STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:
of	:
SHORE LINE OIL COMPANY, INC. DETERMINATION	:
for Review of a Proposed Refusal to Register Petitioner as a Retailer of Heating Oil Only under Articles 12-A and 13-A of the Tax Law.	: DTA NO. 813859

Petitioner, Shore Line Oil Company, Inc., 94 First Street, New Rochelle, New York 10801, filed a petition on May 30, 1995 for review of a proposed refusal to register petitioner as a retailer of heating oil only under Articles 12-A and 13-A of the Tax Law.

A hearing was held before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on June 29, 1995 at 9:30 A.M.[1] By agreement of the parties, simultaneous briefs were filed on September 7, 1995, and reply briefs were filed on October 13, 1995. Petitioner appeared by Carl S. Levine, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (James P. Connolly, Esq., of counsel)

ISSUE

Whether petitioner should be registered as a retailer of heating oil only.

[1]The hearing was originally scheduled for June 14, 1995. At petitioner's request, made on June 8, 1995, the hearing was adjourned and rescheduled.

FINDINGS OF FACT

Petitioner, Shore Line Oil Company, Inc. ("Shore Line"), filed an application for registration as a retailer of heating oil only (a "ROHO" application) on September 13, 1994.

On or about January 20, 1995, the Division of Taxation ("Division") issued to Shore Line a Notice of a Proposed Refusal to Register as a Retailer of Heating Oil Only under articles 12-A and 13-A of the Tax Law. The notice states four grounds for denying Shore Line registration as follows:

> "A. You operated as a Distributor of Diesel Motor Fuel without being duly registered. (Tax Law Sec. 282-a(2)).
>
> "B. Your registration as a Distributor of Diesel Motor Fuel has been cancelled within the preceding five years. (Tax Law Sec. 283.2(f)).
>
> "C. Shore Line Oil Co., Inc. has finally determined liabilities for taxes imposed under Chapter 60 of the Tax Law which have not been paid in full. (Sec. 283.2(a)).
>
> "D. Shore Line Oil Co., Inc. failed to comply with provisions of Section 287 of the Tax Law relating to the filing of Petroleum Business Tax Returns and the payment of tax

thereon. (283.4(v))."

On or about March 3, 1995, the Division issued to petitioner a second notice stating three more grounds for its proposed refusal to register as follows:

> "1) Louis Caposela [sic] is President and 100% owner of the stock of Standard Petroleum Corp., a corporation with liabilities for taxes imposed under Chapter 60 of the Tax Law which have been finally determined and which have not been paid in full (Tax Law Sec. 283.2(e)).
>
> "2) Louis Caposela [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 imposed under Chapter 60 of the Tax Law which have been finally determined and which have not been paid in full (Tax Law Sec. 283.2(e)).
>
> "3) Shore Line Oil Co., Inc. operated as a Residual Petroleum products business without being duly licensed (T.L. Sec. 302(a))."

Shore Line's current president and sole shareholder is Louis Capossela who testified at hearing. Shore Line is a New York corporation founded in 1948 by Mr. Capossela's father. Mr. Capossela has worked for Shore Line since he was a teenager. He assumed the position of president of the corporation when his father died in 1969. Mr. Capossela's son and daughter now work for Shore Line.

Until the 1980's, Shoreline was primarily in the business of selling diesel fuel as heating oil for residences and commercial establishments. Sometime before the mid-1980's, Shore Line entered the gasoline sales business. It owned a terminal in Mount Vernon, New York and apparently bought and sold gasoline as a distributor. Mr. Capossela testified that Shore Line "was more or less pushed out of [the gasoline

business] by bootleggers because we couldn't compete with their pricing and it caused us substantial losses" (tr., p. 150). Mr. Capossela also testified that he purchased fuel from persons later indicted for bootlegging gasoline, but he stated that he did not know they were bootleggers until Federal authorities began investigating them. Mr. Capossela testified in a Federal trial concerning gasoline bootlegging under a grant of immunity.

Also in the late 1980's, Shore Line's facilities were found to be leaking gasoline. Shore Line suffered financial losses from the costs of cleaning up the damage caused by this leakage. Total costs were approximately $500,000.00.

By the beginning of 1989, Mr. Capossela decided that Shore Line could not operate profitably in the gasoline business. In January 1989 Shore Line sold those assets relating to the gasoline business, including its customer lists, equipment and gasoline service station leases, to Barrier Gasoline Company. Shore Line incurred losses of over $1 million on this transaction. After 1989, Shore Line operated as a distributor of Diesel motor fuel, licensed under articles 12-A and 13-A of the Tax Law.

By 1993, Shore Line owed well over $3 million to National Westminster Bank, approximately $250,000.00 in back taxes to the Federal government and a substantial amount in overdue taxes to New York State.

By letter dated July 29, 1993, the Division informed Shore Line that its registration as a Diesel motor fuel distributor had been cancelled. The letter states, in relevant part:

> "Your registrations are being cancelled for failure to satisfy outstanding liabilities finally determined to be due within ten (10) days after the date the demand was sent by certified mail (Tax Law Sec. 283.5).
>
> * * *
>
> "YOUR REGISTRATION AS A DISTRIBUTOR OF DIESEL MOTOR FUEL HAS BEEN CANCELLED. YOU MAY NO LONGER IMPORT OR CAUSE TO BE IMPORTED DIESEL PRODUCT, SELL DIESEL PRODUCT, PRODUCE, REFINE, MANUFACTURE OR COMPOUND DIESEL PRODUCT WITHIN THE STATE, ENGAGE IN THE ENHANCEMENT OF DIESEL PRODUCT IN THE STATE OR ACT IN ANY OTHER CAPACITY AS A DISTRIBUTOR OF DIESEL MOTOR FUEL."

