

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**LINDA M. SMITH D/B/A J.J. SMITH** : DECISION  
for Review of a Denial, Suspension, Cancellation or : DTA NO. 816344  
Revocation of a License, Permit or Registration under :  
Article 12-A and Article 13-A of the Tax Law. :

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Petitioner Linda M. Smith d/b/a J.J. Smith, 3 Vigars Place, Albany, New York 12205, filed an exception to the determination of the Administrative Law Judge issued on June 11, 1998.

Petitioner appeared *pro se*. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Michael B. Infantino, Esq., of counsel).

Petitioner did not file a brief on exception. The Division of Taxation filed a letter in lieu of a brief in opposition. Oral argument was not requested. Pursuant to Tax Law § 283(6)(a), this decision must be issued on or before September 8, 1998.<sup>1</sup>

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

***ISSUE***

Whether petitioner has established that the Division of Taxation erred in refusing to register her as a distributor of diesel motor fuel under Articles 12-A and 13-A of the Tax Law.

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<sup>1</sup>Tax Law § 283(6)(a) provides that the Tribunal's decision must be issued within 75 days from the date of notice to the Tribunal that an exception is being taken to the Administrative Law Judge's determination. Since the 75<sup>th</sup> day after June 24, 1998 falls on a legal holiday, the next succeeding day is considered timely under Tax Law § 289-d(3).

***FINDINGS OF FACT***

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

On July 22, 1997, the Division of Taxation (“Division”) received from petitioner, Linda M. Smith, an Application for Registration as a Distributor of Diesel Motor Fuel. The application indicated that petitioner was the sole owner of a business named J.J. Smith and intended to enter into the business of selling diesel motor fuel upon registration by the Division.

Petitioner’s initial application was deficient in several respects. Item 7 asks the date business began or will begin in New York State. Petitioner answered “Upon Approval of Registration.” Petitioner indicated that she was not registered as a sales tax vendor, and she failed to submit an application for registration as required. Rather than list all suppliers of diesel motor fuel, she stated: “Going to Apply at Amerada Hess, Sears Petroleum, Pal Oil Corp.” No business history was provided, and several questions were left unanswered.

The Division returned the application to petitioner with a cover letter explaining that required documentation was needed to process the application. The Division enclosed a copy of an information booklet for completing an application for registration. Among other things, the instructions state that all applicants must submit a letter from each supplier including certain specific information:

- that the supplier has or will supply aviation gasoline or diesel motor fuel or kero-jet fuel to you;
- the terminals from which the diesel motor fuel will be shipped and the method of shipment (ocean vessel, barge, tank truck, pipeline, etc.);

- the quantity that the supplier agrees to furnish or has furnished per month and type of product;
- delivery terms; and
- payment and/or credit terms.

In addition, all applicants are instructed to submit “a current financial statement prepared by a person or persons not employed by the applicant.”

Petitioner returned a copy of the original application to the Division where it was received on September 4, 1997. No additional information was provided.

The Division wrote to petitioner again, on or about September 9, 1997. The letter asks petitioner to submit the information necessary to process her application. The items listed in the information booklet about supplier letters and a certified financial statement are specifically requested in the letter. In addition, the letter asks petitioner to complete four separate items in the application: Line 7 which asks for the date that the applicant began doing business in New York; Line 12 which asks the applicant to indicate the name of the individual who will perform certain duties within the organization; Line 15 which asks for information regarding the applicant’s sales tax registration or completion of an Application for Registration as a Sales Tax Vendor (form DTF-17) (a sales tax registration form was enclosed for petitioner’s use); and Line 25 which asks for the total monthly diesel motor fuel the applicant expects to sell or use (petitioner had indicated on her application that the number of tax exempt gallons she intended to sell exceeded the total number of gallons, exempt and not exempt, that she intended to sell).

On September 23, 1997, the Division received a copy of the same application that it had previously returned to petitioner. Changes were made to the application. On Line 7, petitioner

indicated that she began doing business on June 11, 1997. Petitioner indicated that she would perform all of the duties related to the financial affairs of the business as enumerated in the information brochure. As stated in the brochure those duties are:

- a. signing checks on the company's bank account;
- b. signing the business tax returns;
- c. paying creditors;
- d. making the final decision on which bills are to be paid;
- e. conducting the business general financial affairs;
- f. filing returns or paying taxes imposed by Article 12-A of the Tax Law;
- g. complying with any other requirement of the Tax Law.

