarized as follows:

(1) An "Application for Registration as Distributor of Gasoline and Similar Motor Fuels" for Wizard Petroleum dated July 8, 1985 signed by Ashley Jarwood as Secretary/Treasurer of Wizard Petroleum;

We modify paragraph (2) of finding of fact "10" of the Administrative Law Judge's determination to read as follows:

(2) Four Article 12-A motor fuel tax returns for Wizard Petroleum for each of the months, April, May, June and August 1985 signed by Ashley Jarwood as treasurer of Wizard Petroleum;⁷

(3) A business check of Wizard Petroleum dated February 4, 1986 in the amount of \$126,829.17 in payment of motor fuel tax for November 1985 signed by Ashley Jarwood and Trevor Wisdom;

(4) Two business checks of Wizard Petroleum each dated November 6, 1987 in the amounts of \$7,407.64 and \$228,690.90, respectively, and each signed by both Ashley Jarwood and Trevor Wisdom in payment of sales tax for December 1985 and March 1986, respectively;

(5) Three business checks of Wizard Petroleum each dated September 24, 1987 in the

⁷We modified paragraph (2) of finding of fact "10" of the Administrative Law Judge's determination to properly reflect the months represented by the four Article 12-A tax returns as well as the name of the taxpayer.

amounts of \$135,784.71, \$168,183.99, and \$200,000.00, respectively, and each signed by both Ashley Jarwood and Trevor Wisdom in payment of motor fuel tax for June 1986 of \$135,784.71 and of motor fuel tax for July 1986 of \$368,183.99;

(6) An "Application for Motor Fuel Tax and Sales and Use Tax Reregistration" of Wizard Corporation⁸ date stamped received by the Division's Miscellaneous Tax Bureau on June 16, 1987, which was signed by Trevor Wisdom and shows Mr. Wisdom as 50% owner and vice-president of Wizard Corporation and shows Ashley Jarwood as 50% owner and Secretary of Wizard Corporation. Mr. Wisdom's duties were described as "operations" and Ms. Jarwood's as "office operations";

(7) A letter dated April 21, 1989 on Wizard Petroleum's letterhead to Manufacturers Hanover Trust Co. signed by Ashley Jarwood requesting copies of two checks "issued between November [sic] 1, 1985 and February 1988 in the amount of \$122,588.24 and \$228,690.90";

(8) A "Secretary's Certificate Respecting Wizard Corp. dated as of July 23, 1990" of Ashley Jarwood indicating that she and Trevor Wisdom each own 50% of the outstanding stock of Wizard Corporation and "to the best of my knowledge following reasonable inquiry, no other person has any beneficial interest in or voting or dispositive control with respect to any such securities" and an affidavit dated September 25, 1992 of Ashley Jarwood notarized by attorney Berkowitz indicating that she is an officer of Wizard Petroleum, Inc.;

(9) An affidavit of Trevor Wisdom dated May 12, 1992 indicating that he is the president of Wizard Petroleum, Inc. and that an individual named Joseph A. Bernardo, "who was a minority stockholder of Wizard Petroleum, Inc., never had anything to do with the day-to-day operation of the business of Wizard Petroleum, Inc.";

(10) Fifteen pages of a stenographic transcript made of the hearing held in the Matter of the Petition of Ashley Jarwood, Officer of Wizard Petroleum, Inc., DTA # 811098 before Administrative Law Judge Arthur Bray on July 13, 1994 where the Division was represented by

⁸This reregistration form references an entity by the name of Wizard Corporation with a federal employer identification number of 112714701. This is the same identification number as shown for Wizard Petroleum on the "Application for Registration as Distributor of Gasoline and Similar Motor Fuels" dated July 8, 1985 as indicated above.

attorney Matthews and Ms. Jarwood by attorney Berkowitz. At pages 49 through 59 of the transcript, Ms. Jarwood's testimony was transcribed. She testified in relevant part as follows:

- (i) She signed each of the 18 monthly sales tax returns of Wizard Petroleum for the period beginning June 1, 1986 and ending November 30, 1987; and
- (ii) As treasurer of Wizard Petroleum, "My duties were whatever had to be done that I could do, that is what I did" (tr., p. 56).

Upon further prodding by the administrative law judge, Ms. Jarwood elaborated:

"ALJ: Could you give me some examples?"

Ms. Jarwood: I did everything other than mechanically--anything that didn't require manual dexterity or ability. Other than that, I did it, if the corporation required that service.

ALJ: In the course of a typical day, what would that involve?"

Ms. Jarwood: Buying and selling products, overseeing the running of the office, and what have you" (tr., pp. 55-56).

