

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
CENTURY 2000 PETROLEUM, INC. : DECISION
for Review of a Denial, Suspension, Cancellation or : DTA NO. 817774
Revocation of a License, Permit or Registration under :
Articles 12-A and 13-A of the Tax Law. :

Petitioner Century 2000 Petroleum, Inc, c/o John A. Tartaglia, Esq., PO Box 929, Bedford, New York 10506-0929, filed an exception to the determination of the Administrative Law Judge issued on January 24, 2002. Petitioner appeared by John A. Tartaglia, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Todd M. Kerner, Esq., of counsel).

Petitioner did not file a brief in support of its exception. The Division of Taxation relies on its post-hearing brief in lieu of filing a brief in opposition to the exception. Petitioner did not file a reply brief. Petitioner did not request oral argument.

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's proposed cancellation of its registration as a Retailer of Heating Oil Only is unwarranted and should be denied.

FINDINGS OF FACT

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

Petitioner, Century 2000 Petroleum, Inc., filed an Application for Registration as a Distributor of Diesel Motor Fuel, Retailer of Heating Oil Only, Distributor of Kero-Jet Fuel Only, or Retail Seller of Aviation Gasoline (“Form P-600”). This application, hand-dated as signed on November 5, 1998 and stamp-dated as received by the Division of Taxation (“Division”) on November 13, 1998, indicates that petitioner sought to be registered solely as a retailer of heating oil only. Item “12” of this application, which requires a listing of all “owners, directors, partners and responsible individuals” of the applicant, listed only Angelo LoPriore under the title “President.” The instruction sheet for Form P-600 requires, with regard to Item “12”, that the applicant must specify those individuals having the final authority for signing checks on the company’s bank account; signing the business’s tax returns; paying creditors; making the final decision on which bills are to be paid; conducting the business’s general financial affairs; filing returns or paying taxes imposed by Article 12-A of the Tax Law; and complying with any other requirement of the Tax Law. The application, which indicates petitioner to be a “new company,” is signed by Angelo LoPriore under the title “President.”

In response to the filing of this application, the Division’s field audit management personnel conducted an interview of Angelo LoPriore, the only person listed on the application. During the course of this interview, Angelo LoPriore’s son, Frank LoPriore, came into the interview. When asked whether Frank LoPriore would have any involvement with petitioner’s

business, both Frank LoPriore and Angelo LoPriore responded that Frank LoPriore would not be involved.¹

It is undisputed that Frank LoPriore and two companies owned by him, to wit, Dade Oil, Inc. and Rainbow Fuel Service, Inc., have unpaid fixed and final tax liabilities under Articles 12-A and 13-A of the Tax Law. Dade Oil, Inc. owes the Division in excess of \$65,000.00 and Frank LoPriore individually owes in excess of \$15,000.00 in associated liabilities, while Rainbow Fuel Service, Inc. owes the Division in excess of \$206,000.00 and Frank LoPriore individually owes in excess of \$73,000.00 in associated liabilities. Frank LoPriore's involvement in both of these companies is discussed in detail in *Matter of Dade Oil* (Tax Appeals Tribunal, November 9, 1995), where the Tribunal sustained the Division's denial of his Application for Registration as a Retailer of Heating Oil Only.

Upon the representations that Frank LoPriore would not be involved in petitioner's business, on December 30, 1998, the Division issued to petitioner a registration to operate as a retailer of heating oil only.

Petitioner did not file its required tax return as a retailer of heating oil only for the first quarter of 1999. In turn, the Division issued a letter dated May 11, 1999 demanding that the delinquent return be filed within ten days. In response, the Division received a letter on petitioner's letterhead, dated July 23, 1999, together with a Form PT-200 ("Petroleum Business Tax Return"). The July 23, 1999 letter, as well as the tax return, are signed by Frank LoPriore under the title "vice-president." The letter states that Frank LoPriore "filled out the forms" and

¹ Petitioner did not provide testimony by any witnesses in this matter, including testimony to dispute or refute the Division's version of events which transpired during the field visit prior to petitioner's registration. In this regard, Angelo LoPriore and Frank LoPriore both attended the hearing, but opted not to testify.

also states that “I can assure you that all returns will be filed and paid promptly.” The return did not correspond to any particular reporting period and there was no payment of tax accompanying the return.