Petitioner corrected Line 25 by indicating that she expected to sell a total of 125,000 gallons of diesel motor fuel per month, and of that total, 100,000 gallons were expected to be tax exempt. She did not submit an Application for Registration as a Sales Tax Vendor as requested. She attached a copy of a letter sent to her by Polsinello Fuels, Inc. ("Polsinello") which states that Polsinello would be happy to sell her petroleum once all state registrations and certificates of insurance were supplied. The letter states that petroleum product would be lifted from the Apex terminal via petitioner's trucks and would be sold COD unless credit was approved in amounts necessary to meet petitioner's requirements. Petitioner also enclosed a copy of a Pal Oil Co., Inc. ("Pal"), information sheet dated September 2, 1997. Petitioner did not submit a certified financial statement.

Petitioner's application was acknowledged by the Division on September 24, 1997. On the same date, the application was forwarded to the Division's field audit management unit requesting them to review the application and make a recommendation for approval or denial. The following memorandum was included with the forwarded application:

The above company has the same home address as J.D. Smith/J.D. Smith and Sons, Inc. Mr. Smith applied for registration as a Diesel Distributor in May, 97 but failed to respond to my letter and the application was closed. Linda Smith [sic] original application was received in July, 97 but returned twice for information.

As part of its review procedure, the field audit management unit conducted an interview with petitioner at her residence, which is the same address as her business. Ms. Smith provided the information which was later memorialized in a memorandum from the interviewer to the supervisor of the field audit management unit. The memorandum contains the following facts:

(a) Petitioner is starting a fuel oil business to employ her brother, Joel D. Smith. He has an outstanding tax liability and was unable to obtain a diesel motor fuel distributor license for that reason. Petitioner has full-time employment elsewhere and no experience in the motor fuel business.

(b) Petitioner's brother was receiving calls from former customers requesting deliveries to be made. All motor fuel would be purchased from Polsinello and PAL on a tax paid basis. Joel D. Smith would pick up all purchases, and he would make all deliveries on a COD basis. The business had no truck and no storage capacity at the time of the interview. Petitioner stated that her brother would borrow a truck initially. Petitioner stated that the business would have no kerosene sales. When asked what her responsibilities would be, petitioner stated that she would oversee the billings to ensure customer payments.

(c) During the course of the interview, petitioner asked the auditor to speak with her brother by telephone. Mr. Smith said that he would simply be an employee of the business, driving and making deliveries. However, he mentioned that he was interested in getting back in

the motor fuel business and stated that he would be buying a truck in the near future. He also stated that the kerosene fuel would be sold to trailer parks.

On the basis of information received during the interview and the conflicts between information received from petitioner contrasted with that received from her brother, the auditor recommended that the application not be approved. If the application were approved, the auditor recommended a bond of \$250,000.00 based on projected sales as stated in the application.

A copy of petitioner's 1996 Federal income tax return was attached to the interviewer's memorandum. It indicates that her income for that year was almost entirely from wages and salary.

The Division's computer record-keeping system shows that the Division issued 10 notices and demands to Joel D. Smith as a person responsible for collection and payment of tax on behalf of J.D. Smith & Sons, Inc. The tax liability on these 10 notices totaled \$139,368.10. Penalties and interest were also asserted. After the application of payments and credits, the balance due on these assessments, as of February 27, 1998, was \$159,734.23. Notices and demands in the same amounts were also issued to J.D. Smith & Sons, Inc. and also remain unpaid.

On November 18, 1997, the Division issued to petitioner a Notice of Proposed Refusal to Register as a Distributor of Diesel Motor Fuel under Articles 12-A and 13-A of the Tax Law.

The notice lists the following facts as the forming the basis for the refusal:

(1) Joel D. Smith is an employee under a duty to act for Linda M. Smith d/b/a J.J. Smith, and petitioner failed to include Joel D. Smith on the application as a responsible person.

(2) Joel D. Smith was the president and sole owner of J.D. Smith & Sons, Inc., a corporation with outstanding tax liabilities and one which had its registration as a motor fuel distributor cancelled within the preceding five years.

(3) Joel D. Smith was the president and sole owner of a corporation that failed to comply with the provisions of section 287 of the Tax Law relating to the filing of petroleum business tax returns and the payment of petroleum business tax.

(4) Petitioner's supplier letter did not contain required information.

(5) Petitioner failed to provide an audited financial statement as requested by the Division in its letter of September 9, 1997.

A conference was conducted in the Bureau of Conciliation and Mediation Services ("BCMS") on December 17, 1997. Petitioner appeared *pro se*. After hearing all the evidence presented, BCMS issued a Conciliation Order, dated January 30, 1998, denying petitioner's request for a reversal of the Division's proposed refusal to license, and sustaining the statutory notice.