We modify paragraph (11) of finding of fact "10" of the Administrative Law Judge's determination to read as follows:

(11) Two Article 12-A motor fuel tax returns for Wizard Petroleum, Inc. for the months of May and June, 1987, respectively, each signed by Trevor Wisdom as president of Wizard Petroleum;⁹

(12) A corporate power of attorney for Wizard Petroleum dated August 1, 1990 appointing attorney Berkowitz to represent it concerning sales and use taxes for the period 1986-1988 which was executed by Trevor Wisdom in his capacity of president of Wizard Petroleum;

(13) A letter dated November 16, 1987 on the letterhead of Wizard Petroleum from Trevor Wisdom to the Division's Director of the Processing and Revenue Management Division concerning tax payments made by Wizard Petroleum;

(14) Six pages of a stenographic transcript made of the hearing in the Matter of the Petition of Trevor Wisdom, Officer of Wizard Petroleum, Inc., DTA # 812655 before Administrative Law Judge Winifred Maloney on December 14, 1994 where the Division was represented by

⁹We modified paragraph (11) of finding of fact "10" of the Administrative Law Judge's determination to reflect the taxpayer named on the two Article 12-A tax returns.

attorney Matthews and Mr. Wisdom by attorney Berkowitz. Mr. Wisdom's testimony focused upon his denial of receipt of certain notices of deficiency issued against him as an officer of Wizard Petroleum;

(15) A New York corporation franchise tax report of Wizard Corporation for 1986 which was signed by Trevor Wisdom;

(16) A United States corporation income tax return of Wizard Corporation for the period June 1, 1987 to May 31, 1988 which was signed by Trevor Wisdom as vice-president on February 8, 1989.

With reference to its affirmative statement that Ashley Jarwood and Trevor Wisdom were officers and major owners of petitioner, the Division attached to its answer as "Attachment 5" photocopies of seven separately identified documents summarized as follows:

(1) Four petroleum business tax returns for each of the months March, April, May and June, 1995, respectively, for Janus Petroleum each signed by Trevor Wisdom in his capacity of president of Janus Petroleum;

(2) A verification of a pleading dated August 13, 1991 signed by Ashley Jarwood on behalf of Janus Petroleum in her capacity as corporate secretary;

(3) An "Application for registration as a Distributor of Diesel Motor Fuel or as a Retailer of Heating Oil Only" for Janus Petroleum apparently date stamped by the Division on September 2, 1983 and signed by Trevor Wisdom in his capacity of president of Janus Petroleum, which listed two "owners, directors, partners and responsible individuals": Trevor Wisdom, as President and Ashley Jarwood, as Secretary/Treasurer;

(4) A corporate power of attorney for Janus Petroleum dated March 15, 1995 appointing attorney Berkowitz to represent it concerning the matter at hand which was executed by Trevor Wisdom, in his capacity of president of Janus Petroleum;

(5) A letter dated May 10, 1995 on the letterhead of Janus Petroleum signed by

Trevor Wisdom requesting a refund of corporate tax;

(6) New York General Business Corporation Franchise Tax Return for a fiscal year ending August 31, 1994 for Janus Petroleum signed by Trevor Wisdom in his capacity as president on May 11, 1995;

(7) New York General Business Corporation MTA Surcharge Return for a fiscal year ending August 31, 1994 for Janus Petroleum signed by Trevor Wisdom in his capacity as president on May 11, 1995.

We make the following additional findings of fact:

Pursuant to State Administrative Procedure Act ("SAPA") § 206(4), we take official notice of the facts and holdings in our decision in Matter of Wizard Petroleum (*supra*) affirming the determination of the Administrative Law Judge which found clear and convincing evidence that Wizard had engaged in fraudulent conduct as a motor fuel distributor under Article 12-A of the Tax Law and sustained the subject sales and use taxes against Wizard.

The facts in the record of that case reflect that, *inter alia*:

"[m]otor fuel imported by Wizard entered New York through a terminal operated by Terminelle Corporation ('Terminelle'), a Wizard affiliate. Terminelle also serviced Janus Petroleum, Inc. ('Janus') . . . which are also affiliated with Wizard. Terminelle and Wizard shared offices located at 364 Maspeth Avenue, Brooklyn where the audit was conducted. Two of Wizard's corporate officers, Ashley Jarwood and Trevor Wisdom, were principals of Terminelle . . ." (Matter of Wizard Petroleum, *supra*).

