

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

---

In the Matter of the Petition	:	
of	:	
<b>TERMINELLE CORPORATION</b>	:	DECISION
for Review of a Denial, Suspension, Cancellation or	:	DTA No. 814478
Revocation of a License, Permit or Registration under	:	
Article 12-A of the Tax Law.	:	

---

Petitioner Terminelle Corporation, 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.<sup>1</sup> Petitioner appeared by Uncyk, Borenkind & Nadler, LLP (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 license as a terminal operator under Article 12-A of the Tax Law.

II. Whether the Division of Taxation's (hereinafter the "Division") answer 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

---

<sup>1</sup>The hearing in this matter was consolidated with the hearing in Matter of Janus Petroleum, Inc. (DTA No. 814466). Like the determination below, this decision is being issued separately, but simultaneously, with our decision in Matter of Janus Petroleum.

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

III. Whether the Division failed to fully inform petitioner of the nature of the charges against it.

IV. Whether the Commissioner of Taxation and Finance, acting through Bonnim Tanzman, failed to exercise proper discretion in issuing the notice of proposed cancellation of petitioner's registration.

V. Whether the Commissioner of Taxation and Finance could properly delegate his authority to cancel petitioner's registration to his subordinates in the Division.

VI. 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 findings of fact "5" and "10" which have been modified and findings of fact "13" through "15" which have been deleted since such paragraphs are in the nature of argument and are not findings of fact. Moreover, these arguments made in findings of fact "13" through "15" are irrelevant since petitioner did not take an exception to them. We have also made additional findings of fact. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional findings of fact are set forth below.

Petitioner, Terminelle Corporation ("Terminelle"), operates a fuel terminal in New York City that holds from five to seven million gallons of fuel in seven to ten aboveground and underground tanks. Terminelle receives fuel by barges, pipeline and truck. Most shipments made out of the terminal are by truck.

The Division issued a Notice of Proposed Cancellation of Your License as a Terminal Operator Under Article 12-A of the Tax Law dated February 13, 1995 ("the Notice of

Cancellation" or "the Notice") against petitioner. The Notice stated five grounds for canceling Terminelle's license as follows:

"1) Trevor Wisdom, an owner and officer of Terminelle Corporation, was an officer and 50% owner of Wizard Corporation at the time that Wizard Corporation committed fraud in its operations as a distributor.<sup>2</sup>

2) Ashley Jarwood, an owner and officer of Terminelle Corporation, 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, an owner and officer of Terminelle Corporation, 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) Terminelle Corporation has failed to comply with provisions of Articles 28 and 29 of the [T]ax [L]aw with respect to automotive fuel.

5) Terminelle Corporation, through the actions of its officers and owners, knowingly aided and abetted Wizard Corporation in violating the provisions of Articles 28 and 29 of the Tax Law with respect to automotive fuel.

Subsequently, the Division issued an Amended Notice of Proposed Cancellation of Your License as a Terminal Operator dated June 28, 1995. This amended notice set forth the reasons noted 1, 2, 3 and 5 above. Reason 4 was changed to read as follows:

"4) Terminelle Corporation has failed to comply with provisions of Article 12-A of the [T]ax [L]aw with respect to automotive fuel."

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

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

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

---

<sup>2</sup>Statutory references have been omitted.

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" 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.<sup>3</sup> 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."

We modify finding of fact "5" of the Administrative Law Judge's determination to read as follows:

In addition to the five grounds set forth in the amended 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 license:

"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

---

<sup>3</sup>Mr. Matthews' letter also referenced the proposed cancellation of the registration as a diesel motor fuel distributor at issue in the matter concerning Janus Petroleum.

corporation [for petitioner and Janus Petroleum]<sup>4</sup> based on that exhibit" (tr. p. 195).<sup>5</sup>

Petitioner, in its petition dated November 8, 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 License as a Terminal Operator by the Department of Taxation and Finance is based on erroneous and incorrect facts.
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 issue.
4. The related corporate-taxpayer (Wizard Corporation) did not commit any acts prohibited by statute during the statutory period in issue.
5. The Petitioner did not fail to comply with any Article or provision of the Tax Law.
6. The Petitioner did not knowingly aid and abet Wizard Corporation in violating any provisions of the Tax Law."