At the hearing, petitioner presented no evidence. She did not deny any of the facts that form the basis for the Division's Notice of Proposed Refusal to Register as a Distributor of Diesel Motor Fuel under Articles 12-A and 13-A of the Tax Law. She stated that her brother Joel's ex-wife was granted registration as a diesel fuel distributor, and petitioner found it extremely unfair that her brother's ex-wife would be treated differently than petitioner herself. In addition, petitioner believes that it is unfair to deny her registration because of the tax problems of her brother. Petitioner believes that she should not be denied the right to employ her brother in the motor fuel business since he is the person most knowledgeable about that business.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

Following the standard of review we set forth in *Matter of OK Petroleum Prods. Corp.* (Tax Appeals Tribunal, November 1, 1990), the Administrative Law Judge reviewed the refusal to register petitioner as a diesel motor fuel distributor *de novo* and concluded that the Division was correct in its action. The Administrative Law Judge's review of the record led to the conclusion that petitioner's failure to supply the Division with a current financial statement, a letter from a supplier and a complete and accurate application for registration provided sufficient grounds for the Division's refusal to register petitioner as a distributor (*see*, Tax Law § 283[1]; 20 NYCRR 411.1[b]). In addition, petitioner declined to offer testimony or other evidence at the hearing.

Critical to the Administrative Law Judge's determination and relevant to petitioner's argument on exception was the Administrative Law Judge's finding that petitioner had no knowledge of or experience in the motor fuel industry and intended to rely on her brother, Joel D. Smith, to operate the business. Since petitioner had informed the Division on her application that she would be the only responsible individual, the application contained a substantial omission. In her interview with the Division, petitioner conceded that she would only oversee billing while her brother would be responsible for obtaining customers and a truck for picking up and delivering fuel, collecting payment from customers and paying suppliers.

Further, petitioner minimized her failure to submit a letter from a prospective supplier and a current financial statement, characterizing them as onerous requirements. The Administrative Law Judge disagreed, stating that the filing and record-keeping requirements imposed on distributors may be complex, but compliance is mandatory (*see*, 20 NYCRR 413.1 *et seq.*). The

Administrative Law Judge found petitioner's reluctance to file the requisite letter from a supplier, her current financial statement and a properly completed application supportive of the Division's refusal to register, noting that these failures directly related to the question of whether petitioner could be relied on to properly exercise her filing, reporting, collection and payment responsibilities under the Tax Law.

Finally, the Administrative Law Judge noted that petitioner's description of her brother's duties indicated that he would be a responsible individual, under a duty to file returns and pay taxes on behalf of the applicant. Since her brother was an officer and 100 percent owner of another corporation whose registration was canceled within the preceding five years and which continues to owe motor fuel taxes, the Administrative Law Judge concluded that, pursuant to Tax Law § 283, her brother could not be relied upon to carry out the duties of a motor fuel distributor on behalf of petitioner. The Administrative Law Judge observed that the statutory scheme prevented petitioner's brother from registering as a diesel motor fuel distributor given his outstanding tax liabilities and also provided the basis for denying registration to any entity in which he is a responsible individual, under a duty to act for the business in complying with the Tax Law (*see, Matter of Shore Line Oil Co.*, Tax Appeals Tribunal, February 15, 1996). Since the uncontroverted evidence demonstrated that petitioner's brother would direct and manage every aspect of petitioner's business, the Administrative Law Judge concluded that petitioner applied for registration merely to circumvent the Tax Law and enable her brother to buy and sell motor fuel and has failed to meet her burden of demonstrating that the Division's refusal to register was improper. Hence, the Division's refusal to register petitioner as a diesel motor fuel distributor was sustained.

***ARGUMENTS ON EXCEPTION***

Petitioner argues on exception, as she did below, that her application to be registered as a diesel motor fuel distributor was denied on the basis of her brother's actions in the past.

***OPINION***

We affirm the determination of the Administrative Law Judge for the reasons set forth therein. Further, we find that the Administrative Law Judge completely and adequately addressed all of the issues before her, one of which is the sole argument on exception. For this reason, we refuse to disturb her determination in any way.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Linda M. Smith d/b/a J.J. Smith is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Linda M. Smith d/b/a J.J. Smith is denied; and

4. The Notice of Proposed Refusal to Register as a Distributor of Diesel Motor Fuel under Articles 12-A and 13-A of the Tax Law is sustained.

DATED: Troy, New York  
August 27, 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