We also take official notice of the record and holding in our decision in Matter of Jarwood (Tax Appeals Tribunal, January 25, 1996)¹⁰ (SAPA § 204[4]). In this officer case, the record reflects that Ashley Jarwood was assessed sales and use tax of \$4,439,587.00, plus fraud penalties and interest and additional penalties (by separate notice) of \$443,958.72,¹¹ as a responsible officer of Wizard. The facts in this officer case established, *inter alia*, that Ashley Jarwood was secretary or secretary-treasurer and 50% owner of the stock in Wizard.

The Administrative Law Judge concluded, *inter alia*, and we affirmed, that the record contained clear and convincing evidence that

¹⁰This case was brought separately from the corporation in Matter of Wizard Petroleum (*supra*), but involves the same tax and tax periods, i.e., June 1, 1986 through November 30, 1987.

¹¹The tax, penalties and interest in these assessments have now grown to over \$15,000,000.00. Hence, the references in the record and this decision to the amount owed vary depending on the time period in which the statement of the amount owed is made.

Ashley Jarwood, as officer of Wizard, had engaged in fraud in that she personally participated in a scheme to evade payment of sales tax and that she was a principal of both Wizard and

Terminelle. Accordingly, the tax and penalties assessed against her were sustained.

PETITIONER'S PROCEDURAL ARGUMENTS

Nevertheless, petitioner made a general objection to the introduction into evidence of the Division's answer on the basis that it contained excessive information that went beyond "a statement of any additional facts to be proven by the Division of Taxation either as a defense or for affirmative relief, or to sustain any issue raised in the petition upon which the Division of Taxation has the burden of proof" (tr., p. 33). In addition, petitioner objected to the answer because it included evidence for which "[t]here has been no foundation laid" (tr., p. 33).

Petitioner also objected to the expediting of the hearing in this matter:

"[T]his hearing is not with respect to a denial of an application for registration, but rather with respect to the revocation of a registration. Consequently, the expedited hearing procedures are improper in regard to this hearing" (tr., p. 22).

Petitioner requested that Bonnim Tanzman, who manages the Division's Registration Bond Unit which is within the Fuels, Alcohol, Cigarette and Carrier Tax Section of the Transfer and Transaction Tax Bureau, "be not present in the courtroom during the preliminary materials and during the testimony of each other" (tr., p. 13).¹² The administrative law judge denied petitioner's request to exclude Mr. Tanzman from the hearing room:

"I am not sure I see sufficient grounds to ask Mr. Tanzman to leave the hearing room at this point in time. I think earlier I might have stated on the record when there is a type of factual dispute and you want to have one person's testimony concerning certain incidents that occurred, you don't want to have that tainted by having a later witness in the matter hear what the first person has said about those particular incidents. . . .

* * *

. . . I do think on the record now you have the State's position on why they are seeking to revoke the [registrations], and if they should come up with another basis, it would be clear that they are doing that. So why don't we proceed now and

¹²Because the Division had indicated that it was not going to present the testimony of any witnesses at the hearing, petitioner called Mr. Tanzman as its own witness. It also produced Benet Doloboff as its witness primarily to testify concerning the inactivity of Wizard Petroleum within the past five years.

I will permit Mr. Tanzman to remain in the room" (tr., pp. 69-71).

Petitioner contended that it "would be inappropriate to apply the doctrine of collateral estoppel to this matter" and prevent petitioner from relitigating issues raised in the Matter of Wizard Petroleum. It must be observed, however, that petitioner made no attempt to introduce any evidence concerning the issues raised in Wizard. Neither did it introduce any evidence concerning the status of Trevor Wisdom and Ashley Jarwood as responsible officers/major shareholders of petitioner or of Wizard Petroleum.

Petitioner also objected to the administrative law judge's permitting the Division's attorney to pose questions concerning the source and authenticity of a tax return which its related petitioner, Terminelle Corporation, sought to introduce into evidence (tr., p. 82), while at the same time accepting the Division's answer into evidence, which included documents for which no foundation was established.

PETITIONER'S PRESENTATION

As noted above, petitioner made no attempt to introduce any evidence concerning the issues previously litigated in Wizard Petroleum. Rather, its strategy was to focus on the competency and credibility of Bonnim Tanzman, in an attempt to discredit his decision to propose that petitioner's registration should be cancelled. Much of the hearing was taken up with extensive questioning of Mr. Tanzman, who manages the Division's Registration Bond Unit, concerning his career with the Division and his authority to make the decision to propose to cancel petitioner's registration. Benet Doloboff, petitioner's other witness, provided limited testimony. Petitioner offered his testimony to establish that Wizard Petroleum had been inactive for at least five years preceding February 13, 1995, the date of the Division's notice of proposed cancellation of petitioner's registration. According to Mr. Doloboff, the last year that Wizard Petroleum had any income "was probably a period ending May 31st, 1988" (tr., p. 96).