The Division issued a letter to petitioner dated July 28, 1999, noting that Frank LoPriore had not been listed as an officer or responsible individual on petitioner’s application and inquiring about the duties Frank LoPriore would be performing on behalf of petitioner. Petitioner responded by letter dated August 16, 1999, indicating that Frank LoPriore was appointed to the position of vice-president and would be handling petitioner’s day-to-day operations, including the responsibility for signing checks and tax returns, and paying bills. In response to a follow-up letter from the Division dated August 19, 1999, petitioner admitted by letter dated September 14, 1999 that Frank LoPriore had been appointed vice-president on January 1, 1999, some two days after the Division had issued petitioner’s registration and the same date that petitioner commenced its operations.

The Division did not receive petitioner’s Retailer of Heating Oil Only tax returns for the second or third quarters of 1999. In turn, the Division issued to petitioner a ten-day letter, dated October 15, 1999, demanding the tax returns and associated payments covering the first three quarterly periods of petitioner’s operations. The Division did not receive a timely response and as a result, canceled petitioner’s registration to operate as a retailer of heating oil only, upon the basis that petitioner had failed to comply with the requirements of the ten-day letter.

Petitioner filed the delinquent returns, signed by Frank LoPriore as vice-president, and made payment of the tax due with such filing. As a result of this filing and payment, the Division agreed to rescind its cancellation of petitioner’s registration, and petitioner and the

Division so stipulated. The rescission was accomplished by an Order of Discontinuance issued by the Division of Tax Appeals dated February 24, 2000. The Order of Discontinuance expressly allowed the Division to issue a Notice of Proposed Cancellation pursuant to Tax Law § 283(6), subject only to the limitation that the Division would not assert as a ground for cancellation the unregistered operation of petitioner's business during the pendency of petitioner's protest against the cancellation of its registration for the period from October 28, 1999 through the date of the stipulation.

On April 5, 2000, the Division issued to petitioner a Notice of Proposed Cancellation of Registration as a Retailer of Heating Oil Only. This Notice sets forth six grounds for the proposed cancellation, as follows:

- a) Frank LoPriore was not included on the application as a responsible person;
- b) Frank LoPriore, an employee under a duty to act for petitioner, has liabilities under Article 12-A finally determined to be due and which have not been paid;
- c) Frank LoPriore is president and 100% owner of Rainbow Fuel Service, Inc., a corporation with outstanding tax liabilities with respect to its diesel motor fuel operations;
- d) Frank LoPriore is president and 100% owner of Rainbow Fuel Service, Inc., a corporation which failed to comply with section 287 of the Tax Law relating to the filing of petroleum business tax returns and payment of tax thereon;
- e) Frank LoPriore is president and 100% owner of Dade Oil, Inc., a corporation with outstanding tax liabilities with respect to its diesel motor fuel operations; and
- f) Frank LoPriore is president and 100% owner of Dade Oil, Inc., a corporation which failed to comply with section 287 of the Tax Law relating to the filing of petroleum business tax returns and payment of tax thereon.

Petitioner does not deny Frank LoPriore's involvement in the business conducted by petitioner. However, petitioner justifies such involvement as necessary due to illnesses suffered by Angelo LoPriore, his wife, and his grandson, which left Angelo LoPriore unable to operate petitioner's business for a period of time. Specifically, Angelo LoPriore's wife suffered a stroke at some point in February 1999, resulting in an extended period of hospitalization. Thereafter, at some point in March 1999, Angelo LoPriore encountered medical difficulties which impacted his ability to walk and stand. In addition, Angelo LoPriore's grandson by his daughter Rose Marinelli became seriously ill at some point in the summer of 1999, thereby curtailing Rose Marinelli's ability to assist Angelo LoPriore with bookkeeping tasks for petitioner.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge observed that Tax Law § 282-a(1) provides that no person may engage in the sale of diesel motor fuel in this state unless registered as a distributor. Further, Tax Law § 282-a(2) allows for the registration of a distributor of diesel motor fuel as a retailer of heating oil only, if such distributor makes sales of diesel motor fuel to consumers solely for heating purposes. However, the full registration provisions of Tax Law § 283 are applicable to such registrants.

The Administrative Law Judge noted that Tax Law § 283(4) lists certain acts as grounds upon which the Division may cancel the registration of a diesel motor fuel distributor, including a registration as a retailer of heating oil only. The Administrative Law Judge cited applicable case law concerning the legislative intent behind the system of registration, licensing and record keeping with respect to persons engaged in manufacturing, importing, selling, distributing and transporting motor fuel and diesel motor fuel in New York State.

The Administrative Law Judge concluded that the Division's determination to cancel petitioner's registration should be sustained. The Administrative Law Judge found that the six grounds for cancellation provided by the Division in its Notice of Proposed Cancellation of Registration were premised upon three facts:

- 1) that Frank LoPriore is, and has been directly involved in conducting petitioner's business since day one of its operations, holding the title of vice-president and being responsible for filing tax returns and remitting any tax due;
- 2) that Frank LoPriore's past record of failures in compliance with the timely filing of returns and remittance of tax are clearly established, as borne out by the existence of outstanding unpaid petroleum tax liabilities owed by Frank LoPriore, Dade Oil, Inc. and Rainbow Fuel Service, Inc., thus constituting not only direct grounds for refusal to register or to cancel the registration of a petroleum business in which Frank LoPriore holds a position of responsibility, but also militating against his suitability to carry out the responsibilities for assuring timely filing and remittance in the future; and
- 3) that Frank LoPriore's status with and involvement in petitioner's business not only was undisclosed on petitioner's application for registration in this matter, but further was specifically denied upon questioning during the course of a field visit by Division personnel prior to issuance of a registration to petitioner.

The Administrative Law Judge rejected petitioner's challenge to the proposed cancellation. The Administrative Law Judge found that the record demonstrates that Frank LoPriore was always intended to be involved in petitioner's operations. The Administrative Law Judge relied as support for this conclusion on the fact that Frank LoPriore was appointed petitioner's vice-president and was involved in petitioner's day-to-day operations as of the start of business for petitioner on January 1, 1999 and that his duties included signing checks and tax returns and paying bills. The Administrative Law Judge found that this was in direct contrast to the absence of his name from the application for registration, and to the statements made by

Angelo LoPriore and Frank LoPriore to the Division's field representative that Frank LoPriore would have no involvement in petitioner's business. The Administrative Law Judge concluded that the absence of Frank LoPriore's name from petitioner's application was deliberate as opposed to inadvertent and the claim that petitioner never intended or anticipated Frank LoPriore's involvement in its business was not believable.

The Administrative Law Judge found, however, that the Division was not asserting fraud in this matter. The Administrative Law Judge concluded that the proposed cancellation was based not only on the failure to disclose Frank LoPriore's involvement in petitioner's business at the time of application for registration, but ultimately on Frank LoPriore's involvement in fact in a position of responsibility in light of his prior record of compliance failures while responsible for other entities. The Administrative Law Judge noted that petitioner bears the burden of proof to establish that the grounds stated by the Division do not support its Notice of Proposed Cancellation. The Administrative Law Judge found that petitioner had offered nothing to overcome the Division's grounds for proposed cancellation. The Administrative Law Judge rejected petitioner's claim that offers to compromise and settle the outstanding liabilities of Frank LoPriore, Dade Oil, Inc., and Rainbow Fuel Service, Inc., had been made and rejected. The Administrative Law Judge concluded that this had no bearing on the present matter.