The letter ends by advising Shore Line of its right to protest the cancellation by requesting a hearing, but it warns that the cancellation is in effect pending such a hearing. Shore Line did not request a hearing to protest the Division's cancellation of its registration.

The Division's registration and bond unit received a letter from petitioner's attorney, dated April 19, 1994, which states in pertinent part:

> "Shore Line's Diesel License was surrendered on or about July 29, 1993. The purpose of this submission is to commence the process of releasing the bond and its underlying collateral to Shore Line."

Home heating oil, whether used for residential or commercial purposes, is a form of Diesel motor fuel. The two products are distinguished by their use and tax status more than by their physical properties. Retailers of heating oil and residual petroleum product are required to be registered with the Division as distributors of Diesel motor fuel. After July 29, 1993, Shore Line was not authorized to sell heating oil in New York State. Nonetheless, Shore Line continued to sell heating oil and residual petroleum product to residential and

commercial customers after its registration as a distributor of Diesel motor fuel was suspended. Mr. Capossela testified that Shore Line employs 40 persons and has approximately 7,000 customers at this time.

From the time its registration was cancelled until the time of the hearing, Shore Line continued to file New York State petroleum business tax returns under articles 12-A and 13-A of the Tax Law. The Division placed in evidence monthly returns filed by Shore Line for the period August 1, 1993 through January 31, 1995. On all returns except those filed for the months of December 1994 and January 1995, Shore Line indicated that it was registered as a distributor of diesel motor fuel. Shore Line listed its registration number as D-0536.

On its Petroleum Business Tax Return for August 1993, Shore Line reported that its Diesel motor fuel license was suspended as of July 29, 1993. On form PT-102 (Tax on Diesel Motor Fuel), Shore Line reported having purchased taxable gallons of Diesel motor fuel having paid the tax at the time of purchase. The amount of the tax paid was reported as $4,861.10.

Thereafter, Shore Line consistently reported sales of Diesel motor fuel subject to the tax imposed by article 12-A. The number of taxable gallons sold was relatively small in comparison with the total number of gallons sold. Shore Line also reported selling relatively small quantities of residual petroleum product to customers for residential heating. Shore Line reported no sales of residual petroleum product subject to tax.

The Division received Shore Line's application for ROHO registration on September 13, 1994. A letter acknowledging receipt of the application was sent to Shore Line on or about September 21, 1994. The letter states, in pertinent part:

> "Please be advised that the submission of an application does not permit you to engage in activities requiring registration. You may engage in activities only if and when your application is approved and you are duly licensed. Conducting any unauthorized business is grounds for denial of your pending license or pending registration and may result in felony prosecution."

The Division offered the testimony of Bonnim Tanzman, an Audit Group Manager in the Transaction and Transfer Tax Bureau, to explain the basis for the Division's refusal to register Shore Line as a ROHO. Along with his other duties, Mr. Tanzman manages the Registration and Bond Unit which reviews applications for completeness and determines whether the applicant has any outstanding tax liabilities.

The Division maintains records of assessments on a computer system called the Case and Resource Tracking System ("CARTS"). The Division offered in evidence computer printouts generated by CARTS showing assessments receivable from Shore Line. The printouts were generated on June 28, 1995. They are essentially hardcopy replicas of the computer screens which list all assessments issued to Shore Line in the period from 1986 through the date of the printout. Although numerous assessments are listed, only nine are shown as being open assessments with a balance due. Those assessments are as follows:

Assessment No.	Tax Type	Period Ended	Assessment Stage	Case Type

L 010118142 7 Petro 11/94 Notice & Demand

K
L 010096005 1 Sales 11/94 Notice & Demand
K
L 009859857 9 Sales 2/94 Notice & Demand
E
L 008816154 9 Petro 2/94 Notice & Demand
E
L 007951478 9 Oil Tax 5/90 Notice & Demand
K
L 007008661 8 Petro 1/92 Notice & Demand
E
L 006734085 4 WITHLD 12/91 Notice & Demand
E
L 002174185 9 GasDsl M/89 Notice & Demand
K
L 002008447 2 GasDsl M/88 Notice & Demand
K

Along with the listing of outstanding assessments, CARTS generated an assessment history of three assessments. Assessments L 009859857 9 and L 008816154 9 came about as the result of the dishonoring of two checks written by Shore Line in payment of taxes due. The current balance due on the first assessment is shown as $64,193.16, and the current balance due on the second is shown as $24,466.25.

The assessment history for Assessment L 007951478-9 shows a tax liability of $99,689.15 for the period June 1, 1989 through May 31, 1990. The Division concedes that the CARTS information regarding this assessment is wrong in two respects. First, the letter "K" in the category "Case Type" indicates that an assessment has not been formally protested by either a request for a conciliation conference or a petition to the Division of Tax Appeals. Shore Line filed a petition with the Division of Tax Appeals protesting Assessment L 007951478 9, so CARTS is incorrect in indicating that the assessment was not formally

protested. In addition, the parties reached agreement concerning the amount of tax due on that assessment and executed a Stipulation for Discontinuance of Proceeding reducing the amount of the tax deficiency to $70,000.00. CARTS records were not updated to reflect this stipulation.

Mr. Tanzman testified that the letter "E" in the category Case Type indicates that an assessment has not been protested in any manner, that the letter "K" indicates that the Division has received and is considering an informal protest and the letter "T" indicates that an assessment has been formally protested by the filing of an application for a conciliation conference or a petition for a hearing. Mr. Tanzman explained that where a case was formally protested before CARTS was implemented CARTS will show the case type as "K" rather than the appropriate "T".

The Division offered in evidence CARTS printouts showing assessments issued to Standard Petroleum Corporation and Westchester Hudson Petroleum Corporation. Mr. Capossela is the sole shareholder of both corporations and president of Standard Petroleum. Most of the assessments issued against Standard Petroleum have been closed, and the outstanding balance due on all such assessments was less than $2,000.00 at the time of the hearing. All assessments issued to Westchester Hudson were for periods before May 31, 1989. CARTS shows outstanding assessments against Westchester Hudson in excess of $400,000.00.