OPINION

In his determination below, the Administrative Law Judge concluded, in relevant part, that:

i) Bonnim Tanzman had authority, as manager of the Division's Registration Bond Unit, to issue the notice of proposed cancellation in this case;

ii) the Division's answer should not be defaulted and the documents attached to the answer should not be struck from the record, and petitioner offered no proof to show that its due process rights had been violated;

iii) this hearing was properly treated as an expedited hearing, and no statutory or due process rights of petitioner have been violated by doing so;

iv) petitioner offered no evidence to challenge the merits or substance of the Division's grounds for proposing the cancellation of its registration, but petitioner is correct that the five-year statute of limitations bars the Division from basing the proposed cancellation of registration on any of the six grounds specified in the notice of proposed cancellation in evidence because Tax Law § 283(6)(a) does not provide for an exception to the statute in cases of falsity or fraud. On the other hand, the Division offered proof to show that the assessment in excess of \$10,000,000.00 against Wizard had not been paid as of the date of the hearing and this failure to pay constitutes a continuing act or omission which would not be barred by the statute of limitations. Accordingly, the additional grounds for proposed cancellation of petitioner's registration set forth in the Division's answer (failure to pay the taxes due from Wizard) constituted proper grounds for cancellation;

v) petitioner failed to offer proof to rebut the Division's evidence or to show that Ashley Jarwood or Trevor Wisdom were not responsible officers of Wizard. Both Wizard and petitioner were owned and operated by Ashley Jarwood and Trevor Wisdom, so failure to pay the taxes due from Wizard was a proper ground for the proposed cancellation of petitioner's registration; and

vi) the Division of Tax Appeals is without jurisdiction to determine whether the Division should be precluded from asserting, at a later date, a basis for proposing to cancel petitioner's registration where that basis was withdrawn without prejudice at hearing.

Petitioner, on exception, argues i) that an officer of a corporation cannot be under a duty

to act when the corporation is inactive or out of business; ii) that petitioner was not fully aware of the charges against it because an additional charge was raised for the first time in the Division's answer; iii) that the Commissioner of Taxation and Finance failed to exercise proper discretion in this matter; iv) that the Commissioner of Taxation and Finance cannot delegate his statutory discretion and authority to cancel registrations; v) that the documents attached to the Division's answer should be struck from the record because the Rules of Practice and Procedure of the Tax Appeals Tribunal do not provide for the submission of documentary evidence as attachments to the Division's answer; and vi) that the Division should be precluded and prohibited from reasserting as a ground for cancelling petitioner's registration in any subsequent proceeding the same ground which was voluntarily withdrawn prior to the conclusion of the hearing in this matter.

Petitioner did not take exception to any findings of fact of the Administrative Law Judge. While petitioner took exception to conclusion of law "E" relating to the "expedited hearing" issue, it did not raise the issue in its brief, nor did it make a proposed conclusion of law on this issue in its exception.

Petitioner continues to argue that:

"with respect to this ground of nonpayment of any taxes due, the matter has been closed by the Tax Department's withdrawal of such ground to cancel [Janus'] registration. Therefore, the Tax Department should be precluded and prohibited from re-asserting this same ground or any other ground which is subject to the Division of Tax Appeal's Determination in this matter, against the Petitioner in any future proceeding relating to the Petitioner's Registration as a Diesel Motor Fuel Distributor" (Petitioner's brief in support, p. 25).

The Division contends that Wizard Petroleum's outstanding tax liability is a sufficient basis for the proposed cancellation of petitioner's registration because both Wizard and Janus were owned and operated by the same two individuals, Ashley Jarwood and Trevor Wisdom. Similarly, the fraudulent conduct of Wizard Petroleum as found by the Tax Appeals Tribunal in Matter of Wizard Petroleum (*supra*) was also a sufficient basis for the proposed cancellation of petitioner's registration because of the common ownership and management of Wizard Petroleum and petitioner.

According to the Division, the ultimate question is whether the presently registered entity can be relied upon to properly exercise its responsibilities in the future. The Division urges that Janus cannot further be trusted to do so in light of the fact that its sole owners and officers, Ashley Jarwood and Trevor Wisdom, were directly responsible for the fraud committed by Wizard and for Wizard's outstanding liability of more than \$15,000,000.00.

Petitioner argues that an outstanding tax liability of an affiliated corporation for a period not within the preceding five years is not a valid ground for cancellation of petitioner's registration.