The Administrative Law Judge found that the outstanding unpaid petroleum tax liabilities owed by Frank LoPriore and by companies he owned and operated alone stood as a bar to petitioner's registration. The Administrative Law Judge concluded that such failures call into question the likelihood of timely filing and payment in the future. By coupling this with the failure to disclose and identify Frank LoPriore as directly involved with petitioner's operations,

notwithstanding his direct involvement in fact, the Administrative Law Judge concluded that there was ample support for the Division's proposal to cancel petitioner's registration.

ARGUMENTS ON EXCEPTION

Petitioner argues that there is no credible evidence that Frank LoPriore appeared at any field audit nor that Frank LoPriore or his father, Angelo LoPriore, made any statements to Division personnel regarding Frank's involvement or lack of involvement in petitioner. Petitioner argues that Frank LoPriore became involved in petitioner as the result of his father's illness; that such involvement was temporary; and that it ended when Angelo LoPriore recovered from his illness. Petitioner asserts that Frank LoPriore was neither a shareholder nor a director of petitioner and was not under a duty to act on behalf of petitioner on either the date when the application for a license was signed and submitted nor on the date of the field audit. Petitioner alleges that the Division has failed to meet its burden of proving fraud; that any tax liabilities of Frank LoPriore were irrelevant to petitioner; and that the attempt by the Division to disenfranchise the business as the result of Frank LoPriore's tax liabilities constitutes a violation of due process. Further, to the extent that Tax Law § 283 has been interpreted as allowing the Division to cancel the registration of a company which employs a person who has tax delinquencies, it is violative of due process.

The Division relied on the Administrative Law Judge's determination and the arguments raised in its post-hearing brief, which assert that Frank LoPriore directed and managed petitioner's business prior to Angelo LoPriore's illness; that petitioner applied for registration merely to circumvent the Tax Law and to enable Frank LoPriore to buy and sell diesel motor

fuel; and that there is no exception in the Tax Law which would allow Frank LoPriore to be involved in the business of petitioner due to the illness of its owner.

OPINION

Tax Law § 283(4) provides that the Division may cancel the registration of a diesel motor fuel distributor, including a registration as a retailer of heating oil only, if certain conditions pertain:

The registration of any distributor may be canceled or suspended by the commissioner where a registrant, or an officer, director, shareholder, employee or partner of the registrant who as such officer, director, shareholder, employee or partner is under a duty to act for such registrant or any shareholder directly or indirectly owning more than ten percent of the number of shares of stock of the registrant . . . fails to comply with any of the provisions of this article [Article 12-A, Tax on Gasoline and Similar Motor Fuel] or article twenty-eight of this chapter [Sales and Compensating Use Tax] with respect to motor fuel or any rule or regulation adopted pursuant to this article or article twenty-eight of this chapter with respect to motor fuel A registration may also be canceled or suspended if the commissioner determines that a registrant or an officer, director, shareholder, employee or partner of the registrant who as such officer, director, shareholder, employee or partner is under a duty to act for such registrant or any shareholder directly or indirectly owning more than ten percent of the number of shares of stock of the registrant (where such registrant is a corporation) entitling the holder thereof to vote for the election of directors or trustees of such registrant:

- (i) commits fraud or deceit in his operations as a distributor or has committed fraud or deceit in procuring his registration;
- (ii) has been convicted in a court of competent jurisdiction, either within or without the state, of a felony, within the meaning of subdivision eight of this section, bearing on such distributors's duties and obligations under this chapter;
- (iii) has knowingly aided and abetted a person who is not registered as a distributor in the importation, production, refining, manufacture or compounding of motor fuel;
- (iv) has impersonated any person represented to be a distributor under this article but not in fact registered under this section; or

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

A registration may also be canceled or suspended if the commissioner determines that a registrant or an officer, director, shareholder, employee or partner of the registrant who as such officer, director, shareholder, employee or partner is under a duty to act for such registrant or any shareholder directly or indirectly owning more than ten per cent of the number of shares of stock of the registrant . . . , was an officer, director, shareholder, employee or partner of another person who as such officer, director, shareholder, employee or partner was under a duty to act for such other person or was a shareholder directly or indirectly owning more than ten percent of the number of shares of stock of such other person (where such other person is a corporation) entitling the holder thereof to vote for the election of directors or trustees 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.