The Division's answer dated November 30, 1995 denied the above six paragraphs set forth in the petition. In addition, the Division in paragraph "7" of its answer referenced the decision of the Tax Appeals Tribunal (hereinafter the "Tribunal") in Matter of Wizard Corporation (March 24, 1994)<sup>6</sup> and described the Tribunal's holding in that matter as follows:

---

<sup>4</sup>Mr. 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).

<sup>5</sup>We modified finding of fact "5" of the Administrative Law Judge's determination to properly reflect the transcript page of the first set of quoted material.

<sup>6</sup>We take official notice of our findings and decision in Matter of Wizard Petroleum dated March 24, 1994.

"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:

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

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

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

11. 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 1" a photocopy of three separate computer records, each dated November 16, 1995 and labelled "CARTS- Assessments Receivable, Assessment History" for Wizard Corporation 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 2" 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 each of the months, April, May, June and August 1985 signed by Ashley Jarwood as treasurer of Wizard Petroleum;<sup>7</sup>

(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 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;

---

<sup>7</sup>We 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 motor fuel tax returns in evidence.

(6) An "Application for Motor Fuel Tax and Sales and Use Tax Reregistration" of Wizard Corporation<sup>8</sup> 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 dispository 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

---

<sup>8</sup>This 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:

"ADMINISTRATIVE LAW JUDGE: 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.

ADMINISTRATIVE LAW JUDGE: 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;<sup>9</sup>

(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;

---

<sup>9</sup>We 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.

(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 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 3" photocopies of five separately identified documents summarized as follows:

(1) Seven "Terminal Operator's Monthly Report of Motor Fuel Inventory" returns for each of the months, June, July, August, September, October, November and December 1986, respectively, for Terminelle each signed by Trevor Wisdom as vice-president (except for the return for November, 1986 on which Mr. Wisdom did not note his title);

(2) Six "Terminal Operator's Monthly Report of Diesel Motor Fuel and Motor Fuel Inventory" returns for each of the months April, May, June, July, August and September, 1995, respectively, for Terminelle each signed by Trevor Wisdom as president;

(3) An "Application for a License as an Importing Transporter and/or Terminal Operator" for Terminelle dated October 24, 1986 signed by Trevor Wisdom as vice-

president which listed three "owners, directors, partners, and responsible individuals": Ashley Jarwood, Trevor Wisdom, and Joseph Bernardo;

(4) A corporate power of attorney for Terminelle 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 Terminelle;

(5) U.S. corporation income tax returns for Terminelle for 1987 and 1994, respectively, each signed by Trevor Wisdom in his capacity of president of Terminelle.

We make the following additional findings of fact:

We held in Matter of Wizard Petroleum (*supra*) that, *inter alia*, there was 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.

Among the facts we found in that case were, in pertinent part, as follows:

"[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 . . . ."

We also take official notice of the record and holding in our decision in Matter of Jarwood (Tax Appeals Tribunal, January 25, 1996)<sup>10</sup> (State Administrative Procedure Act, § 206[4]). In Jarwood, 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,<sup>11</sup> as a responsible officer

---

<sup>10</sup>This 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.

<sup>11</sup>The 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.

(continued...)

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.

We held, inter alia, in Jarwood that the record contained clear and convincing evidence that 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, as officer of Wizard, were sustained.

#### Petitioner's Presentation

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).

#### Petitioner's Procedural Arguments

Petitioner objects to the introduction into evidence of the Division's answer because 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.