The Division argues against each of petitioner's positions and also takes exception to conclusion of law "I." Specifically, the Division takes exception to that part of conclusion of law "I" that holds that the five-year period of limitations of Tax Law § 283(4) bars the proposed cancellation of petitioner's registration based on any of the grounds set forth in the notice of proposed cancellation. The Division urges that where fraud is involved, the notice of proposed cancellation can be issued at any time (Tax Law § 283[6]; 20 NYCRR 411.7).

Under Tax Law § 283(4), registration as a distributor of diesel motor fuel¹³ may be cancelled or suspended by the Division:

"where a registrant, or an officer, director, shareholder, employee or partner of the registrant who as such officer, director, shareholder, employee or partner is under a duty to act for such registrant or any shareholder directly or indirectly owning more than ten percent of the number of shares of stock of the registrant . . . fails to file a bond or other security when required . . . or fails to comply with any of the provisions of this article [Article 12-A, Tax On Gasoline and Similar Motor Fuel] or article twenty-eight of this chapter [Sales and Compensating Use Tax] with respect to motor fuel or any rule or regulation adopted pursuant to this article or article twenty-eight of this chapter with respect to motor fuel . . . or knowingly aids and abets another person in violating any of the provisions of such articles or of any such rule or regulation with respect to motor fuel, or transfers its registration as a distributor without the prior written approval of the commissioner. A registration may also be cancelled or suspended if the commissioner determines that a registrant or

¹³Tax Law § 282(14) defines diesel motor fuel as:

"kerosene, crude oil, fuel oil or other middle distillate and also motor fuel suitable for use in the operation of an engine of the diesel type, excluding, however, any product specifically designated 'No. 4 Diesel fuel' and not suitable as a fuel used in the operation of a motor vehicle engine."

an officer, director, shareholder, employee or partner of the registrant who as such officer, director, shareholder, employee or partner is under a duty to act for such registrant or any shareholder directly or indirectly owning more than ten percent of the number of shares of stock of the registrant . . .
:

"(i) commits fraud or deceit in his operations as a distributor or has committed fraud or deceit in procuring his registration;

"(ii) has been convicted in a court of competent jurisdiction, either within or without the state, of a felony . . . bearing on such distributor's duties and obligations under this chapter;

"(iii) has knowingly aided and abetted a person who is not registered as a distributor in the importation, production, refining, manufacture or compounding of motor fuel;

"(iv) has impersonated any person represented to be a distributor under this article but not in fact registered under this section; or

"(v) has knowingly aided and abetted the distribution of motor fuel imported, caused to be imported, produced, refined, manufactured or compounded by a distributor who is not registered by the department of taxation and finance.

"A registration may also be cancelled or suspended if the commissioner determines that a registrant or an officer, director, shareholder, employee or partner of the registrant who as such officer, director, shareholder, employee or partner is under a duty to act for such registrant or any shareholder directly or indirectly owning more than ten percent of the number of shares of stock of the registrant . . . was an officer, director, shareholder, employee or partner of another person who as such officer, director, shareholder, employee or partner was under a duty to act for such other person or was a shareholder directly or indirectly owning more than ten percent of the number of shares of stock of such other person . . . at the time such other person committed any of the acts or omissions which are, or was convicted as, specified in this subdivision within the preceding five years."

The Administrative Law Judge concluded that in determining whether petitioner's registration as a diesel motor fuel distributor should be cancelled, a de novo review of the available administrative record is properly conducted by the Administrative Law Judge in order to determine whether there are sufficient grounds to cancel such registration (see, Matter of Shore Line Oil Co., Tax Appeals Tribunal, February 15, 1996). Consequently, he determined that petitioner's contention that Mr. Tanzman's decision to issue the notice of proposed cancellation was improper and without authority was irrelevant.

We agree. Tax Law § 170(3) states that the Commissioner of Taxation and Finance has

explicit power to appoint his subordinates and fix their duties. The Commissioner can exercise his power directly or indirectly through his Deputy Commissioners or others that he may appoint as he deems necessary. The record reflects that Bonnim Tanzman was appointed to manage the Division's Registration Bond Unit. As such, he would have the authority as manager of that unit to decide whether or not to issue a notice of proposed cancellation of a distributor's registration. In any event, petitioner has offered no evidence to show any defect in Mr. Tanzman's appointment to that position or in his conduct in carrying out his duties. Nor has petitioner offered any evidence to show that the Commissioner's delegation of authority to the Registration Bond Unit's manager was defective or nonexistent. If such evidence exists, petitioner did not produce it.

