

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
STANDARD PETROLEUM CORP.	:	DECISION
D/B/A A.J.S. STANDARD	:	DTA NO. 815413
	:	
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 Standard Petroleum Corp. d/b/a A.J.S. Standard, Attn: Louis Capossela, President, 128-07 18th Avenue, College Point, New York 11356, filed an exception to the determination of the Administrative Law Judge issued on May 7, 1998. Petitioner appeared by Seiff & Kretz, Esqs. (Charles D. Abercrombie, Esq., of counsel). The Division of Taxation appeared by Terrence M. Boyle, Esq. (John E. Matthews, Esq., of counsel).

Petitioner filed a brief in support of its exception. Oral argument, at petitioner's request, was heard on November 12, 1998 in Troy, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether sufficient grounds exist to support the proposed cancellation of petitioner's registration as a retailer of heating oil only and as a residual petroleum products business.

FINDINGS OF FACT

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

Petitioner, Standard Petroleum Corp. d/b/a A.J.S. Standard (“Standard Petroleum”), is a retailer of heating oil based in the College Point section of the borough of Queens in New York City. Petitioner has approximately 15 employees, including truck drivers, burner service repair people and office workers. With annual heating oil sales of approximately \$3,000,000.00,¹ petitioner services customers in an unspecified area of Long Island. According to the testimony of Louis S. Capossela,² petitioner’s president and sole shareholder, 90% of its heating oil sales is residential and 10% commercial.

Louis S. Capossela purchased petitioner or petitioner’s assets in 1980 from three individuals, Sidney Sklar, Frank Rizzo and Vincent Rizzo, who, according to the testimony of Mr. Capossela, operated a company that had absorbed other companies including one named Allen James Savon. Petitioner does business under the name of A.J.S. Standard whose initials represent an abbreviation of Allen James Savon.

The Division of Taxation (“Division”) issued against petitioner a Notice of Proposed Cancellation of Your Registrations as a Retailer of Heating Oil Only and as a Residual Petroleum Products Business Under Articles 12-A and 13-A of the Tax Law dated January 5, 1996. The

¹ Petitioner’s financial statements and accountant’s compilation report for the nine months ended March 31, 1997 and 1996 include statements of income and retained earnings which show oil sales for the nine months ended March 31, 1997 of \$2,811,015.00 and for 1996 of \$2,811,387.00. Petitioner’s application for registration as a retailer of heating oil only shows that for 1985, 1986, and 1987, petitioner “sold or used” the following number of gallons of diesel motor fuel including heating oil: 3,500,000, 3,500,000 and 4,100,000, respectively.

²Mr. Capossela’s surname has been spelled incorrectly in the transcript and in the Division’s documents as “Caposella”.

notice stated four grounds for canceling the registrations of Standard Petroleum Corp./A.J.S. All four grounds relate to failures to comply with the Tax Law by Shore Line Oil Co., Inc. and by Westchester Hudson Petroleum Corp., two companies also owned by Louis S. Capossela, as follows:

1. Louis Caposella [sic] is the President and 100% owner of the stock of Shore Line Oil Co., Inc., a corporation which has failed to comply with Articles 12-A, 13-A and/or 28 of the Tax Law as follows (Tax Law Sec. 283.4):
 - a. Shore Line Oil Co., Inc. has finally determined liabilities which have not been paid in full.
 - b. Shore Line Oil Co., Inc. has continued to operate as a Diesel Motor Fuel Distributor after the cancellation of its registration.
 - c. Shore Line Oil Co., Inc. has continued to operate as a Residual Petroleum Product Business after the cancellation of its registration.
2. Louis Caposella [sic] was President and 100% owner of the stock of Westchester Hudson Petroleum Corp. at the time that Westchester Hudson Petroleum Corp. incurred liabilities for taxes under Articles 12-A, 13-A and/or 28 of the Tax Law which have been finally determined and remain unpaid (Tax Law Sec. 283.4)

Shore Line Oil Co., Inc. ("Shore Line") was formed in 1948 by Louis S. Capossela's father, Louis Capossela, Sr. Upon his father's death in 1969, Mr. Capossela, who had worked for Shore Line since he was a teenager, took over Shore Line and has "been running it almost thirty years now" (tr., p. 95). Mr. Capossela is Shore Line's president and sole shareholder.

Until the 1980s, Shore Line primarily sold diesel fuel as heating oil for residences and commercial establishments. Sometime in the 1980s, it entered the gasoline sales business as well. It also began to sell diesel fuel as diesel motor fuel not just as heating oil. For an approximately four-year period, running from 1989 to July 1993, Shore Line fell behind in its payment of taxes under Articles 12-A, 13-A and 28 of the Tax Law. It entered into a deferred

payment agreement with the Division in order to pay its overdue taxes. Shore Line paid on this agreement until early 1997, about a year after the Division's issuance of the notice of proposed cancellation described above, when it paid off in full the taxes remaining due. In order to satisfy its overdue taxes, Shore Line sold off some of its assets to its competitors in 1992 and 1993, namely two business routes, i.e., a list of its heating oil customers in the Bronx, to Atlas Fuel and a list of its heating oil customers in upper Westchester, north of interstate 287, to Lewis Fuel. Then in 1997, Shore Line sold³ its office and garage in New Rochelle (Westchester County) and paid in full taxes owed to New York State. Consequently, as of the date of the hearing in this matter, Shore Line no longer, in the words of the notice of proposed cancellation described above, "has finally determined liabilities which have not been paid in full." Therefore, only three of the four grounds for canceling petitioner's registrations remain at issue. The Division has not asserted Shore Line's failure to *timely* pay its taxes as a basis for canceling the registrations.

The Division has also issued approximately 25 notices of deficiency and determination over the past nine years against petitioner, but it has not asserted petitioner's failure to timely pay its taxes as a basis for canceling petitioner's registrations. None of those approximately 25 assessments are currently open, and Mr. Capossela, to the contrary, testified that petitioner, in contrast to Shore Line, always paid its taxes on time. The record does not show the basis for the Division's issuance of the 25 statutory notices against petitioner.

Petitioner does not deny that Shore Line continued to operate as a diesel motor fuel distributor after the cancellation of its registration pursuant to a notice of cancellation dated July 29, 1993, which Shore Line did not protest. Rather, Shore Line surrendered its registration

³Shore Line now rents space from an unrelated landlord at \$5,500.00 per month.

to the Division on or about July 29, 1993. Consequently, Shore Line was not authorized after July 29, 1993 to sell heating oil or diesel motor fuel in New York State since its registration as a distributor of diesel motor fuel had been canceled. Nonetheless, Shore Line continued to make diesel motor fuel sales until January 1995 and continued to make heating oil sales to date.

Heating oil and diesel motor fuel are the same product. Mr. Capossela noted in his testimony:

What they have done now is they have dyed home heating fuel red and left diesel fuel white. If an inspector, auditor, took a sample from somebody's vehicle, and it was red, that means someone is fooling around putting heating oil into diesel tanks (tr. p. 145).

In short, heating oil and diesel motor fuel are distinguished by their use and tax status more than by their physical properties.

On or about September 13, 1994, more than a year after its registration as a distributor of diesel motor fuel had been canceled, Shore Line applied for a registration as a retailer of heating oil only. In response, the Division issued a letter dated September 21, 1994 acknowledging receipt of Shore Line's application and also notifying Shore Line that it was not allowed to conduct any unauthorized business before its application was approved. By a letter dated January 9, 1995, Mr. Capossela was again notified by the Division that Shore Line was not allowed to sell diesel motor fuel including heating oil within New York State without a registration after the Division became aware that it was making such sales. On May 22, 1995, the Division's Tax Enforcement Unit stopped a Shore Line truck and issued an appearance ticket to the driver, Louis S. Capossela, III. The younger Capossela was charged with two offenses: (1)

failure to produce a uniform manifest contrary to Tax Law § 1812(e) and (2) the retail sale of home heating oil without being registered contrary to Tax Law § 1812-1(b).

Shore Line contends that by approving a deferred payment agreement dated January 23, 1995, the Division acquiesced in Shore Line's continued operation and reaped benefits from such continued operation by receiving payment of overdue taxes. Further, Shore Line operated its heating oil business openly and many individuals in the Division were aware of its continued operation even after the denial of its application for registration as a retailer of heating oil only.⁴

Louis S. Capossela was also the president and sole shareholder of Westchester Hudson Petroleum Corporation ("Westchester Hudson"), now a defunct business. In the 1980s, Westchester Hudson, as operated by Mr. Capossela, was a wholesaler of heating oil and gasoline, with annual sales of approximately \$20 million. Westchester Hudson, which operated two fuel terminals, had only four employees. Mr. Capossela described its operation as follows: "We would receive the product by boat. The boat would pump it into our tanks, and then our men in the terminal would help disperse it into trucks that came in to load" (tr., p. 139).

Westchester Hudson ceased gasoline sales in December 1986 and all operations in June 1989. However, according to the records of assessments maintained by the Division on a computer system called the Case and Resource Tracking System ("CARTS"), an amount in excess of \$500,000.00⁵ in tax, interest and penalty remains due from Westchester Hudson. At the hearing in this matter, Peter Spitzer, the head of the Division's registration and bond unit,

⁴ By its decision in *Matter of Shore Line Oil Co.* (Tax Appeals Tribunal, February 15, 1996), the Tribunal sustained the Division's notice of proposed refusal to register Shore Line as a retailer of heating oil only dated January 20, 1995.

⁵ A case contact dated December 22, 1995 shows a warrant docketed by the Division against Westchester Hudson in the amount of \$448,561.30.

reviewed a summary of case activities with reference to Westchester Hudson from the CARTS system, consisting of 4 pages, as well as details concerning such summary, consisting of 63 pages. The 4 summary pages list 32 specific contact dates, and the details concerning such contact dates are included on the 63 back-up pages. According to Mr. Spitzer, most of the contacts were done by a compliance agent in the conduct of duties to collect on outstanding liabilities of Westchester Hudson. For example, the first and last dates shown on the summary pages are November 15, 1990 and April 22, 1997, respectively. There are two pages showing details concerning the first contact date of November 15, 1990, and two pages showing details concerning the last contact date of April 22, 1997. The two pages showing details concerning November 15, 1990 indicate “a regular collection letter mailed” and a “balance due” of \$32,806.13. The two pages showing details concerning April 22, 1997 indicate in the space for “contact descrip” that “bankruptcy/special procedures unit-see comments.” The “comments” note “rec’d ck for \$921.00, applied to asmts L004693223 (\$.88) and L004693227 (\$920.12), tax only.”

A contact dated May 27, 1992 shows that a Division employee spoke with Mr. Capossela who advised that Westchester Hudson had been dormant since 1988 or 1989 and that Westchester Hudson had no assets to apply to outstanding liabilities. There do not appear to be any other contacts that note a specific communication with Mr. Capossela. Other contacts of special note include the following:

Date	Contact
May 27, 1992	District office manager recommends closing case because corporation has no assets.

August 27, 1992	Supervisor comments that a form was prepared in order to transfer the case to a status of uncollectable because of no assets.
April 19, 1993	Tax enforcement received payment for restitution in the amount of \$1,074.50.
July 8, 1993	Documents sent to Law Bureau with regard to a conciliation and mediation services conference.
July 11, 1995	Bankruptcy-special procedure unit received payment in the amount of \$2,149.00 and applied to a particular assessment.
January 24, 1996	Close case, no responsible person assessment because too old.
January 30, 1996	Supervisor recommends reclose case because “corp killed” and “nothing has changed”.
February 13, 1996	Received check for \$1,074.50 and applied to the collection case.
June 4, 1996	Received check for \$2,149.00 and applied to a tax only assessment.

By two notices of withdrawal of petition and discontinuance of proceeding, each dated February 3, 1995, Westchester Hudson Petroleum Corp. withdrew its petitions filed with the Division of Tax Appeals, with prejudice, that had contested statutory notices issued by the Division under Article 12-A and Article 13-A, respectively.

Louis S. Capossela asserts that petitioner has been operated independently of his other entities. However, petitioner’s business is the same type of retail heating oil business as Shore Line’s, although Shore Line’s operation, with 25 employees as compared to petitioner’s 15 employees, is somewhat larger. Further, Mr. Capossela noted that the only difference between the operations is one of geography, and even so, he noted:

THE WITNESS: We are only fifteen minutes apart, so I spend half days here and there, back and forth. I’m always available by telephone for decisions to be made right away.

JUDGE BARRIE: It's a flexible arrangement, though, you take a phone call on Shore Line's business, and the next phone call could be on Standard's business?

THE WITNESS: That is correct. Wearing two hats at once. (Tr., pp. 132-133.)

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

Tax Law § 283(4), the Administrative Law Judge noted, provides that registration as a retailer of heating oil only and as a residual petroleum product business may be canceled or suspended by the Division for certain enumerated reasons involving any of the following individuals or entities: (1) the registrant, i.e., petitioner; (2) an officer, director, shareholder, employee or partner of petitioner under a duty to act for petitioner; or (3) a shareholder of petitioner directly or indirectly owning more than 10 percent of petitioner's stock entitling such shareholder to voting rights in the corporation. As relevant here, Tax Law § 283(4) prescribes the circumstances which may warrant the cancellation of a registration under Tax Law § 282-a(2) and § 302(b) to include the following:

(1) the failure "to comply with any of the provisions of [article 12-A] or article twenty-eight of this chapter 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 by the department of taxation and finance or by the commissioner," and

(2) where petitioner or an officer, partner or greater than 10 percent shareholder of petitioner

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 (where such other person is a corporation) entitling the holder thereof to vote . . . at the time such other person committed any of the acts or omissions which are . . . specified in this subdivision within the preceding five years.

The Administrative Law Judge concluded that the Division had the authority under this second provision to base the cancellation of petitioner's registrations on the failures of Westchester Hudson and Shore Line to comply with the provisions of Article 12-A, since Mr. Capossela was petitioner's president and 100 percent shareholder as well as the president and 100 percent shareholder of Westchester Hudson and Shore Line.

The Administrative Law Judge stated that Westchester Hudson's outstanding tax liability is a sufficient basis for the proposed cancellation of petitioner's registration because both Westchester Hudson and petitioner were owned and operated by Mr. Capossela. The Administrative Law Judge stated that the five-year statute of limitations does not apply, since the failure to pay tax is an ongoing act or omission which continues each day that the tax remains unpaid (*see, Matter of Janus Petroleum*, Tax Appeals Tribunal, April 24, 1997). Further, the Administrative Law Judge noted, we rejected a similar laches argument to the one raised here in *Matter of Shore Line Oil Co. (supra)*.

The Administrative Law Judge concluded that petitioner has not proved that it suffered any prejudice to support its laches argument. Rather, the Administrative Law Judge stated, petitioner has benefitted by the Division's allowing it to maintain its registrations and continuing to operate. The Administrative Law Judge pointed out that the record⁶ does not disclose any substantial

⁶Finding of Fact "1" and footnote "1" of the Administrative Law Judge's determination.

increase in petitioner's operation over the years. Nor did petitioner introduce any concrete evidence concerning any substantial investments in its operation.

In addition, the Administrative Law Judge concluded that Shore Line's unlicensed operation provides an independent basis for the proposed cancellation of petitioner's registrations. The Administrative Law Judge rejected petitioner's argument that the Division acquiesced in Shore Line's unlicensed operation as not supported by the record. The Administrative Law Judge cited the Division's refusal to register Shore Line, which was subsequently sustained by the Tax Appeals Tribunal in *Matter of Shore Line Oil Co. (supra)* as support for the conclusion that the Division did not approve of Shore Line's unlicensed operation. Further, the Administrative Law Judge stated, the fact that the Division entered into a deferred payment agreement with Shore Line does not constitute acquiescence in the company's unlicensed operation, but rather, reflects a reasonable step to ensure collection of overdue taxes. With respect to the doctrine of estoppel, the Administrative Law Judge noted that it does not apply to government acts unless exceptional facts require the application of the doctrine to avoid manifest injustice (*Matter of Harry's Exxon Serv. Station*, Tax Appeals Tribunal, December 6, 1988). The Administrative Law Judge concluded that neither such exceptional facts nor manifest injustice are present here (*see, Matter of Shore Line Oil Co., supra* [wherein the Tribunal also rejected Shore Line's similar estoppel argument]).

Although the Administrative Law Judge felt it necessary to weigh certain mitigating factors against the justifications for canceling petitioner's registrations detailed above, he concluded petitioner had failed to sustain its burden of proving that the proposed cancellation was in error citing to *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 Administrative Law Judge concluded that the failures of Shore Line and Westchester Hudson as noted above are sufficient to justify the cancellation of petitioner's registrations even after consideration of petitioner's mitigating factors.

ARGUMENTS ON EXCEPTION

Petitioner takes exception to the conclusion of the Administrative Law Judge that held that Westchester Hudson's outstanding tax liability is a sufficient reason to cancel petitioner's registration. Petitioner emphasizes that no fraud was involved here and the Administrative Law Judge failed to give sufficient weight to factors mitigating against cancellation of its license.

Petitioner also disagrees with the Administrative Law Judge's conclusion which rejected petitioner's laches claim. Petitioner maintains that the Westchester Hudson case had been dormant for many years. Therefore, laches should bar the Division from canceling Standard's registrations based upon Westchester Hudson's outstanding tax liability. According to petitioner, the Division delayed raising the issue of Westchester Hudson's tax liability against it. Petitioner urges, contrary to the Administrative Law Judge's conclusion, that it has suffered actual prejudice as a result of the Division's permitting it to remain in business and continue operations.

Petitioner also takes exception to the conclusion that the Division is not estopped from canceling petitioner's registration. Petitioner argues that based on the passage of time, it was reasonable for petitioner to conclude that its registrations would not be canceled as a result of Shore Line's unlicensed operation. Petitioner contends, as it did below, that the Division should

be estopped from using Shore Line's continued operation as a basis for canceling its registrations, because the Department, by its actions in accepting tax payments, in fact sent a message to Shore Line that it could continue to operate. Petitioner states, presumably as a mitigating factor, that Shore Line was advised by counsel that it could continue to operate even though it was no longer licensed (*see*, Oral Argument Tr., p. 5). Petitioner claims that Mr. Capossela relied on this erroneous advice. Petitioner maintains that it would be a manifest injustice to permit the Division to revoke its registrations having accepted Shore Line's operation and its tax revenue.

Petitioner contends that it and Mr. Capossela are worthy of collecting and paying taxes on behalf of and to the State of New York. Petitioner emphasizes that Louis Capossela has never hidden behind corporate names. Shore Line and Westchester Hudson, it is urged, have operated openly and separately with no effort to conceal his involvement. Further, Shore Line has paid off its deferred payment agreements. The outstanding liabilities of Westchester Hudson, petitioner states, are the result of an accountant's error, discovered during an audit.

OPINION

We affirm the determination of the Administrative Law Judge.

Petitioner offers as mitigating factors, *inter alia*, the fact that Shore Line's unlicensed operation was due to bad legal advice. Petitioner attributes the outstanding tax liability of Westchester Hudson amounting to approximately \$500,000.00 to an accountant's error. We do not regard these "errors" as mitigating factors. A licensee cannot avoid the consequences of its actions by merely claiming it was poorly advised.

In particular, we note that Shore Line's registration was canceled July 29, 1993, yet Shore Line continued to sell diesel motor fuel until January, 1995. That means that at the very time Shore Line reapplied to the Division for re-registration on September 13, 1994, it was engaged in unlawful unlicensed operations. Shore Line's unlicensed operation is a sufficient basis by itself for the proposed cancellation of petitioner's registrations. We find no merit to petitioner's estoppel claim that the Division's acceptance of tax payments constitutes acquiescence in Shore Line's unlicensed operation. Further, we do not find that any special commendation is due petitioner for making tax payments that are due the State of New York. Nor has petitioner demonstrated actual prejudice to its position. Petitioner's argument that it has been prejudiced by the Division's permitting it to operate and make a profit up to this point is, at best, incongruous. Petitioner has benefitted by the Division's allowing it to maintain its registrations and operate legally for more years than wisdom would dictate.

Further, we agree with the Administrative Law Judge that Westchester Hudson's outstanding tax liability of more than \$500,000.00 is, by itself, a sufficient basis for the proposed cancellation of petitioner's registrations (*Matter of Shaw v. Tax Appeals Tribunal*, 203 AD2d 720, 610 NYS2d 971, *lv denied* 84 NY2d 803, 617 NYS2d 137). The record establishes that there was not undue delay, supporting a laches claim, in asserting Westchester Hudson's outstanding tax liability as a basis for canceling petitioner's registrations. Westchester Hudson's tax liability could not be asserted as a grounds for cancellation of petitioner's registrations until that tax liability became fixed and final, which did not occur until February 3, 1995.⁷ The Division asserted Westchester Hudson's newly fixed and final liabilities as a basis for its refusal

⁷The date upon which the petitions of Westchester Hudson were withdrawn.

to register Shore Line (in a related proceeding) on March 3, 1995. Thus, sufficient grounds exist to support the proposed cancellation of petitioner's registration.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Standard Petroleum Corp. d/b/a A.J.S. Standard is denied;
2. The determination of the Administrative Law Judge is sustained;
3. The petition of Standard Petroleum Corp. d/b/a A.J.S. Standard is denied; and
4. The Notice of Proposed Cancellation of Your Registrations as a Retailer of Heating Oil

Only and as a Residual Petroleum Products Business dated January 5, 1996 and issued to Standard Petroleum Corp. d/b/a A.J.S. Standard, is sustained.

DATED: Troy, New York
April 29, 1999

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.

Joseph W. Pinto, Jr.
Commissioner