---

<sup>11</sup>(...continued)

33). In addition, petitioner objects to the answer because it included evidence for which "[t]here has been no foundation laid" (tr., p. 33).<sup>12</sup>

Petitioner also objects to the Administrative Law Judge's permitting the Division's attorney to pose questions concerning the source and authenticity of a tax return which petitioner 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.

### ***OPINION***

The Administrative Law Judge, in his determination, concluded, in relevant part:

i) in determining whether petitioner's license as a terminal operator should be cancelled, a de novo review is conducted by the Administrative Law Judge in order to determine whether there are sufficient grounds to cancel such license. Consequently, petitioner's contention that Mr. Tanzman's decision to issue the Notice of Cancellation was improper and without authority is irrelevant. Further, the Administrative Law Judge concluded the Commissioner of Taxation and Finance had express statutory authority for delegating his authority to Mr. Tanzman, and Mr. Tanzman, as manager of the Registration Bond Unit, had authority to issue the Notice of Cancellation;

ii) the Division did not act improperly in attaching exhibits to its answer, and the Division can introduce documents contained in records as exhibits at hearing without laying a foundation (State Administrative Procedure Act § 306[2]). Petitioner failed to produce any evidence of prejudice to its position arising from the Division's attaching documents to its answer or that its due process rights had been violated. Mr. Tanzman was available as a witness at hearing and yet

---

<sup>12</sup>Because 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.

petitioner did not ask him any questions concerning the authenticity of the documents introduced by the Division;

iii) petitioner failed to offer any evidence in response to the merits or substance of the Division's Notice of Cancellation. However, the Administrative Law Judge concluded that the five-year statute of limitations barred the Division from basing the proposed cancellation of petitioner's registration on any of the five grounds set forth in the amended notice of proposed cancellation. Further, he concluded that Tax Law § 283(6)(a) does not provide an exception to the five-year statute of limitations, as urged by the Division. He went on to state that no such exception exists. However, the Administrative Law Judge concluded that the Division had proved that the multi-million dollar assessment sustained against Wizard by this Tribunal remains unpaid and this constitutes a continuing violation of the Tax Law to which the five-year statute of limitations does not apply. Accordingly, the Administrative Law Judge concluded that the grounds set forth in the Division's answer was a valid basis for cancellation of petitioner's terminal operator's license; and

iv) petitioner offered no proof that Trevor Wisdom and Ashley Jarwood were not corporate officers and owners of petitioner's and Wizard's stock.

Petitioner did not take exception to any of the findings of fact of the Administrative Law Judge. Petitioner, on exception, argues that, with regard to the substantive basis for the Division's proposing to cancel petitioner's license, the grounds for cancellation did not meet the statutory requirements of Tax Law § 283-b(4).

Specifically, petitioner argues that the prohibited acts committed by Wizard were for the period beginning June 1, 1986 and ended September 30, 1987. Because the notices of proposed cancellation of petitioner's license were dated February 13, 1995 for the original notice and June 28, 1995 for the amended notice, i.e., more than five years after Wizard Petroleum's

violations, petitioner asserts that the statute of limitations precludes the cancellation of petitioner's license.

Finally, petitioner contends that the decision made by Mr. Tanzman to issue the Notice of Cancellation of petitioner's license was unilateral, arbitrary and capricious and was without authority because the Commissioner cannot and did not properly delegate his statutory discretion and authority to cancel licenses to Mr. Tanzman.

The Division contends that Wizard Petroleum's outstanding tax liability of more than \$15,000,000.00 is a sufficient basis for the proposed cancellation of petitioner's license because both Wizard Petroleum and petitioner were owned and operated by the same two individuals, Ashley Jarwood and Trevor Wisdom. Similarly, the Division urges that the fraudulent conduct of Wizard Petroleum as found by the Tribunal in Matter of Wizard Petroleum (*supra*) was a sufficient basis for the proposed cancellation of petitioner's license because of the common ownership and management of Wizard Petroleum and petitioner.

Petitioner responds 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 license. Similarly, petitioner maintains that the fraudulent act of an affiliated corporation, which occurred more than five years ago is not a valid ground for cancellation of petitioner's license.

The Division disagrees. In addition, the Division takes exception to that portion of the Administrative Law Judge's determination which held that the five-year statute of limitations of Tax Law § 283-b(4) bars the Division from canceling Terminelle's registration as a terminal operator based on any of the five grounds set forth in the Notice of Cancellation and which were based on the corrupt acts of Wizard Petroleum for the period beginning June 1, 1986 and ended September 30, 1987. The Division argues that, due to the fraudulent conduct of Wizard and its officers, the exception to the five-year statute of limitations contained in Tax Law § 283(6)(a) permits the grounds contained in the Notice of Cancellation to be asserted at any time. The

Division maintains that the Tribunal's decision in Wizard Petroleum is a valid basis for the Notice of Cancellation.

The Division also rejects the various technical and procedural arguments raised by petitioner and argues that:

(i) the answer was full and complete and, under State Administrative Procedure Act § 306, the documents attached to the answer were properly admitted into the record;

(ii) the failure to pay an open liability is not subject to the five-year limitation and acts of fraud are available as grounds for cancellation of a license regardless of when the acts occurred; and

(iii) the Commissioner has implied power to delegate to his subordinates and that Mr. Tanzman's decision to propose the cancellation of petitioner's license was not an abuse of discretion. In any event, the review of such decision is de novo in the Division of Tax Appeals.

We first address the statutory basis for the Division's actions. Under Tax Law § 283-b(4), petitioner's license as a terminal operator may be cancelled or suspended by the Division as follows:

"where a licensee, 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 licensee or any shareholder directly or indirectly owning more than ten percent of the number of shares of stock of the licensee . . . 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 with respect to motor fuel adopted pursuant to such articles . . . 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 license as a terminal operator. A license may also be cancelled or suspended if the commissioner determines that a licensee or an officer, director, shareholder, employee or partner of the licensee who as such officer, director, shareholder, employee or partner is under a duty to act for such licensee or any shareholder directly or indirectly owning more than ten percent of the number of shares of stock of the licensee . . . :



"(i) commits fraud or deceit in his operations as a terminal operator or has committed fraud or deceit in procuring his license;

"(ii) has been convicted in a court of competent jurisdiction, either within or without the state, of a felony . . . bearing on such terminal operator'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; or

"(iv) has knowingly aided and abetted the distribution of motor fuel which he has knowledge of as being 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 license may also be cancelled or suspended if the commissioner determines that a licensee or an officer, director, shareholder, employee or partner of the licensee who as such officer, director, shareholder, employee or partner is under a duty to act for such licensee or any shareholder directly or indirectly owning more than ten percent of the number of shares of stock of the licensee . . . 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."

In determining whether petitioner's license as a terminal operator should be cancelled, a de novo review of the available administrative record is properly conducted by the Administrative Law Judge and, later, by this Tribunal, in order to determine whether there are sufficient grounds to cancel such license (see, Matter of Shore Line Oil Co., Tax Appeals Tribunal, February 15, 1996). Consequently, we conclude, as did the Administrative Law Judge, that petitioner's contention that Mr. Tanzman's decision to issue the Notice of Cancellation was improper and without authority is irrelevant. In any event, under Tax Law § 170(3) and (4), the Commissioner of Taxation and Finance has explicit power to delegate his authority to his subordinates, including Bonnim Tanzman, who, as noted, was appointed to manage the Division's Registration Bond Unit. As such, Mr. Tanzman would have the authority as manager of such unit to decide

whether or not to issue a notice of proposed cancellation of a terminal operator's license.

Petitioner has offered no evidence to show that the Commissioner did not properly delegate his authority in this matter to the Registration Bond Unit and to Mr. Tanzman. If petitioner wished to rely on this argument, it needed to establish the evidentiary basis to support it. Petitioner raised this issue, so it was an element of its proof. It has failed to meet its evidentiary burden.