Because the documents which provide the basis for any determination that sufficient grounds exist for cancelling petitioner's license came into the record as attachments to the Division's answer, the Administrative Law Judge addressed the issue of whether the answer and/or the attachments to the answer should be struck from the record.

Petitioner claims that the Division should be defaulted or have its documents struck from the record because the Rules of Practice and Procedure of the Tribunal do not authorize the submission of documentary evidence as attachments to the answer. The Administrative Law Judge concluded that, under 20 NYCRR 3000.4, there is no basis for defaulting the Division. We agree with the Administrative Law Judge's conclusion based upon his full and adequate discussion of this issue below.

Although attaching documents or evidence to a pleading is an unusual practice, there is nothing to prohibit such practice in the Tribunal Rules of Practice and Procedure. Moreover, there is absolutely no proof or even an allegation that petitioner was prejudiced by the attachment of documents to the answer.

Nor is there a basis to conclude, under our rules of procedure, that attaching documents or evidence to a pleading impedes the purpose of the pleadings as specified in such rules, i.e., to give the parties and the Division of Tax Appeals fair notice of the matters in controversy and

the basis for the parties' respective positions (20 NYCRR 3000.4[a]).

The Division has the authority to introduce into the record documents in its possession. There is no requirement that a foundation be established for such documents through the testimony of a witness (State Administrative Procedure Act § 306[2]). Since the Division would have been able to introduce the documents attached to its answer at the hearing without utilizing a witness, there is no harm to petitioner that the documents came into the record as attachments to the Division's answer. The burden is on petitioner to show that its due process rights have been violated and that burden is heavy (see, Matter of R.A.F. General Partnership, Tax Appeals Tribunal, November 9, 1995). Given the language of State Administrative Procedure Act § 306(2), petitioner's due process rights were not violated by permitting the Division to voir dire the authenticity of petitioner's documents while the Division's documents were accepted into the record as attachments to its answer without an auditor to provide a foundation for such documents.

Furthermore, the Division produced Mr. Tanzman so that petitioner could call him as its witness, and it is observed that no questions were posed to Mr. Tanzman by petitioner concerning the authenticity of the documents attached to the Division's answer. We find no merit in petitioner's argument that the exhibits attached to the Division's answer should be struck from the record.

We turn now to the question of whether sufficient grounds exist to support the proposed cancellation of petitioner's registration as a diesel motor fuel distributor under Articles 12-A and 13-A¹⁴ of the Tax Law.

We note that petitioner has the burden of proving that each of the grounds stated by the Division are inadequate to support its proposed cancellation of its registration (see, Matter of

¹⁴Article 13-A at Tax Law § 302(a) provides that "[e]ach petroleum business with respect to motor fuel must be registered with the department of taxation and finance as a distributor of motor fuel under article twelve-A" A "residual petroleum product business" must be registered under Article 13-A. As noted above, the notice of proposed cancellation specified Article 13-A as well as Article 12-A. The record does not disclose whether petitioner was also registered as a residual petroleum product business under Article 13-A but, in any event, pursuant to Tax Law § 302(e), the grounds for cancelling such registration mirror the grounds under Article 12-A.

Janus Petroleum, Tax Appeals Tribunal, July 11, 1991, annulled on other grounds Matter of Janus Petroleum v. Tax Appeals Tribunal, 180 AD2d 53, 583 NYS2d 983).

The Division has clearly set forth the general basis for its proposed cancellation of petitioner's registration which was that the decision of the Tax Appeals Tribunal in Matter of Wizard Petroleum (*supra*) established that Wizard Petroleum was a corrupt enterprise and, because petitioner's officers and major owners were the officers and major owners of Wizard Petroleum, petitioner's registration should be cancelled. In Wizard Petroleum, the Tribunal upheld three notices of determination of sales and use taxes due each dated July 20, 1990. The first notice asserted tax due of \$4,204,879.96, plus fraud penalty and interest, for a total due of \$8,466,445.58 for the period June 1, 1986 through July 31, 1987. The second notice asserted tax due of \$234,707.30, plus fraud penalty and interest, for a total due of \$445,644.91 for the period August 1, 1987 through September 30, 1987. The third notice asserted penalty only for the period June 1, 1986 through November 30, 1987 in the amount of \$443,958.72. In sum, the Tribunal sustained an assessment of approximately \$10,000,000.00.¹⁵

Petitioner did not introduce evidence to challenge the merits or substance of the Division's grounds for proposing the cancellation of its registration. Rather, petitioner's primary argument below was that the five-year statute of limitations provided in Tax Law § 283(4) bars the Division from cancelling the registration of Janus Petroleum based upon corrupt acts by Wizard Petroleum for the period beginning June 1, 1986 and ended September 30, 1987. This statutory provision is quoted at length at the beginning of this opinion. The statutory language specifying the five-year statute of limitations states, in pertinent part, as follows:

