

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
TREVOR WISDOM	:	DECISION
	:	DTA NO. 815553
for Revision of a Determination or for Refund of Motor	:	
Fuel Tax under Article 12-A of the Tax Law for the Period	:	
June 1, 1986 through July 31, 1986.	:	

Petitioner Trevor Wisdom, 875 Cedar Swamp Road, Old Brookville, New York 11545, filed an exception to the determination of the Administrative Law Judge issued on July 10, 1997. 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).

Petitioner filed a brief in support of his exception and a reply brief. The Division of Taxation filed a brief in opposition. Oral argument, at petitioner's request, was heard on February 11, 1998 in New York, New York.

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

ISSUE

Whether the Administrative Law Judge properly granted summary determination concluding petitioner was a responsible officer of Wizard Petroleum, Inc., and liable for penalties equal in amount to the penalty and interest due from the corporation.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and make an additional finding of fact. The Administrative Law Judge's findings of fact and the additional finding of fact are set forth below.

We make the following additional finding of fact.

Pursuant to 20 NYCRR 3000.9(a)(1)(i) and 3000.9(b), the Division of Taxation (hereinafter the "Division") moved the Administrative Law Judge to dismiss the petition or, in the alternative, for summary determination based upon documentary evidence. The motion was supported by the affirmation of the Division's attorney with attached exhibits. Petitioner's attorney filed an affidavit arguing in opposition to the motion below, but did not submit any evidence by way of attachments or exhibits.

Wizard Petroleum, Inc. ("Wizard Petroleum") was a distributor of motor fuels, which filed untimely monthly motor fuel tax returns for June and July 1986. These late-filed returns reported 1,696,685 gallons and 4,631,782 gallons of motor fuel subject to tax for June 1986 and July 1986, respectively. After taking credit for certain specified sales, Wizard Petroleum reported tax due of \$135,784.71 and \$368,183.99 on 1,653,652 gallons and 4,591,574 gallons of motor fuel for June 1986 and July 1986, respectively. The Division received these returns, according to an in-date stamp, on September 8, 1986. Photocopies of three checks of Wizard Petroleum each dated September 24, 1987, in the amounts of \$135,784.71, \$200,000.00, and \$168,183.99, show late payment of the taxes reported due approximately two weeks after the late filing of the tax returns. The sum of the two checks in the amounts of \$200,000.00 and \$168,183.00 equals the \$368,183.99 shown due on the return for July 1986. In addition, each check was signed by petitioner, Trevor Wisdom.

The Division issued a Notice of Determination of Tax Due under Motor Fuel Tax Law dated November 10, 1987 against Wizard Petroleum asserting penalty and interest due of \$117,270.65 and \$40,947.90, respectively, for a total amount due of \$158,218.55 for the following reason:

"Since additional tax liability was paid per late filing of the returns, this assessment represents penalty and interest due on said returns."

A corresponding Notice of Determination also dated November 10, 1987 was issued against petitioner, Trevor Wisdom, as officer of Wizard Petroleum.

An assessment history included in the administrative record on this motion shows that, as of February 24, 1997, although the penalty amount due of \$117,270.65 remains the same, interest due has increased from the original assessment of \$40,947.90 to \$91,298.74.

In its answer, the Division made the affirmative statement that petitioner was an officer of Wizard Petroleum under a duty to act for the corporation, and that therefore, pursuant to Tax Law § 289-b, he was a person liable for a penalty equal in amount to any tax, penalty and interest due from Wizard Petroleum. In support of this affirmative statement, the Division included in the administrative record on this motion, photocopies of 11 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 which reported that petitioner was (i) the president of Wizard Petroleum, and (ii) owned one-third of its stock;

(2) 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 petitioner;

(3) 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 petitioner for Wizard Petroleum's sales tax prepayment on motor fuel for December 1985 and March 1986, respectively;

(4) An Application for Motor Fuel Tax and Sales and Use Tax Reregistration of Wizard Corporation¹ date stamped received by the Division's Miscellaneous Tax Bureau on June 16, 1987, which was signed by petitioner and shows Mr. Wisdom as 50% owner and vice-president of Wizard Corporation. It is observed that no individual is shown as president of Wizard Corporation with only two officers listed, petitioner as vice-president and Ashley Jarwood as secretary. Petitioner's duties were described as "operations";

(5) A "Secretary's Certificate Respecting Wizard Corp. dated as of July 23, 1990" of Ashley Jarwood indicating that she and petitioner 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";

(6) An affidavit by petitioner 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." Petitioner also swore that Mr. Bernardo "resigned and divested himself of his stock in Wizard Petroleum, Inc. on May 19, 1986";

¹This 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 noted above.

(7) Two monthly motor fuel tax returns for May 1987 and June 1987 showing tax due of \$487,046.40 on 6,088,080 gallons and \$399,822.90 on 4,995,553 gallons of motor fuel, respectively, which were signed by petitioner on behalf of Wizard Petroleum in his capacity as president of the corporation. Petitioner's signature is dated June 11, 1987 and July 16, 1987 on the May 1987 and June 1987 returns, respectively;

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

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

(10) A New York corporation franchise tax report of Wizard Corporation dated February 11, 1988 for the taxable period beginning June 1, 1986 and ending May 31, 1987 which was signed by Trevor Wisdom in his capacity as president of the corporation. It is observed that this tax return references a Federal employer identification number of 112714701 which is also Wizard Petroleum's identification number;

(11) A United States corporation income tax return of Wizard Corporation for 1987 signed by petitioner in his capacity as vice-president of the corporation. Petitioner's signature is dated February 8, 1989. Once again, it is observed that the Federal employer identification number shown for Wizard Corporation is the same as Wizard Petroleum's identification number.

Petitioner has not offered any evidentiary proof to support his attorney's unsubstantiated allegations that petitioner was not under a duty to act for Wizard Petroleum during the period at

issue and that he merely held a corporate office. Not even an affidavit of petitioner, supportive of his attorney's allegations, was submitted for review.

By a letter dated April 30, 1997, the Division requested that, in reviewing the motion at hand, consideration should be given to the recent decisions by the Tax Appeals Tribunal in *Matter of Janus Petroleum* (Tax Appeals Tribunal, April 24, 1997) and *Matter of Terminelle Corp.* (Tax Appeals Tribunal, April 24, 1997) wherein the Tribunal found that Mr. Wisdom was an officer and major owner of Wizard Petroleum. The period at issue here, the months of June and July 1986, were included in the period covered by the Tribunal's finding that Mr. Wisdom was an officer and major owner of Wizard Petroleum. The Tribunal cited an open assessment against Wizard Petroleum for the period June 1, 1986 to July 31, 1987 totaling \$14,155,848.46 consisting of tax due of \$4,204,879.96, penalty due of \$2,102,439.98 and interest due of \$7,848,528.52. It is further observed that the Tribunal in these two decisions held that Janus Petroleum's diesel motor fuel registration should be canceled and Terminelle Corporation's terminal operator license should be canceled because the two operating officers of these corporations, which included petitioner, were the operating officers of Wizard Corporation, "a corrupt enterprise" which engaged in fraudulent conduct.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

At the outset, the Administrative Law Judge stated that an officer of a corporation who is under a duty to act for such corporation, which is a motor fuel distributor, is personally liable for penalties and interest that have been imposed against the corporation under Tax Law former § 289-b (*see*, Tax Law former § 289-b[2]).

The Administrative Law Judge noted that petitioner in his capacity as a corporate officer of Wizard Petroleum untimely paid, with checks dated September 24, 1987, motor fuel tax that was due from Wizard Petroleum for the months of June and July 1986. The Division seeks to collect penalty and interest for such late payment from petitioner as an officer of Wizard Petroleum. The Division offered in support of its motion numerous documents to establish that petitioner was an officer of Wizard Petroleum responsible for the corporation's operations. In particular, the Administrative Law Judge observed that petitioner signed the checks in payment of the taxes at issue, as well as checks for tax liabilities of Wizard Petroleum for periods before and after the months at issue. The Administrative Law Judge also found, as emphasized by the Division, that petitioner was an officer of Wizard Petroleum and responsible for the operations of the corporation during the period June 1, 1986 to July 31, 1987, which includes the two months at issue herein, in *Matter of Janus Petroleum (supra)* and *Matter of Terminelle Corp. (supra)*.

In response to the Division's motion, petitioner offered only the affidavit of Mr. Berkowitz, his attorney, which the Administrative Law Judge concluded had no probative value (*see, Di Sabato v. Soffes*, 9 AD2d 297, 193 NYS2d 184, *revd on other grounds* 11 AD2d 981, 207 NYS2d 991; Siegel, NY Prac § 281, at 410 [2d ed]). The Administrative Law Judge noted that petitioner himself did not offer his own affidavit to show that there is a material and triable issue of fact. Consequently, the Administrative Law Judge concluded the facts asserted by the Division, which had not been controverted by petitioner, are properly deemed admitted (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 369 NYS2d 667). The Administrative Law Judge then granted the Division's motion for summary determination (*cf., Matter of McNamara*,

Tax Appeals Tribunal, January 30, 1997), denied the petition of Trevor Wisdom and sustained the Notice of Determination dated November 10, 1987.

ARGUMENTS ON EXCEPTION

Petitioner takes exception to all of the conclusions of the Administrative Law Judge. In particular, petitioner argues that the motion for summary determination should not have been granted, since there are material and triable issues of fact in dispute. Petitioner urges further that the Administrative Law Judge, by referencing *Matter of Janus Petroleum (supra)* and *Matter of Terminelle Corp. (supra)*, improperly based his decision on collateral estoppel depriving him of a hearing on the issue of whether he is a responsible officer. Petitioner argues he is entitled to a full hearing.

Petitioner also argues that he was not an officer of Wizard Petroleum under a duty to act for the corporation. Further, he states, that the penalties and interest assessed against Wizard Petroleum have not been proven by the Division to be unpaid.

Finally, at oral argument, petitioner argued that even if he is found to be an officer under a duty to act for the corporation, he is not liable for the penalties and interest. His argument here is that there is no requirement under Tax Law former § 289-b(2) that the subject tax be “timely” paid, only that it be paid. In this case, Wizard paid the underlying taxes even though payment was over a year late. Thus, he argues, under Tax Law former § 289-b(2), an officer can only be held liable for penalties and interest if the tax has not been paid by the corporation.

OPINION

We will first address the issue of whether the Administrative Law Judge properly granted summary determination.

“To obtain summary determination it is necessary that the movant establish his cause of action or defense ‘sufficiently to warrant the court as a matter of law in directing judgment’ in his favor (CPLR 3212, subd. [b]), and he must do so by tender of evidentiary proof in admissible form” (*Friends of Animals v. Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790, 791-792; *see also*, 20 NYCRR 3000.9[b]). Generally, with exceptions not relevant here, to defeat a motion for summary judgment, the opponent must produce evidence in admissible form sufficient to raise an issue of fact requiring a trial (CPLR 3212[b]). Unsubstantiated allegations or assertions are insufficient to raise an issue of fact (*Matter of Alvord & Swift v. Muller Constr. Co.*, 46 NY2d 276, 413 NYS2d 309), and the bare affirmation by counsel is without evidentiary value in this regard (*Columbia Ribbon & Carbon Mfg. Co. v. A-I-A Corp.*, 42 NY2d 496, 398 NYS2d 1004). However, an affidavit or affirmation of an attorney, even if he has no personal knowledge of the facts, may serve as the vehicle for the submission of acceptable exhibits or attachments which do provide the necessary evidentiary proof (*Matter of Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595).

In this case, the Division filed a motion for summary determination supported by documentary evidence, which if unrebutted, would require a determination in favor of the Division on the only factual issue, i.e., whether petitioner was an officer of Wizard Petroleum under a duty to act for the corporation. In particular, the Division submitted several exhibits including Wizard Petroleum’s application for registration as a distributor of gasoline and other motor fuels dated July 8, 1985. This application shows that petitioner, in 1985, was President and one-third owner of Wizard Petroleum. The Division also submitted Wizard Petroleum’s application for motor fuel tax and sales tax registration. This application was in-date stamped by

the Division on June 16, 1987, signed by petitioner and shows him to be Vice-President and 50% owner of Wizard Petroleum. Taken together, these two exhibits show petitioner to be an owner and officer of Wizard Petroleum in 1985 and 1987. Petitioner offered no evidence for the motion record to contravene the Division's proof. This evidence alone shows that petitioner was an owner and officer of Wizard Petroleum in 1985 and 1987. From this evidence, and other evidence in the record, if unrebutted, the Administrative Law Judge could reasonably infer that petitioner was also an owner and responsible officer of Wizard Petroleum in 1986, the year in issue.

In response to the Division's motion, petitioner offered the affidavit of Mr. Berkowitz, petitioner's attorney. The attorney's affidavit did not include any attached evidence, e.g., exhibits to rebut the Division's evidence. In fact, petitioner's attorney never denied that petitioner was an officer of Wizard Petroleum under a duty to act for the corporation. Since the affidavit of petitioner's attorney is without evidentiary value and is insufficient to defeat the Division's motion (*Columbia Ribbon & Carbon Mfg. Co. v. A-I-A Corp.*, *supra*), and no other documents or exhibits were offered by petitioner in opposition to the motion, he failed to raise any issue of fact. Therefore, the Administrative Law Judge properly granted the Division's motion for summary determination holding petitioner an officer of Wizard Petroleum under a duty to act for the corporation with respect to motor fuel taxes.

Petitioner's argument that the Administrative Law Judge based his decision on collateral estoppel is without merit. There is sufficient evidence in the record submitted by the Division, unrebutted by petitioner, to establish his status as a responsible officer of Wizard Petroleum without resort to collateral estoppel. In any event, it is clear from the determination of the

Administrative Law Judge that his decision is based on facts in this record and not collateral estoppel.

Petitioner next claims that the Division failed to prove that the penalty and interest assessed against the corporate taxpayer were not paid. This argument must fail for two reasons. First, a computer printout is attached to the Division's answer, which is a computer record of the assessment against Wizard Petroleum. This computer printout shows that penalties and interest assessed against Wizard Petroleum have not been paid. Petitioner offered no evidence to rebut this document, e.g., a cancelled check showing the penalties and interest have been paid. Second, this argument ignores the fact that it is petitioner's burden to show, if he can, that the penalties and interest have been paid to the State of New York (*Matter of Mira Oil Co. v. Chu*, 114 AD2d 619, 494 NYS2d 458, ***appeal dismissed*** 67 NY2d 756, 500 NYS2d 1027). Petitioner offered no evidence to establish payment.

Finally we come to petitioner's argument that the statute does not require the tax be timely paid, only that it be paid. Since the corporation paid the tax, petitioner argues, he cannot be held liable as an officer for penalties and interest due from the corporation.

At the outset, we note that Tax Law former § 289-b(1) provides, in pertinent part, that:

(a) A distributor . . . which fails to file a return or to pay any tax within the time required by or pursuant to [Article 12-A] . . . shall be subject to a penalty

(b) If any amount of tax is not paid on or before the last date prescribed in this article for payment, interest on such amount at the rate set by the tax commission . . . shall be paid for the period from such last date to the date paid [emphasis added]

We affirm the determination of the Administrative Law Judge on this issue.

Contrary to petitioner's argument, it is clear these provisions contemplate that a motor fuel distributor, like Wizard Petroleum, is obligated to file its motor fuel returns and pay its motor fuel taxes within the time frame prescribed by the statute and regulations, i.e., that these acts be performed in a timely manner, and that failure to do so will result in the assessment of penalties and interest.

Tax Law former § 289-b(2) provides, inter alia, that an officer of a corporate motor fuel distributor who is under a duty to act for the corporation in complying with the requirements of Article 12-A (relating to the tax on motor fuel) who "fails to pay the taxes imposed [under such article], shall, in addition to other penalties provided by law, be liable to a penalty equal to the the total amount of the tax not paid, plus penalties and interest"² computed against the corporation under former section 289-b(1), as if such person were himself the distributor.

The penalties and interest challenged here were assessed against the corporation and petitioner after the corporation had paid the underlying motor fuel taxes. It is noted that the penalties and interest imposed against the corporation under Tax Law former § 289-b(1) were for late filing and late payment. The underlying taxes having been paid, the penalties and interest asserted against petitioner under former section 289-b(2), as an officer with a duty to act for the corporation, are equal to the penalty and interest computed under former section 289-b(1) remaining due from the corporation.

Contrary to petitioner's argument, Tax Law former § 289-b(2) does not provide that penalties against a responsible officer are abated once the corporation has paid the underlying tax obligation. Former section 289-b(2) does provide for the abatement of penalties against an

²Computed in the same manner as penalties under the sales tax (Tax Law § 1145[e]).

officer, but only where a determination has been made that the failure to timely file and pay the tax due is “due to reasonable cause and not due to willful neglect.” No such showing has been made here. The penalties and interest assessed against petitioner represent amounts remaining due from the corporation and for which he is liable as a person with a duty to act on behalf of the corporation (*see, Lorenz v. Division of Taxation of Dept. of Taxation & Fin.*, 212 AD2d 992, 623 NYS2d 455, *affd* 87 NY2d 1004, 642 NYS2d 621; *see also, Matter of Hall v. Tax Appeals Tribunal*, 176 AD2d 1006, 574 NYS2d 862).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Trevor Wisdom is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Trevor Wisdom is denied; and
4. The Notice of Determination dated November 10, 1987 is sustained.

DATED: Troy, New York
April 9, 1998

/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