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.

The Rules of Practice and Procedure promulgated by the Tribunal, effective November 1, 1995, which are codified at 20 NYCRR Part 3000, provide, in relevant part, as follows, with reference to the purpose of pleadings in the Division of Tax Appeals:

"[s]ection 3000.4 Pleadings, amended pleadings.

"(a) Purpose. The purpose of the pleadings is 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. All pleadings shall be liberally construed so as to do substantial justice.

"(b) Answer. (1) The office of counsel shall serve an answer on the petitioner or the petitioner's representative, if any, . . .

"(2) The answer as drawn shall contain numbered paragraphs corresponding to the petition and shall fully and completely advise the petitioner and the division of tax appeals of the defense. It shall contain:

"(i) a specific admission or denial of each statement contained in the petition; however, if the division of taxation is without knowledge or information sufficient to form a belief as to the truth of a statement, then the answer shall so state, and such statements shall have the effect of a denial;

"(ii) 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; and

"(iii) the relief sought by the division of taxation."

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. Even if the Division were to fail to answer a petition, it would not be defaulted. As noted earlier, the Division, in its answer, specifically denied all of the "facts" asserted by petitioner in its petition and made the Division's position clear that it was relying on the decision of the Tax Appeals Tribunal in Matter of Wizard Petroleum (*supra*) as the basis for its Notice of Cancellation of petitioner's license because, simply put, petitioner's officers and major owners were the officers and major owners of a corrupt enterprise, Wizard Petroleum.

As noted above, the Division attached to its answer all of the documents it intended to introduce at the hearing in this matter. 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.

There is also no 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.

As to whether the Division was required to establish an evidentiary foundation for the documents attached to its answer and offered as evidence at hearing, the State Administrative Procedure Act § 306(2) provides as follows:

"[a]ll evidence, including records and documents in the possession of the agency of which it desires to avail itself, shall be offered and made a part of the record, and all such documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference."

Pursuant to this provision, 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. 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 also reject petitioner's claim that it was not fully apprised of the nature of the charges against it or able to adequately respond to those charges. This claim by petitioner relates to the additional charges initially raised in the Division's answer. With regard to the additional charges, later clarified by Mr. Matthews' letter of December 4, 1995, regarding Wizard's continuing unpaid tax liability and failure to file tax returns, the answer and the subsequent letter provided petitioner with the required "notice." That notice gave petitioner more than enough time to review and prepare a response to these additional charges at hearing. Since Ms. Jarwood and Mr. Wisdom were major owners and officers of both Wizard and Terminelle, it can be reasonably assumed that they had knowledge of whether they had paid Wizard's taxes and filed Wizard's

previously unfiled returns. We are not compelled by the suggestion that petitioner would need additional preparation time to respond to such charges. To rebut this charge, Terminelle merely had to show that the subject taxes had been paid, that the returns had been filed and when they were filed. No such evidence was offered by petitioner. Under the facts of this case we conclude that petitioner had adequate notice of the charges against it and sufficient time to prepare and respond.

We now turn to whether sufficient grounds exist to support the Notice of Cancellation of petitioner's license as a terminal operator under Article 12-A of the Tax Law. It is initially noted that petitioner has the burden of proving that the grounds stated by the Division do not support its Notice of Cancellation of its license (see, Matter of 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 license as follows: the decision of the Tribunal in Wizard Petroleum established that Wizard was a corrupt enterprise engaging in fraudulent conduct and, since petitioner's officers and major owners were the officers and major owners of Wizard, petitioner's license should be cancelled. In Wizard Petroleum, the Tribunal sustained 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.<sup>13</sup>

Petitioner has introduced no evidence to challenge the merits or substance of the Division's grounds for proposing the cancellation of its license. Rather, petitioner relies on the argument that the five-year statute of limitations provided in Tax Law § 283-b(4) bars the Division from cancelling the registration of Terminelle based upon corrupt acts by Wizard 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. A review of the statutory language specifying the five-year statute of limitations reveals:

"[a] license may also be cancelled . . . if the commissioner determines that a licensee or an officer . . . of the licensee who as such officer . . . is under a duty to act for such licensee or any shareholder directly . . . owning more than ten percent of the number of shares of stock of the licensee . . . 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 § 283-b[4]).