"[a] registration may also be cancelled . . . if the commissioner determines that a registrant or an officer . . . of the registrant who as such officer . . . is under a duty to act for such registrant or any shareholder directly . . . owning more than ten percent of the number of shares of stock of the registrant . . . was an officer . . . shareholder . . . of another person who as such officer, . . . shareholder . . . was under a duty to act for such other person or was a shareholder directly or indirectly owning more than ten percent of the number of shares of stock of such other person . . . at the time such other person committed any of the acts or omissions which are . . . specified in this subdivision within the preceding five years" (Tax Law

¹⁵At that time.

§ 283[4]).

The Administrative Law Judge concluded from this language that petitioner was correct that the five-year statute of limitations bars the Division from basing the proposed cancellation of its registration on any of the six grounds specified in the notice of proposed cancellation issued to petitioner. The Administrative Law Judge further concluded that the Division's argument that Tax Law § 283(6) provided an exception to the five-year statute of limitations "in the case of acts involving falsity or fraud" was incorrect, and that no such exception exists.

We reverse the Administrative Law Judge on this issue.

Tax Law § 283(4) does not provide for an exception to the five-year statute of limitations, but Tax Law § 283(6)(a) provides, in pertinent part, that:

"[s]uch notice of proposed cancellation or suspension or of proposed refusal to register must be given to such person within five years from the date of the act or omission referred to in subdivision two or four of this section, except that in the case of acts involving falsity or fraud, such notice may be issued at any time" (emphasis added).

We conclude from this language, based on the fraud of Wizard and the common ownership of Wizard and Janus by Ms. Jarwood and Mr. Wisdom, that the Division's notice of proposed cancellation was not time barred.

At hearing, the Division offered proof that the assessment of approximately \$10,000,000.00 sustained by the Tribunal against Wizard Petroleum remains unpaid. Petitioner offered no evidence to rebut this evidence, i.e., by proof that Wizard or its two officers had paid the assessment and, if so, when paid. In Matter of Shore Line Oil Co. (supra), we affirmed the Administrative Law Judge's determination that the five-year statute of limitations does not apply to the failure to pay tax which is an act or omission which occurs each day that the tax remains unpaid. It is of interest to note that in Shore Line, the amount of unpaid tax was a mere \$2,000.00, while in the matter at hand the unpaid assessment against the related corporation (Wizard) is approximately \$10,000,000.00. Consequently, the Administrative Law Judge concluded that the additional grounds for proposing the cancellation of petitioner's registration as set forth in the Division's answer provided an adequate basis for the cancellation of

petitioner's registration.

We affirm the Administrative Law Judge on this issue. We reject petitioner's claim that it was denied due process because it was not notified of this additional ground for cancellation (non-payment of taxes and failure to file returns) until the Division submitted its answer. As petitioner itself noted in its brief (Petitioner's brief in support, p. 24), a petitioner's due process rights are not violated where it was notified prior to a hearing of an additional reason for the Tax Department's denial of an application for a motor fuel terminal operator's license and is given an opportunity to review and respond to them prior to hearing (Diamond Terminal Corp. v. New York State Dept. of Taxation & Fin., 158 AD2d 38, 557 NYS2d 962, lv denied 76 NY2d 711, 563 NYS2d 767). The answer was filed on November 30, 1995 and a follow up letter, dated December 4, 1995, explaining the additional charges was sent to petitioner. This provided petitioner with the necessary due process "notice." Petitioner then had until the date of the hearing on December 12, 1995 to review and decide how to respond to this charge at hearing. Since Wizard and Janus are owned by Ms. Jarwood and Mr. Wisdom, they should readily know whether or not they had paid the back taxes of Wizard. No evidence of payment was proffered by petitioner. Further, petitioner offered no evidence to show that it had been prejudiced in any way by the Division's manner of raising the additional basis for cancellation.