In the course of considering Shore Line's application for ROHO registration, Mr. Tanzman became aware that Shore Line was continuing to do business as a retailer of heating oil and

residual petroleum product without registration. By letter to Mr. Capossela dated January 9, 1995, Mr. Tanzman informed Shore Line that it "may not engage within this state in the enhancement of Diesel motor fuel, [or] make a sale or use of Diesel motor fuel (including #2 heating oil) . . . within the state." Mr. Tanzman's letter notes that there are two exceptions to this rule, not relevant here. Mr. Tanzman also warned that "[t]he importation or distribution of diesel product while not properly registered is grounds for refusal to register and subjects the distributor to criminal prosecution under §1812-a of the Tax Law".

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. Mr. 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-a(b).[2]

At hearing, Shore Line's representative stipulated that Shore Line continues to sell Diesel motor fuel in the form of heating oil and residual petroleum product even after being advised not to by the Division. Petitioner's representative noted that the vast majority of Shore Line's sales are for

---

[2]Petitioner stipulated to these facts but did not acknowledge that the truck driven by Mr. Capossela was a Shore Line truck. Such a conclusion can be drawn from the evidence in the record. After the record of hearing was closed, both parties submitted additonal evidence regarding this event. Since neither party requested permission to submit additional evidence, before or after the hearing was closed, this evidence was not considered in arriving at a determination.

residential purposes and are not subject to tax.

In reviewing an application, it is a standard practice for Mr. Tanzman's office to refer the matter to Field Audit Management to conduct a field interview with the applicant. In this case, an interview was held in the offices of Shore Line. Mr. Tanzman stated that he never received a written report of the interview which is contrary to the Division's standard practice. However, it is Mr. Tanzman's understanding that after conducting

the interview, Field Audit Management decided to conduct a field audit of Shore Line before submitting a report to Mr. Tanzman's office. That audit was being conducted at the time of this hearing.

Mr. Tanzman testified that he considered financial statements on file for Shore Line in arriving at his decision to deny registration. Mr. Tanzman specifically referred to financial statements for the years 1988 and 1993. The Division placed in evidence a combined balance sheet for Shore Line and its subsidiaries for 1988. It shows total assets of $4,920,566.00 and total liabilities of $6,215,791.00. The Division also produced a statement of Liabilities and Stockholder's Equity as of April 30, 1993 which shows "Total stockholder's deficiency" of $3,427,407.00. Mr. Tanzman drew the conclusion from these documents that Shore Line's financial condition was worsening. Mr. Tanzman was unable to identify the source of these documents with any certainty.

Mr. Tanzman testified that he remembers that the Division received a notice of termination of a bond filed by Shore Line. He stated that "termination" means the bond will continue to cover past periods up to a certain point in time but would not cover future liabilities.

The Division and Shore Line entered into a deferred payment agreement dated January 23, 1995. It requires Shore Line to make minimum monthly payments of $4,997.61 to satisfy six assessments issued to Shore Line. At the time of the agreement, Shore Line's tax liability under these six assessments totalled $86,845.94. With penalty and interest accrued as of the date of the agreement, the amount due from Shore Line totalled $125,021.94. Testimony from the Division's witnesses seemed to indicate that Shore Line was in default on this agreement. It seems that Shore Line either failed to make two payments or had checks dishonored. This situation was rectified, and, for all practical purposes, Shore Line was in compliance with its deferred payment agreement at the time of the hearing.

The deferred payment agreement includes four of nine assessments listed in Finding of Fact "16". They are the assessments identified as Case Type "E" by CARTS.

The Division issued to Shore Line (apparently at its request) a Consolidated Statement of Tax Liabilities. It lists five assessments that are identified as being "currently under review". They correspond to the five assessments identified as case type "K" on the CARTS printouts. Joseph O'Dartei, a Tax

Compliance Agent assigned to the Shore Line account, testified that a "K" identifier indicates that he is to inquire further to determine whether he can proceed with collection activities and a "T" identifier means that there is an absolute bar to collection.

During the course of negotiating deferred payment agreements with the Division, Shore Line gave to Mr. O'Dartei a Consolidated Financial Statement for the Year Ended June 30, 1994 ("1994 Financial Statement"). The statement was prepared by L.H. Frishkoff & Company, Certified Public Accountants. In a statement dated December 2, 1994 which is a part of the 1994 Financial Statement, Frishkoff & Company explain that a consolidated statement is limited to presenting certain information. Frishkoff & Company averred that it had not audited or reviewed the financial statements. The Frishkoff & Company statement further provides:

> "The owner has elected to omit substantially all of the disclosures and the consolidated statement of cash flows required by generally accepted accounting principles. If the omitted disclosures and consolidated cash flows were included in the financial statements, they might influence the user's conclusions about the Company's financial position, results of operations, and cash flows. Accordingly, these financial statements are not designed for those who are not informed about such matters.
>
> "The accompanying consolidated financial statements have been prepared assuming that the Company will continue as a going concern. The Company has suffered recurring losses from operations and its total liabilities exceeds its total assets. These conditions indicate that the Company may be unable to continue as a going concern. The consolidated financial statements do not include any adjustments that might result from the outcome of this uncertainty."

Shore Line has closed, by payment of taxes due, many of

the original assessments issued to it. On October 15, 1993, Shore Line sold its Bronx customer list and a Mack truck to Atlas Fuel Oil Corp. for $446,108.50. On December 21, 1993, Shore Line sold its customer list consisting of customers in certain towns in Westchester, Putnam, and Dutchess Counties to Lewis Oil Company for $285,943.45. The sales prices were calculated by taking the number of gallons of heating oil sold annually to each customer and multiplying that amount by the gross profit realized by the seller on the sale of each gallon (70 cents per gallon on the Atlas sale and 65 cents per gallon on the Lewis sale). Shore Line used the proceeds from these sales to satisfy certain tax warrants which were docketed against it by the Division on April 22, 1993 and to pay other debts.