The Administrative Law Judge concluded from this language that petitioner was correct that this five-year statute of limitations bars the Division from basing the proposed cancellation of its registration on any of the five grounds specified in the amended Notice of Cancellation as detailed above. The Administrative Law Judge concluded that the Division has incorrectly cited to Tax Law former § 283(6)(a) as providing an exception to the five-year statute of limitations "in the case of acts involving falsity or fraud." The Administrative Law Judge concluded no such exception exists in the statute.

We reverse the Administrative Law Judge on this issue. Tax Law § 283(6)(a) provides, in pertinent part, as follows:

---

<sup>13</sup>At that time.

"[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).

Tax Law § 283-b(6) provides that section 283(6), inter alia, shall be applicable to terminal operator registrations and cancellations. We conclude that, in light of our holding in Wizard Petroleum that it had engaged in fraud, and in view of Ms. Jarwood's and Mr. Wisdom's participation as owners and officers of both Wizard and Terminelle, the grounds for cancellation of petitioner's terminal operator's license asserted by the Notice of Cancellation could properly be asserted at any time (Tax Law § 283[6]), and the five-year statute of limitations is no bar to the charges here.

The Administrative Law Judge also concluded below that the Division had offered proof that the assessment of over \$10,000,000.00 against Wizard and sustained by the Tribunal remains unpaid. In a recent decision (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. We note that in Shore Line the amount of unpaid tax was a mere \$2,000.00 while, in this matter, the unpaid assessment against the related corporation, Wizard, is over \$10,000,000.00. Consequently, the additional grounds for proposing the cancellation of petitioner's terminal operator's license as set forth in the Division's answer and Mr. Matthews' letter of December 4, 1995 also provide an adequate basis for the cancellation of petitioner's registration.

We note that petitioner introduced no evidence to controvert the documents introduced by the Division that Trevor Wisdom and Ashley Jarwood were its corporate officers and owners of its stock. Nor has petitioner offered any proof that Wizard's tax obligations have been paid or that its back returns have been filed. In contrast, the Division has introduced into the record substantial documentation to establish that Trevor Wisdom and Ashley Jarwood were officers and major owners of Wizard Petroleum. Moreover, in Matter of Jarwood (supra), we held that

Ashley Jarwood was an owner and "responsible officer" of Wizard Petroleum. Consequently, Ms. Jarwood was collaterally estopped from denying that she was 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 (*supra*), on the other hand, we held that Mr. Wisdom's petition was untimely and upheld the assessment against Mr. Wisdom as a responsible officer of Wizard without actually addressing the merits of his case. Consequently, petitioner was not collaterally estopped from offering evidence to rebut Mr. Wisdom's status as owner and responsible officer. Nevertheless, no attempt was made to introduce evidence to rebut Mr. Wisdom's or Ms. Jarwood's roles as responsible officers and major shareholders of petitioner and of Wizard. Nor did petitioner proffer evidence on the issues concerning the corrupt nature of Wizard. Accordingly, we conclude that Wizard's outstanding multi-million dollar liability for unpaid taxes is a valid additional basis for the proposed cancellation of petitioner's license because both Wizard 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).

Except as modified above, the determination of the Administrative Law Judge is affirmed. We have reviewed and considered petitioner's remaining contentions and reject them for the reasons stated in the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Terminelle Corporation 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;
  
4. The petition of Terminelle Corporation is denied; and



5. The amended Proposed Cancellation of Terminal Operator License under Article 12-A of the Tax Law, dated June 28, 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