On exception, petitioner has focused on the timing of Frank LoPriore's involvement in petitioner's business as an officer and the circumstances leading to his involvement. While we agree with petitioner that there is little credible evidence to establish the content of the alleged conversation between Frank LoPriore, Angelo LoPriore and the Division's field audit management personnel during the interview conducted subsequent to petitioner's registration application, we note that petitioner presented no testimony or documentation to refute the testimony of the Division's witness in this regard. Additionally, the record contains a letter from petitioner's representative to a member of the Division's staff, dated August 16, 1999, which states that "Frank P. LoPriore is the son of Angelo LoPriore and was present at the original interview for licensing" (Exhibit "D"). A subsequent letter by petitioner's representative to this same Division staff member, dated September 14, 1999, states that "Mr. Frank LoPriore was appointed to this position [vice-president of petitioner] on January 1, 1999" (Exhibit "D"). Thus,

whether or not the alleged conversation occurred, the record is clear that Frank LoPriore was present at the time that the Division interviewed Angelo LoPriore regarding his application for registration and that, two days subsequent to the approval of such registration, Frank LoPriore became petitioner's vice-president. This may, in itself, have provided a basis for revocation of petitioner's license if the Division had alleged and proven the existence of fraud or deceit in the procuring of petitioner's registration. However, no such allegations were made by the Division.

Rather, the Administrative Law Judge found that the outstanding Article 12-A tax liabilities owed by two corporations of which Frank LoPriore was president and 100% owner were themselves a sufficient basis for the cancellation of petitioner's registration pursuant to Tax Law § 283(4). We agree (*see, Matter of Standard Petroleum Corp.*, Tax Appeals Tribunal, April 29, 1999 [wherein we upheld the Division's Notice of Proposed Cancellation of the petitioner's registrations since Louis S. Capossela, the petitioner's president and sole shareholder, was also president and 100% shareholder of two other corporations that failed to comply with the Tax Law]).

We note that pursuant to Tax Law § 282-a(2), all the provisions of Tax Law § 283 apply to applicants for registration and registrants with respect to Diesel motor fuel, and

distributors with respect to Diesel motor fuel shall be subject to all other provisions of this article relating to distributors of motor fuel, including but not limited to, the keeping of records, the fixing, determination and payment of tax and filing of returns.

Frank LoPriore, an officer of petitioner, was also a responsible person under a duty to act for two taxpayers which failed to comply with the provisions of Article 12-A of the Tax Law. As the Administrative Law Judge found, "It is undisputed that Frank LoPriore and two companies owned by him, to wit, Dade Oil, Inc. and Rainbow Fuel Service, Inc., have unpaid

fixed and final tax liabilities under Articles 12-A and 13-A of the Tax Law” (Determination, Finding of Fact “3”). We note that the five-year statute of limitations set forth in Tax Law § 283(4) does not benefit petitioner here, 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).

It is petitioner’s burden to prove that the Proposed Notice of Cancellation of Registration issued by the Division was erroneous or improper (*see, Matter of Janus Petroleum, supra*). Petitioner introduced no evidence to meet this burden. As a result, we find that the Administrative Law Judge completely and adequately addressed the issues presented to him and we see no reason to modify them in any respect.

Thus, we affirm the Administrative Law Judge’s determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Century 2000 Petroleum, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Century 2000 Petroleum, Inc. is denied; and

4. The Notice of Proposed Cancellation, dated April 5, 2000, is sustained.

DATED: Troy, New York
November 21, 2002

/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