Mr. Capossela testified that Shore Line's financial condition is better than the 1994 Financial Statement makes it appear. The Financial Statement does not include Shore Line's customer lists in the category of assets. He stated that the value of Shore Line is over $6 million if only customer lists, real estate and equipment is included in the valuation. He also stated that Shore Line's financial problems stem from cash flow and not assets. He testified that Shore Line is currently making payments on the bond which the Division claims has been terminated.

Asked why Shore Line continued to do business after its registration was cancelled in 1993, Mr. Capossela testified:

> "Well, I thought that if I was able to pay up my obligations and continue, because if I went out of

> business, I would have put 40 faithful employees out of work. I would have disappointed 7,000 customers who depended on us for heat and service. And I just felt if I kept paying my obligations and caught up enough, that perhaps the State of New York would see that I was truly wanting to pay my obligations.
>
> "And I could have went Chapter 11. I did not choose to do that because I want to pay everybody. And I could not see myself giving up, going out of business and giving up everything that my father worked for, I worked for and my children." (Tr., p. 166-167.)

Mr. Tanzman testified that when Shore Line's application was considered the Division considered Shore Line's compliance with its deferred payment agreement and the fact that it has satisfied many outstanding assessments.

CONCLUSIONS OF LAW

A. The term Diesel motor fuel means "kerosene, crude oil, fuel oil or other middle distillate and also motor fuel suitable for use in the operation of an engine of the diesel type", excluding number 4 Diesel fuel (Tax Law § 282[14]). Tax Law § 282-a(1) imposes an excise tax on the sale of Diesel motor fuel in New York. There is a specific exemption from taxation for "the sale to or use by a consumer of previously untaxed Diesel motor fuel . . . which is used exclusively for heating purposes or for the purpose of use or consumption directly and exclusively in the production of tangible personal property, gas, electricity, refrigeration or steam, for sale. . ." (Tax Law § 282-a[3][b][i]).

As relevant here, Tax Law § 282-a(2) provides that no person shall engage in the sale of Diesel motor fuel in New York State unless such person is registered as a distributor of Diesel motor fuel. Tax Law § 302(a) requires every petroleum business

with respect to Diesel motor fuel to be registered as a distributor pursuant to article 12-A of the Tax Law. In addition, each petroleum business with respect to residual petroleum product must be registered in accordance with Tax Law § 302(b). All of the registration provisions of Tax Law § 283 are made applicable to applicants for registration and registrants with respect to Diesel motor fuel (Tax Law § 282-a[2]) and residual petroleum product (Tax Law § 302[b]). Retailers of heating oil only and residual petroleum product are entitled to a limited registration under these sections; however, a person with a ROHO registration is limited to making sales of diesel fuel for the uses described in Tax Law § 282-a(3)(b)(i) only, i.e., for heating purposes or for consumption directly and exclusively in production.

The Commissioner of Taxation and Finance may refuse to register an applicant under certain specified circumstances involving any of the following: (1) the applicant, (2) an officer, director, or partner of the applicant, (3) a shareholder of the applicant directly or indirectly owning more than 10 percent of the applicant's stock (i.e., a shareholder with voting rights) or (4) a shareholder or employee of the applicant under a duty to file returns and pay tax (Tax Law § 283[2]). As pertinent to this proceeding, the circumstances which may warrant a refusal to register include, but are not limited to, the following:

(1) where "any tax imposed under [the Tax Law] or any related statute as defined in section eighteen hundred of [the

Tax Law] has been finally determined to be due . . . and has not been paid in full" (Tax Law § 283[2][a]);

(2) where the applicant or an officer, partner or greater than 10 percent shareholder of the applicant, was an officer, director, partner or greater than ten percent shareholder of another person

> "at the time any tax imposed under [the Tax Law] or any related statute . . . was finally determined to be due, from such other person and where such tax has not been paid in full, or at the time such other person was convicted of a crime provided for in this chapter . . . within the preceding five years, or at the time the registration of such other person was cancelled or suspended pursuant to subdivision four of this section within the preceding five years, or at the time such other person committed any of the acts or omissions which are, or was convicted as, specified in subdivision four of this section within the preceding five years . . ." (Tax Law § 283[2][e]; emphasis added).

(4) where the registration of the applicant (or any of the persons described above) has been cancelled or suspended within the preceding five years (Tax Law § 283[2][f]).

The Division primarily relies on the three provisions cited above to support its decision to refuse registration to Shore Line. Petitioner argues that most of these provisions do not apply to it. Petitioner's contentions may be summarized as follows:

(1) Petitioner contends that the Division is estopped from asserting the cancellation of its registration as a Diesel motor fuel distributor as a basis for denying ROHO registration. According to petitioner, the Division was or should have been aware that Shore Line continued doing business after cancellation of its license and did not attempt "to enforce its

cancellation of Petitioner's diesel license." (Petitioner's brief, p. 33.) Petitioner asserts that it reasonably relied on the Division's inaction and reasonably believed that it had the Division's permission to continue to do business without registration.

(2) Petitioner contends that tax liabilities which are the subject of a deferred payment agreement should not be treated as liabilities which have been finally determined but have not been paid in full. According to petitioner, such a policy (even if technically correct) is counter-productive since it would not encourage taxpayers to enter into such agreements.

(3) Petitioner claims that the Division relied on the existence of "non-finally determined, but fully protested assessments against Shore Line" as a ground for denying registration (Petitioner's brief, p. 23). Petitioner did not identify with specificity the assessments which it considers to be non-final, but I presume that it means those assessments identified as Case Type "K" on the CARTS printouts.

(4) Petitioner claims that the CARTS documents and the financial statements relied on by the Division in making its determination are unreliable and inaccurate and do not provide reliable evidence of taxes owed.

(5) Petitioner contends that where a related person or corporation has failed to pay a tax finally determined to be due (Tax Law § 283[2][e]) the tax liabilities cannot have arisen more than five years from the application under consideration. Based upon this interpretation of the statute, petitioner claims

that the finally determined but unpaid tax liabilities of Westchester Hudson may not be considered in this determination.

(6) Petitioner claims that if the liabilities of Westchester Hudson are properly considered under Tax Law § 283(2)(e) the Division is still barred from considering these liabilities under the doctrine of laches. According to petitioner, the Division failed to assert its claim for the unpaid taxes and "inexplicably sat on its hands by permitting Shore Line to be licensed as a distributor in the face of the aforementioned substantial 'finally determined, but allegedly unpaid' assessments outstanding against Petitioner's alleged affiliate, Westchester Hudson" (Petitioner's brief, p. 20). Since the Division did not initiate collection action against Westchester Hudson, petitioner claims that it would be highly prejudicial for the Division to now assert the unpaid liabilities as a basis for refusing to license Shore Line as a ROHO.

(7) Petitioner claims that the Division "deprived Petitioner of its fundamental due process rights by failing to provide Petitioner with an opportunity for a hearing prior to issuing a Notice of Proposed Refusal to Register" (Petitioner's brief, p. 26).

(8) Petitioner argues that the Division abused its discretion by failing to consider mitigating factors, such as petitioner's attempts to satisfy all outstanding assessments by entering deferred payment agreements. Petitioner states that denying it registration would drive it out of business, cause 40 employees to lose their jobs and cause 7,000 customers to be

left out in the cold. Moreover, it asserts that denying registration would be counter-productive since Shore Line would no longer be able to earn the money necessary to pay its outstanding liabilities.

B. In Matter of OK Petroleum (Tax Appeals Tribunal, November 1, 1990), the Tax Appeals Tribunal held that the proper standard of review to be applied by an Administrative Law Judge reviewing a proposed refusal to register or a cancellation of registration is a de novo review of the application. Based upon the evidence presented by both parties, I find that the Division's decision to deny registration was the correct one.

In Matter of Diamond Terminal Corporation (Tax Appeals Tribunal, September 22, 1988, confirmed 158 AD2d 38, 557 NYS2d 962, lv denied 76 NY2d 711, 563 NYS2d 767) the Tribunal noted that the revision of Article 12-A by the Laws of 1986 (ch 276) was the "culmination of legislative and executive efforts to combat massive evasion of the excise and sales taxes imposed on motor fuel by Articles 12-A and 28 and pursuant to the authority of Article 29 of the Tax Law" (id.). In Matter of OK Petroleum (supra), the Tribunal specifically discussed the registration provisions of Article 12-A.

> "[C]hanges to the registration provisions for distributors were enacted which allowed the Division of Taxation to refuse to register a distributor and to cancel or suspend a registration under certain conditions (Tax Law § 283[2] and [4]). The obvious intent of the change in the registration provisions was to provide the Commissioner with the opportunity to decide whether the distributors who would be receiving tax moneys and holding them in trust until paid over to the State could be relied upon to properly exercise their tax collection responsibilities (see, Memorandum of State Department of Taxation and Finance, McKinney's

> Session Laws, 1986, ch 276, at 2882). In 1988 similar legislative changes were made to address evasion and avoidance of the tax imposed on diesel motor fuel (L 1988, ch 261, §§ 67-105)." (Matter of OK Petroleum, supra.)

As posed by the OK Petroleum decision, the ultimate question to be asked in a registration case is whether the applicant can be relied upon to properly exercise its responsibilities as a distributor. There are two circumstances which in themselves demonstrate that Shore Line cannot--its continued activity as a distributor of Diesel motor fuel after its registration was cancelled (Tax Law § 283[2][f]) and its failure to pay in full all taxes finally determined to be due (Tax Law § 283[2][a]).

To eliminate the evasion of motor fuel taxes in New York, the Legislature imposed an elaborate system of registration, licensing and recordkeeping on all persons engaged in manufacturing, importing, selling, distributing and transporting motor fuel in New York. The licensing and registration provisions are vital components of this overall statutory scheme. They are not legal technicalities which can be ignored without consequence. In June 1993 Shore Line's registration as a Diesel motor fuel distributor was cancelled for failure to pay a tax finally determined to be due within 10 days of receiving a notice and demand for payment of that tax (see, Tax Law § 283[5]). The letter of cancellation informed Shore Line that it could no longer act in any capacity as a distributor of motor fuel in New York State. The letter is clear and unequivocal. It also advised Shore Line of its right to seek a review of the Division's determination by filing a request for a conciliation

conference or a petition in the Division of Tax Appeals, but it warned that the cancellation was in effect and would remain in effect pending a hearing.

Shore Line surrendered its registration and chose not to contest the cancellation, but it continued to buy and sell diesel motor fuel in New York State. Petitioner defends its actions in two ways. First, it asserts that the Division knew, or should have known, that it was continuing to do business, and, since the Division took no action to shut down Shore Line's business, it is now estopped from denying petitioner registration on this ground. Petitioner points to its filing of Diesel motor fuel and petroleum business tax returns after cancellation of its registration and its transactions with a tax compliance agent as proof that the Division was aware of its continuing operations. I find no merit to this defense. The Division's acquiescence in Shore Line's unregistered operation cannot be inferred from the mere receipt and processing of tax returns (see, Matter of Barrier Oil Corporation, Tax Appeals Tribunal, January 4, 1991). Also, Shore Line filed most of those returns indicating that it held a Diesel motor fuel license. Although the evidence shows that one or more tax compliance agents were aware of Shore Line's continuing operations, Shore Line has not proven that those agents knew or should have known that Shore Line was operating while unregistered. Even if individual employees of the Division were aware that Shore Line was operating without registration, this would not justify Shore Line's continuing operation after it

received notice of the cancellation of its registration (see, Matter of Diamond Terminal, supra; Matter of Barrier Oil, supra). Shore Line not only continued to act as a distributor after cancellation of its license in June 1993, it did not even apply for registration as a ROHO until September 1994, over a year later. In short, Shore Line knowingly and willfully continued to do business as a Diesel motor fuel distributor in violation of the Tax Law for over a year. This history is compelling evidence that Shore Line cannot be relied on to carry out its duties as a distributor in accordance with the Tax Law.

Shore Line's past history of tax delinquencies also provides adequate grounds for the Division's refusal to register it as a ROHO. Shore Line's registration was cancelled pursuant to Tax Law § 283(5) which provides, as pertinent:

> "[A] registration may be cancelled or suspended without a prior hearing . . . for nonpayment of any taxes due pursuant to this article or article twenty-eight or twenty-nine of [the Tax Law] with respect to sales and uses of motor fuel if the registrant shall have failed to file such return or pay such taxes within ten days after the date the demand therefor is sent by registered or certified mail to the address of the distributor...."

After cancellation of its license, petitioner continued to do business and continued to incur tax liabilities. Petitioner's liabilities for four outstanding tax assessments were incurred after its registration was cancelled--L 010118142-7, a petroleum business tax assessment for the period ended November 30, 1994; L 010096005-1, a sales tax assessment for the period ended November 30, 1994; L 009859857-9, a sales tax assessment for the period ended February 28, 1994 and L 008816154 9, a petroleum business tax assessment for the period

ended February 28, 1994. In addition, Shore Line stipulated to a discontinuance of proceeding for assessment L 007951478-9, resulting in a fixed and final assessment of tax due for the period ended May 31, 1990 in the amount of $70,000.00. Shore Line has four other outstanding assessments for the periods ended January 31, 1992, December 31, 1991, and for the years 1989 and 1988. Petitioner's claim that these tax liabilities have not been finally determined is rejected.

Petitioner claims that the CARTS printouts which provide evidence of nine outstanding assessments were erroneously received in evidence and should be afforded no weight since the printouts were prepared for the purposes of the hearing and are, admittedly, incorrect. I disagree. The Division conceded that the information about assessment L 007951478-9 is incorrect. This is the tax assessment which was reduced by agreement of the parties from $99,689.15 to $70,000.00. CARTS was not updated to reflect this reduction in tax, and it indicates that this assessment has been "informally" protested. In fact, petitioner filed a petition protesting the assessment and then stipulated to discontinuance of the proceeding. Nonetheless, the evidence is indisputable that the tax of $70,000.00 was finally determined and not paid in full at the time of this proceeding.

The CARTS printouts gave petitioner full notice of all taxes which the Division claims to be finally determined and not paid in full. Petitioner maintains that the assessments identified as Case Type "K" are under review and have not been finally determined. Pursuant to Tax Law § 288(5), any determination of

tax due made as the result of an audit of the distributor's tax returns shall finally and irrevocably fix the tax unless the distributor applies for a hearing in the Division of Tax Appeals. Mr. Tanzman testified that only assessments identified as Case Type "T" have been formally protested by the filing of a petition or a request for a conciliation conference. He stated that those identified with a "K" have not been formally protested but are under review at the discretion of the Division. If petitioner had evidence that any of the assessments marked with a "K" have been protested by the filing of a petition or a request for a conciliation conference, it was incumbent upon it to produce such evidence. Inasmuch as petitioner produced no evidence to show the incorrectness or inaccuracy of the CARTS printouts, I find that they were correct in every respect other than the lack of updating of assessment L 007951478 9. Moreover, since none of the assessments was marked with a "T", I find that all of the assessments listed in Finding of Fact "16" have been finally determined including those marked with a "K". In addition, I do not understand petitioner's contention that the printouts are inadmissible as evidence because they were prepared for hearing. The information in the printouts was not prepared for hearing. It is information constantly maintained by the Division as part of CARTS. The printouts are simply a method of conveying that information by printed material rather than on a computer screen.

I also reject petitioner's contention that assessments which are the subjects of deferred payment agreements (those

identified as Case Type "E" in Finding of Fact "16") should not be treated as taxes not paid in full. As long as a tax is still owing, it has not been "paid in full" (Tax Law § 283[2][a]). Accordingly, a tax which is the subject of a deferred payment agreement may still be considered as a basis for denying ROHO registration. The Tax Appeals Tribunal's decision in Matter of Barrier Oil Corporation (supra), does not hold otherwise. In that case, the Division withdrew an allegation of nonpayment of petroleum business taxes as a ground for denying registration upon learning of the existence of a deferred payment agreement relating to those taxes. The reason for the Division's decision to do so was not discussed in the decision; however, there is no language in the Barrier decision that indicates that either the Division or the Tribunal considered the taxes to be paid in full because of the existence of the deferred payment agreements. Moreover, as the Division notes in its brief, there is an important distinction between the petroleum business tax and taxes imposed on motor fuel under articles 12-A and 28 of the Tax Law. The petroleum business tax is a franchise tax imposed on the petroleum business for the privilege of doing business in New York (Tax Law § 301[a]). Taxes on motor fuel are transaction taxes which are collected by the motor fuel distributor and paid over to the State. In carrying out its statutorily imposed duties, a distributor acts as a fiduciary to the State. The petitioner in Barrier had a consistent record of timely filing of motor fuel and sales tax returns and payment of all taxes shown as due on those returns. Its only outstanding

assessments at the time of hearing were for petroleum business taxes. Thus, Barrier had a record of carrying out its duties to collect and pay over taxes to New York. Finally, petitioner can draw no comfort from the decision in Barrier Oil since the Division's refusal to register Barrier as a motor fuel distributor was confirmed on the ground that Barrier violated the Tax Law by operating without registration for a period of two years (Matter of Barrier Oil Corporation, supra).

In contrast to the petitioner in Barrier Oil, Shore Line has a history of incurring liabilities in both motor fuel and sales taxes. I find it especially revealing that Shore Line incurred sales tax liabilities in two tax periods after its registration was cancelled (assessments L 010096005-5 and L 009859857-9). This means that Shore Line collected tax from its customers and failed to pay the monies over to the State. Under the circumstances, I do not find that the existence of deferred payment agreements with respect to these taxes should serve to bar the Division from denying registration to Shore Line.

In addition, the Division points out that a policy of treating taxes subject to a deferred payment agreement as though they had been paid in full would weaken the legislative goal of the registration provisions--to ensure that persons controlling distributorships could be relied upon to properly carry out all of the statutory obligations of a Diesel motor fuel distributor. The Division should not be compelled to register an applicant which has failed to pay over tax monies owed to the State simply because the applicant agrees to repay those monies over time.

In sum, I agree with the Division that Shore Line's past history as a Diesel motor fuel distributor demonstrates that Shore Line cannot be relied upon to properly exercise its duties as a distributor under the Tax Law.

C. Louis Capossela's status as either the president or the 100-percent stockholder, or both, of two corporations with liabilities for outstanding taxes finally determined to be due provides additional grounds for refusal to register Shore Line (Tax Law § 283[2][e]). The two corporations in question are Standard Petroleum and Westchester Hudson.[3] Petitioner dismisses the importance of the Standard Petroleum liability by stating that it is for a relatively small sum of money--less than two thousand dollars. Nonetheless, it is a fixed and final determination of tax due, and the tax has not been paid in full. Petitioner claims that the Westchester Hudson liabilities may not be considered. It states:

> "Contrary to the Division's argument, Tax Law §283(2) provides that in order for the Tax Department to consider any of the acts or omissions specified therein as a basis for denying a person's application for registration, such act or omission must have occurred within five years of the person's application." (Petitioner's reply brief, p. 5.)

I agree with the Division that section 283(2) does not contain such a restriction. Subdivision (2) of section 283 is an extraordinarily cumbersome provision of over 1,300 words in a

---

[3]Mr. Capossela testified to being the president and a 100-percent shareholder of Standard Petroleum (tr., p. 148) and to being a 100-percent shareholder of Westchester Hudson (tr., p. 167). I emphasize this testimony here because petitioner suggests in its brief that there is some doubt about Mr. Capossela's relationship to these corporations.

single sentence. It lists seven grounds for refusal to register an applicant as a distributor of motor fuel or Diesel motor fuel. Under section 283(2)(e), the Division can refuse to register a distributor if the applicant, or an officer, director, partner, or over 10-percent shareholder of the applicant was an officer, director, partner or over 10-percent shareholder of another person when one of three circumstances occurred: (1) at the time any tax imposed under the Tax Law was finally determined to be due from such other person and "where such tax has not been paid in full"; or (2) when such other person was convicted of a crime "within the preceding five years"; or (3) at the time the registration of the other person was cancelled or suspended "within the preceding five years" (Tax Law § 283[2][e]). Notably the language "within the preceding five years" does not appear in conjunction with the failure to pay tax, although it is repeated after each of the other two circumstances enumerated in the statute.

As the Division points out, the failure to pay tax is an act or omission which occurs each day that the tax remains unpaid. Moreover, the language of the statutory provision clearly indicates that failure to pay remains a ground for refusal to register as long as the tax is not paid in full. It does not cease to be a ground five years after the tax is finally determined to be due. Petitioner's reliance on the court's decision in Matter of Diamond Terminal Corporation v. New York State Dept. of Taxation and Fin., 158 AD2d 962, 557 NYS2d 962, lv denied 76 NY2d 711, 563 NYS2d 767) is misplaced. The issue

in that case concerns the proper interpretation of Tax Law § 283-b(2)(g) and (4) which apply to the licensing and registration of terminal operators. The comparable provisions concerning Diesel motor fuel distributors are found at Tax Law § 283(2)(g) and (4). Tax Law § 283(2)(g) provides, as pertinent:

> "[where] the applicant, [or] an officer, director or partner of the applicant . . . has committed any of the acts or omissions which are, or was convicted as, specified in subdivision four of this section within the preceding five years, the commissioner may refuse to register such applicant (emphasis added)."

Petitioner cannot rely on this provision to support its position that outstanding liabilities of more than five years duration may not be considered in a registration proceeding. The Division did not refuse to register Shore Line based on this provision or any of the provisions specified in subdivision four of section 283. The provision relied on by the Division to support its refusal to register is found at Tax Law § 283(2)(e) which is quoted in Conclusion of Law "A". The five-year limitation specifically stated in section 283(2)(g) does not appear in connection with the failure to pay all taxes found in section 283(2)(e).

Accordingly, I find that the Division properly considered the unpaid liabilities of Westchester Hudson, a corporation solely owned by Mr. Capossela, when it made its determination. The past tax payment history of Westchester Hudson reinforces the conclusion that Shore Line cannot be relied upon to satisfy its obligations under the Tax Law.

Petitioner also claims that the assessments of Westchester Hudson may not be considered in reviewing Shore Line's

application on grounds of laches. "Laches is defined as 'such neglect or omission to assert a right as, taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity" (Matter of Barabash, 31 NY2d 76, 334 NYS2d 890, 894, quoting 2 Pomeroy, Equity Jurisprudence [5th ed.], § 419, pp. 171-172). Thus, the essential element of laches is a delay prejudicial to the opposing party.

The Division argues that this argument should not be considered at all since petitioner raised it for the first time in its brief. It contends that whether the Division took collection action or why it did not take such action are factual issues which were not addressed at hearing because the Division was unaware of petitioner's laches defense. I agree that the defense of laches, as raised by petitioner, is a mixed question of law and fact. It was inappropriate for petitioner to raise the issue for the first time in its brief.

Even if it were properly raised, the doctrine of laches is not applicable here. Where an equitable defense is asserted by a petitioner against the Division, the petitioner must show that its application is necessary to avoid a manifest injustice (Matter of Sheppard-Pollock v. Tully, 64 AD2d 296, 409 NYS2d 847; Matter of Turner Constr. v. State Tax Commn., 57 AD2d 201, 394 NYS2d 78). I cannot see that it would be manifestly unjust to allow the liabilities of Westchester Hudson to be considered in determining Shore Line's fitness to act as a Diesel motor fuel distributor. Mr. Capossela never denied the existence of

the Westchester Hudson liabilities or knowledge of them. The Division never stated, orally or in writing, that the Westchester Hudson liabilities would never affect Shore Line. It merely allowed Shore Line to maintain its registration as a Diesel motor fuel distributor until July 1993. As petitioner well knows, the Division is not compelled to refuse registration because one of the criteria set forth in section 282(2) has been met. Rather, the statute provides the grounds which are to guide the discretion of the Commissioner of Taxation in making a determination. Here, the Division allowed Shore Line to operate as a Diesel motor fuel distributor until Shore Line demonstrated its own unreliability by failing to pay tax due within ten days of receiving a notice and demand for those taxes. Then, in reviewing Shore Line's application for a ROHO license, the Division completely reviewed Shore Line's own tax payment history and that of its principal shareholder, Louis Capossela. I cannot see any basis whatsoever for petitioner's claim that these facts demonstrate neglect to assert a right for an unreasonable length of time. Nor do I understand how Shore Line was prejudiced by the Division's consideration of the Westchester Hudson liabilities when it was reviewing its ROHO application. In light of Shore Line's history of tax delinquencies, the tax payment history of Westchester Hudson takes on a different significance than it might have had if Shore Line had maintained a record of timely payment of its tax obligations. The Division was correct in considering the existence of Westchester Hudson's unpaid taxes and Mr.

Capossela's status as the sole shareholder of a motor fuel distributor with outstanding tax liabilities.

D. Petitioner's other arguments are without merit. Tax Law § 283(6)(a) authorizes the Division to issue a Noticed of Proposed Refusal to Register an applicant for a Diesel motor fuel license prior to a hearing. There is no basis for petitioner's claim that such a procedure is a violation of an applicant's due process rights since an applicant does not have a vested right in the license or registration for which it is applying (see, Matter of Clarendon Marketing, State Tax Commn., October 15, 1986 [TSB-H-86(19)M]). Tax Law § 283(6)(a) states that a notice of refusal to register must be issued promptly after an application is received. Here, about five months passed before a notice was issued. As Mr. Tanzman testified, consideration of the application requires a check of the applicant's background and payment history as well as a field interview with the applicant. Under the circumstances, five and one-half months is not an unreasonable amount of time to spend conducting a review of an application. Finally, petitioner maintains that the Division did not follow its own procedures in this case because Mr. Tanzman did not receive a written report of the field interview that was conducted. Inasmuch as there is no statutory or regulatory requirement of a written report, the lack of one does not demonstrate a significant departure from acceptable procedures.

Finally, the mitigating circumstances outlined by petitioner do not justify granting it registration. Certainly, Shore

Line's attempts to satisfy its existing tax liabilities must be weighed against other factors. The deferred payment agreements and the satisfaction of certain tax warrants show that Shore Line has tried to pay its outstanding liabilities. However, I agree with the Division that these efforts are not sufficient in light of Shore Line's flagrant disregard of the registration provisions of the Tax Law. This conclusion is not in conflict with the decision of the Tax Appeals Tribunal in Matter of Barrier Oil (supra). In that case, the Administrative Law Judge upheld the Division's decision to deny the petitioner registration as a motor fuel distributor, but the judge reversed the Division's decision with regard to Barrier's registration as a diesel motor fuel distributor and ordered the Division to register Barrier as such. The Division took no exception to the determination, but the petitioner argued to the Tribunal that granting registration in one instance but not the other was an arbitrary and irrational decision. The Tribunal disagreed stating:

> "[The determination] reflects a balanced and judicious attempt to avoid a harsh and inequitable result. The blanket refusal to register petitioner would exact too harsh a penalty in light of the facts and circumstances here, including the consequences to petitioner of a refusal to register, [Barrier's] filing and payment record and the change in petitioner's corporate structure."

The facts which warranted granting registration to Barrier do not exist here. Barrier had an unblemished record as a distributor of diesel motor fuel. There was no evidence in the record that it had ever failed to meet its obligations as such. Here, Shore Line has failed to meet its obligations as a Diesel

motor fuel distributor: it had its registration cancelled for nonpayment of taxes finally determined to be due; it continued to operate as a Diesel motor fuel distributor after its registration was cancelled; and it continued to incur tax liabilities after its registration was cancelled. Under these circumstances, denying registration to Shore Line is not a harsh or inequitable result. I am mindful of the fact that this action will prevent Shore Line from doing business as a retailer of heating oil in New York and as a seller of residual petroleum product and, as a result, a considerable amount of pain may be inflicted upon Shore Line's employees. However, I believe that in view of all of the facts and circumstances, the Division's refusal to register Shore Line as a Diesel motor fuel distributor is correct and appropriate.

E. The petition of Shore Line Oil Company, Inc. is denied and the Division's notice of proposed refusal to register is sustained.

DATED: Troy, New York
November 30, 1995

/s/ Jean Corigliano

ADMINISTRATIVE LAW JUDGE