In Matter of Diamond Terminal Corp. (Tax Appeals Tribunal, September 22, 1988, confirmed Matter of Diamond Terminal Corp. v. New York State Dept. of Taxation & Fin., 158 AD2d 38, 557 NYS2d 962, lv denied 76 NY2d 711, 563 NYS2d 767), we noted that the revision of Article 12-A by the Laws of 1986 (ch 276) was the "culmination of legislative and executive efforts to combat massive evasion of the excise and sales taxes imposed on motor fuel by Articles 12-A and 28 and pursuant to the authority of Article 29 of the Tax Law" (Matter of Diamond Terminal Corp., *supra*). In Matter of OK Petroleum Products Corp. (Tax Appeals Tribunal, November 1, 1990), we specifically discussed the registration provisions of Article 12-A as follows:

"changes to the registration provisions for distributors were enacted which allowed the Division of Taxation to refuse to register a distributor and to

cancel or suspend a registration under certain conditions (Tax Law § 283[2] and [4]). The obvious intent of the change in the registration provisions was to provide the Commissioner with the opportunity to decide whether the distributors who would be receiving tax moneys and holding them in trust until paid over to the State could be relied upon to properly exercise their tax collection responsibilities (see, Memorandum of State Department of Taxation and Finance, McKinney's Session Laws, 1986, ch 276, at 2882). In 1988 similar legislative changes were made to address evasion and avoidance of the tax imposed on diesel motor fuel (L 1988, ch 261, §§ 67-105)" (Matter of OK Petroleum Products Corp., supra).

As we noted earlier, petitioner introduced no evidence to controvert the Division's evidence showing that Trevor Wisdom was president and owner of two-thirds of petitioner's stock and that Ashley Jarwood was secretary/treasurer and owner of one-third of petitioner's stock. The Division's evidence in the record is more than adequate to establish that Trevor Wisdom and Ashley Jarwood were officers and major owners of Wizard Petroleum. Moreover, in Matter of Jarwood (supra), the Tribunal determined that Ashley Jarwood was a "responsible officer" of Wizard Petroleum. Consequently, Ms. Jarwood would be collaterally estopped from denying herein that she was not a responsible officer of Wizard Petroleum (see, Matter of Waite, Tax Appeals Tribunal, January 12, 1995, confirmed Matter of Waite v. Tax Appeals Tribunal, 225 AD2d 962, 639 NYS2d 584).

In Matter of Wisdom (Tax Appeals Tribunal, March 21, 1996), we held that Mr. Wisdom's petition was untimely and upheld the assessment against him as a responsible officer of Wizard Petroleum without actually reaching the merits of whether he was a responsible officer.

Consequently, Mr. Wisdom was not collaterally estopped from presenting evidence to establish, inter alia, that he was not a responsible officer of Wizard. However, petitioner introduced no evidence rebutting Mr. Wisdom's or Ms. Jarwood's status as responsible officers and/or major shareholders of either Janus or Wizard Petroleum or of the issues concerning the corrupt nature of Wizard Petroleum. Instead, petitioner argues that Ms. Jarwood and Mr. Wisdom cannot be held responsible as officers of a corporation, i.e., Wizard, because it has been inactive for over five years. This argument is without merit. A corporation and its owner-officers cannot escape their liabilities by simply closing their doors. Based on these facts,

Wizard Petroleum's outstanding multi-million dollar liability for unpaid taxes is a sufficient basis for the proposed cancellation of petitioner's registration because both Wizard Petroleum and petitioner were owned and operated by Ashley Jarwood and Trevor Wisdom (see also, Matter of Peterson Petroleum of New Hampshire, Tax Appeals Tribunal, January 18, 1996, confirmed Matter of Peterson Petroleum of New Hampshire v. Tax Appeals Tribunal, ___ AD2d ___, 654 NYS2d 433).

In addition, the grounds stated in the notice of proposed cancellation of its registration stand unrebutted by petitioner.

Finally, we address whether the Division should be precluded from asserting at some later date a ground for cancelling petitioner's registration, when that ground was withdrawn without prejudice by the Division at the hearing in this matter. Once an issue is voluntarily withdrawn from our consideration, as it was here, we no longer have jurisdiction over it (cf., Matter of D & C Glass Corp., Tax Appeals Tribunal, June 11, 1992).

Except for that portion of conclusion of law "I" which has been modified above, we affirm the determination of the Administrative Law Judge.

We have considered petitioner's remaining contentions and conclude that the Administrative Law Judge fully and completely addressed them. Therefore, we reject petitioner's remaining arguments for the reasons stated in the determination of the Administrative Law Judge. Petitioner has offered nothing new on exception that would lead us to further modify the Administrative Law Judge's determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Janus Petroleum, Inc. is denied;
2. The exception of the Division of Taxation is granted;
3. The determination of the Administrative Law Judge is reversed with respect to conclusion of law "I," but is otherwise affirmed; and
4. The petition of Janus Petroleum, Inc. is denied and the Notice of Proposed

Cancellation of Diesel Motor Fuel Registration under Articles 12-A and 13-A of the Tax Law,
dated February 13, 1995, is sustained.

DATED: Troy, New York
April 24, 1997

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner