

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**TERMINELLE CORPORATION** : DETERMINATION  
for Review of a Denial, Suspension, Cancel- : DTA NO. 814478  
lation or Revocation of a License, Permit or :  
Registration under Article 12-A of the Tax Law. :  
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Petitioner, Terminelle Corporation, 56-15 58th Street, Maspeth, New York 11378, filed a petition on November 10, 1995 for review of a proposed cancellation of petitioner's license as a terminal operator under Article 12-A of the Tax Law.

A hearing<sup>1</sup> was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on December 12, 1995 at 9:15 A.M.<sup>2</sup> By agreement of the parties, simultaneous briefs were filed on February 16, 1996 and reply briefs on March 22, 1996.<sup>3</sup> Petitioner appeared by Norman R. Berkowitz, Esq. The Division of Taxation ("Division") appeared by Steven U. Teitelbaum, Esq. (John E. Matthews, Esq., of counsel).

***ISSUES***

I. Whether sufficient grounds exist to support the proposed cancellation of petitioner's license as a terminal operator under Article 12-A of the Tax Law and to what extent the Division must introduce evidence to substantiate such grounds.

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<sup>1</sup>The hearing in this matter was held in consolidation with the hearing in the matter of the petition of Janus Petroleum, DTA #814466. The determination in this matter is being issued simultaneously with the determination concerning Janus Petroleum.

<sup>2</sup>The hearing was originally scheduled for November 20, 1995. At petitioner's request, made on November 14, 1995, the hearing was adjourned and rescheduled for December 12, 1995.

<sup>3</sup>If this matter is treated as an expedited matter, the due date for this determination, including the allowance for the filing of briefs, is June 3, 1996.

II. Whether expediting the hearing in this matter was improper, and if so, whether petitioner's due process rights were violated.

III. Whether the Division's answer was an improper pleading because it includes excessive information in the form of affirmative statements as well as attached documents, and if so, whether the answer should be struck from the record and the Division defaulted or, alternatively, whether the documents attached to the answer should be struck.

IV. Whether the Notice of Proposed Cancellation was invalid because it incorrectly referenced Wizard Petroleum, Inc. as "Wizard Corporation".

V. Whether petitioner's due process rights were violated by permitting the Division to voir dire the authenticity of petitioner's documents while the Division's documents were accepted into the record as attachments to its answer without an auditor to provide a foundation for such documents.

VI. Whether the administrative law judge properly denied petitioner's request to segregate witnesses.

#### ***FINDINGS OF FACT***

1. Petitioner, Terminelle Corporation ("Terminelle"), operates a fuel terminal in New York City that holds from five to seven million gallons of fuel in seven to ten aboveground and underground tanks. Terminelle receives fuel by barges, pipeline and truck. Most shipments made out of the terminal are by truck.

2. The Division issued a Notice of Proposed Cancellation of Your License as a Terminal Operator Under Article 12-A of the Tax Law dated February 13, 1995 against petitioner. The notice stated five grounds for cancelling Terminelle's license as follows:

"1) Trevor Wisdom, an owner and officer of Terminelle Corporation, was an officer and 50% owner of Wizard Corporation at the time that Wizard Corporation committed fraud in its operations as a distributor.<sup>4</sup>

2) Ashley Jarwood, an owner and officer of Terminelle Corporation, was an officer and 50% owner of Wizard Corporation at the time that Wizard Corporation committed fraud in its operations as a distributor.

3) Trevor Wisdom, an owner and officer of Terminelle Corporation, is an officer and 50% owner of Wizard Corporation, a corporation which has failed to comply with provisions of Articles 28 and 29 of the [T]ax [L]aw with respect to automotive fuel.

4) Terminelle Corporation has failed to comply with provisions of Articles 28 and 29 of the [T]ax [L]aw with respect to automotive fuel.

5) Terminelle Corporation, through the actions of its officers and owners, knowingly aided and abetted Wizard Corporation in violating the provisions of Articles 28 and 29 of the Tax Law with respect to automotive fuel.

Subsequently, the Division issued an Amended Notice of Proposed Cancellation of Petitioner's License as a Terminal Operator dated June 28, 1995. This amended notice set forth the reasons noted 1, 2, 3 and 5 above. Reason 4 was changed to read as follows:

"4) Terminelle Corporation has failed to comply with provisions of Article 12-A of the [T]ax [L]aw with respect to automotive fuel."

3. The Division in its answer dated November 30, 1995 (Division's Exhibit "D") "affirmatively" stated that:

"8. The tax, interest and fraud penalty found owing in Wizard remain unpaid as of the date of this answer. . . .

9. The returns which were found to be unfiled in Wizard remain unfiled as of the date of this answer."

4. The Division's representative, John E. Matthews, by his letter dated December 4, 1995 to petitioner's representative, Norman Berkowitz, (Division's Exhibit "E") views the two "affirmative statements" in his answer noted above as "additional grounds for cancellation" of

petitioner's registration. In this letter, Mr. Matthews sought "to clarify the additional grounds" as follows:

"First, Wizard currently has open liabilities in excess of \$15 million. The failure to pay these amounts is a continuing violation of the Tax Law which is, therefore, within the five years preceding the date of the Proposed Notices of Cancellation.<sup>5</sup> As Wizard, Janus and Terminelle have identical officers and owners, this violation of Wizard is a sufficient ground to cancel the registrations of Janus and Terminelle.

Second, Wizard has failed to file the sales tax returns for the audit period covered by the Tribunal's 1994 decision in DTA #809923. This again is a continuing violation on the part of Wizard which falls within the five years preceding the Proposed Notices of Cancellation. In addition, the failure to file those returns could be construed as a continued effort to conceal the fraud which the Tribunal found had occurred."

5. In addition to the five grounds set forth in the amended notice of proposed cancellation and the two additional grounds raised by Mr. Matthews in the Division's answer, at the hearing, Mr. Matthews initially sought to add one further ground to support the cancellation of petitioner's license:

"I have one final set of documents which I only obtained this morning and these are Division computer printouts showing open assessments against Janus Petroleum so this is a new ground which was not set forth until this morning"(tr., 42).

However, late in the hearing, Mr. Matthews decided to withdraw the additional ground concerning open assessments against petitioner:

"So the Division is withdrawing that exhibit ["F"] and withdrawing the two grounds, one for each corporation [for petitioner and Janus Petroleum]<sup>6</sup> based on that exhibit" (tr. p. 195).

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Mr. Matthews letter also referenced the proposed cancellation of the registration as a diesel motor fuel distributor at issue in the matter concerning Janus Petroleum.

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Mr. Matthews had initially asserted that the open assessments against Janus Petroleum was another ground for cancelling the terminal operator license of Terminelle Corporation "because the officers are the same" (tr., p. 60).

6. Petitioner, in its petition dated November 8, 1995 (Division's Exhibit "C"), alleged "that the Commissioner of Taxation and Finance made the following errors and assert[ed] the following facts":

"1. The proposed cancellation of the Petitioner's License as a Terminal Operator by the Department of Taxation and Finance is based on erroneous and incorrect facts.

2. The proposed cancellation . . . does not meet the statutory requirements of the Tax Law.

3. The individual shareholder-officers of the Petitioner were not shareholder-officers of any related corporate taxpayers which committed any acts prohibited by statute during the statutory period in issue.

4. The related corporate-taxpayer (Wizard Corporation) did not commit any acts prohibited by statute during the statutory period in issue.

5. The Petitioner did not fail to comply with any Article or provision of the Tax Law.

6. The Petitioner did not knowingly aid and abet Wizard Corporation in violating any provisions of the Tax Law.

7. The Division's answer dated November 30, 1995 denied the above six paragraphs set forth in the petition. In addition, the Division in paragraph "7" of its answer referenced the decision of the Tax Appeals Tribunal in Matter of Wizard Corporation (March 24, 1994) and described the Tribunal's holding in that matter as follows:

"a) Wizard had committed fraud in its operations with respect to its state tax obligations, b) Wizard had failed to file numerous tax returns, c) Wizard owed tax, interest and fraud penalties, d) the officers of Wizard were Ashley Jarwood and Trevor Wisdom, e) these officers had taken part in the fraud, f) these officers were also officers of Terminelle Corporation and g) Terminelle aided and abetted Wizard in the acts of fraud."

The Division also "affirmatively" asserted the following additional facts in its answer:

"8. The tax, interest and fraud penalty found owing in Wizard remain unpaid as of the date of this answer. . . .

9. The returns which were found to be unfiled in Wizard remain unfiled as of the date of this answer.

10. Ashley Jarwood and Trevor Wisdom were, at all relevant times, officers and major owner of Wizard. . . .

11. Ashley Jarwood and Trevor Wisdom were, at all relevant times, officers and major owners of Petitioner. . . . "

Attachments to the Division's Answer

8. In his letter transmitting the Division's answer to petitioner's representative, attorney Matthews noted that "Referenced in the answers [in Janus Petroleum and in Terminelle Corporation], and attached thereto, are all the documents which I intend, at this point, to introduce at the hearing." Mr. Matthews also informed attorney Berkowitz that he did "not intend to call any witnesses to testify on behalf of the Division but will rely, instead, upon the documentary evidence."

9. With reference to its affirmative statement that tax plus interest and fraud penalty remained unpaid by Wizard Petroleum, Inc. ("Wizard Petroleum") as of November 30, 1995, the date of the answer, the Division attached as an "Attachment 1" a photocopy of three separate computer records, each dated November 16, 1995 and labelled "CARTS- Assessments Receivable, Assessment History" for Wizard Corporation showing balances due as follows:

<u>Assessment ID</u>	<u>File Period</u>	<u>Tax Due</u>	<u>Penalty Due</u>	<u>Interest Due</u>	<u>Balance Due</u>
S900720800M	6/1/86-7/31/87	\$4,204,879.96	\$2,102,439.98	\$7,848,528.52	\$14,155,848.46
S900720801M	6/1/87-9/30/87	234,707.39	117,353.70	387,075.22	739,136.31
S900720802M	6/1/86-11/30/87	-0-	443,958.72	-0-	443,958.72

10. With reference to its affirmative statement that Ashley Jarwood and Trevor Wisdom were officers and major owners of Wizard Petroleum, the Division attached to its answer as "Attachment 2" photocopies of 16 separately identified documents summarized as follows:

(1) An "Application for Registration as Distributor of Gasoline and Similar Motor Fuels" for Wizard Petroleum dated July 8, 1985 signed by Ashley Jarwood as Secretary/Treasurer of Wizard Petroleum;

(2) Four Article 12-A motor fuel tax returns for each of the months, April, May, June and July 1985 signed by Ashley Jarwood as treasurer of Wizard Petroleum;

(3) A business check of Wizard Petroleum dated February 4, 1986 in the amount of \$126,829.17 in payment of motor fuel tax for November 1985 signed by Ashley Jarwood and Trevor Wisdom;

(4) Two business checks of Wizard Petroleum each dated November 6, 1987 in the amounts of \$7,407.64 and \$228,690.90, respectively, and each signed by both Ashley Jarwood and Trevor Wisdom in payment of sales tax for December 1985 and March 1986, respectively;

(5) Three business checks of Wizard Petroleum each dated September 24, 1987 in the amounts of \$135,784.71, \$168,183.99, and \$200,000.00, respectively, and each signed by both Ashley Jarwood and Trevor Wisdom in payment of motor fuel tax for June 1986 of \$135,784.71 and of motor fuel tax for July 1986 of \$368,183.99;

(6) An "Application for Motor Fuel Tax and Sales and Use Tax Reregistration" of Wizard Corporation<sup>7</sup> date stamped received by the Division's Miscellaneous Tax Bureau on June 16, 1987, which was signed by Trevor Wisdom and shows Mr. Wisdom as 50% owner and vice-president of Wizard Corporation and shows Ashley Jarwood as 50% owner and Secretary of Wizard Corporation. Mr. Wisdom's duties were described as "operations" and Ms. Jarwood's as "office operations";

(7) A letter dated April 21, 1989 on Wizard Petroleum's letterhead to Manufacturers Hanover Trust Co. signed by Ashley Jarwood requesting copies of two checks "issued between November [sic] 1, 1985 and February 1988 in the amount of \$122,588.24 and \$228,690.90";

(8) A "Secretary's Certificate Respecting Wizard Corp. dated as of July 23, 1990" of Ashley Jarwood indicating that she and Trevor Wisdom each own 50% of the outstanding stock of Wizard Corporation and "to the best of my knowledge following reasonable inquiry, no other person has any beneficial interest in or voting or dispository control with respect to any such

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<sup>7</sup>This reregistration form references an entity by the name of Wizard Corporation with a federal employer identification number of 112714701. This is the same identification number as shown for Wizard Petroleum on the "Application for Registration as Distributor of Gasoline and Similar Motor Fuels" dated July 8, 1985 as indicated above.

securities" and an affidavit dated September 25, 1992 of Ashley Jarwood notarized by attorney Berkowitz indicating that she is an officer of Wizard Petroleum, Inc.;

(9) An affidavit of Trevor Wisdom dated May 12, 1992 indicating that he is the president of Wizard Petroleum, Inc. and that an individual named Joseph A. Bernardo, "who was a minority stockholder of Wizard Petroleum, Inc, never had anything to do with the day-to-day operation of the business of Wizard Petroleum, Inc.";

(10) Fifteen pages of a stenographic transcript made of the hearing held in the Matter of the Petition of Ashley Jarwood, Officer of Wizard Petroleum, Inc., DTA # 811098 before Administrative Law Judge Arthur Bray on July 13, 1994 where the Division was represented by attorney Matthews and Ms. Jarwood by attorney Berkowitz. At pages 49 through 59 of the transcript, Ms. Jarwood's testimony was transcribed. She testified in relevant part as follows:

(i) She signed each of the 18 monthly sales tax returns of Wizard Petroleum for the period beginning June 1, 1986 and ending November 30, 1987; and

(ii) As treasurer of Wizard Petroleum, "My duties were whatever had to be done that I could do, that is what I did" (tr., p. 56).

Upon further prodding by the administrative law judge, Ms. Jarwood elaborated:

"ALJ: Could you give me some examples?"

Ms. Jarwood: I did everything other than mechanically--anything that didn't require manual dexterity or ability. Other than that, I did it, if the corporation required that service.

ALJ: In the course of a typical day, what would that involve?"

Ms. Jarwood: Buying and selling products, overseeing the running of the office, and what have you" (tr., pp. 55-56);

(11) Two Article 12-A motor fuel tax returns for the months of May and June, 1987, respectively, each signed by Trevor Wisdom as president of Wizard Petroleum;

(12) A corporate power of attorney for Wizard Petroleum dated August 1, 1990 appointing attorney Berkowitz to represent it concerning sales and use taxes for the period



1986-1988 which was executed by Trevor Wisdom in his capacity of president of Wizard Petroleum;

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

(14) Six pages of a stenographic transcript made of the hearing in the Matter of the Petition of Trevor Wisdom, Officer of Wizard Petroleum, Inc., DTA # 812655 before Administrative Law Judge Winifred Maloney on December 14, 1994 where the Division was represented by attorney Matthews and Mr. Wisdom by attorney Berkowitz. Mr. Wisdom's testimony focused upon his denial of receipt of certain notices of deficiency issued against him as an officer of Wizard Petroleum;

(15) A New York corporation franchise tax report of Wizard Corporation for 1986 which was signed by Trevor Wisdom;

(16) A United States corporation income tax return of Wizard Corporation for the period June 1, 1987 to May 31, 1988 which was signed by Trevor Wisdom as vice-president on February 8, 1989.

11. With reference to its affirmative statement that Ashley Jarwood and Trevor Wisdom were officers and major owners of petitioner, the Division attached to its answer as "Attachment 3" photocopies of five separately identified documents summarized as follows:

(1) Seven "Terminal Operator's Monthly Report of Motor Fuel Inventory" returns for each of the months, June, July, August, September, October, November and December 1986, respectively, for Terminelle each signed by Trevor Wisdom as vice-president (except for the return for November, 1986 on which Mr. Wisdom did not note his title);

(2) Six "Terminal Operator's Monthly Report of Diesel Motor Fuel and Motor Fuel Inventory" returns for each of the months April, May, June, July, August and September, 1995, respectively, for Terminelle each signed by Trevor Wisdom as president;

(3) An "Application for a License as an Importing Transporter and/or Terminal Operator" for Terminelle dated October 24, 1986 signed by Trevor Wisdom as vice-president which listed three "owners, directors, partners, and responsible individuals": Ashley Jarwood, Trevor Wisdom, and Joseph Bernardo;

(4) A corporate power of attorney for Terminelle dated March 15, 1995 appointing attorney Berkowitz to represent it concerning the matter at hand which was executed by Trevor Wisdom in his capacity of president of Terminelle;

(5) U.S. corporation income tax returns for Terminelle for 1987 and 1994, respectively, each signed by Trevor Wisdom in his capacity of president of Terminelle.

#### Procedural Permutations

12. Petitioner objected to the introduction into evidence of the Division's answer because it contained excessive information that went beyond "a statement of any additional facts to be proven by the Division of Taxation either as a defense or for affirmative relief, or to sustain any issue raised in the petition upon which the Division of Taxation has the burden of proof" (tr., p. 33). In addition, petitioner objected to the answer because it included evidence for which "[t]here has been no foundation laid" (tr., p. 33).

13. Petitioner also objected to the expediting of the hearing in this matter:

"[T]his hearing is not with respect to a denial of an application for [license], but rather with respect to the revocation of a [license]. Consequently, the expedited hearing procedures are improper in regard to this hearing" (tr., p. 22).

14. Petitioner requested that Bonnim Tanzman, who manages the Division's Registration Bond Unit which is within the Fuels, Alcohol, Cigarette and Carrier Tax Section of the Transfer and Transaction Tax Bureau, "be not present in the courtroom during the preliminary materials

and during the testimony of each other" (tr., p. 13).<sup>8</sup> The administrative law judge denied petitioner's request to exclude Mr. Tanzman from the hearing room:

"I am not sure I see sufficient grounds to ask Mr. Tanzman to leave the hearing room at this point in time. I think earlier I might have stated on the record when there is a type of factual dispute and you want to have one person's testimony concerning certain incidents that occurred, you don't want to have that tainted by having a later witness in the matter hear what the first person has said about those particular incidents. . . .

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. . . I do think on the record now you have the State's position on why they are seeking to revoke the [registrations], and if they should come up with another basis, it would be clear that they are doing that. So why don't we proceed now and I will permit Mr. Tanzman to remain in the room" (tr., pp. 69-71).

15. Petitioner contended that it "would be inappropriate to apply the doctrine of collateral estoppel to this matter" and prevent petitioner from relitigating issues raised in the Matter of Wizard Petroleum. It must be observed, however, that petitioner made no attempt to introduce any evidence concerning the issues raised in Wizard. Neither did it introduce any evidence concerning the status of Trevor Wisdom and Ashley Jarwood as responsible officers/major shareholders of petitioner or of Wizard Petroleum.

16. Petitioner also objected to the administrative law judge's permitting the Division's attorney to pose questions concerning the source and authenticity of a tax return which petitioner sought to introduce into evidence (tr., p. 82), while at the same time accepting the Division's answer into evidence, which included documents for which no foundation was established.

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<sup>8</sup>Because the Division had indicated that it was not going to present the testimony of any witnesses at the hearing, petitioner called Mr. Tanzman as its own witness. It also produced Benet Doloboff as its witness primarily to testify concerning the inactivity of Wizard Petroleum within the past five years.

Petitioner's Presentation

17. As noted in Finding of Fact "15", petitioner made no attempt to introduce any evidence concerning the issues previously litigated in Wizard Petroleum. Rather, its strategy was to focus on the competency and credibility of Bonnim Tanzman, in an attempt to discredit his decision to propose that petitioner's registration should be cancelled. Much of the hearing was taken up with extensive questioning of Mr. Tanzman, who manages the Division's Registration Bond Unit, concerning his career with the Division and his authority to make the decision to propose to cancel petitioner's registration. Benet Doloboff, petitioner's other witness, provided limited testimony. Petitioner offered his testimony to establish that Wizard Petroleum had been inactive for at least five years preceding February 13, 1995, the date of the Division's notice of proposed cancellation of petitioner's registration. According to Mr. Doloboff, the last year that Wizard Petroleum had any income "was probably a period ending May 31st, 1988" (tr., p. 96).

SUMMARY OF THE PARTIES' POSITIONS

18. Petitioner argues that because this matter deals with the proposed cancellation of an existing license, there is no basis to expedite the hearing under Tax Law § 283(6)(a) which requires the scheduling of a hearing within three months of a petition challenging a refusal to license. Petitioner also contends that the Division's answer should be struck from the record because the Rules of Practice and Procedure of the Tax Appeals Tribunal "do not provide for the submission of documentary evidence as attachments to the Tax Department's Answer" [emphasis in original] (Petitioner's brief, p. 13).

Petitioner also makes the technical argument that the notice of proposed cancellation of petitioner's license was invalid because it referenced "Wizard Corporation" and not "Wizard Petroleum, Inc.", thereby violating petitioner's "rights to due process" (Petitioner's brief, p. 18).

Turning to the substantive basis for the Division's proposing to cancel petitioner's license, petitioner argues that "the grounds for cancellation did not meet the statutory requirements of Tax Law Section 283-b(4)" (Petitioner's brief, p. 24).

According to petitioner, the prohibited acts committed by Wizard Petroleum were for the period beginning June 1, 1986 and ended September 30, 1987. Because the notices of proposed cancellation of petitioner's license were dated February 13, 1995, for the original notice and June 28, 1995 for the amended notice, i.e., more than five years after Wizard Petroleum's violations, "the statute of limitations precludes the cancellation of the [petitioner's license]" (tr., p. 26).

Finally, petitioner contends that the decision made by Mr. Tanzman to propose the cancellation of petitioner's license was unilateral, arbitrary and capricious, and was without authority because "the Commissioner cannot and did not properly delegate his statutory discretion and authority to cancel [licenses]" to Mr. Tanzman (Petitioner's brief, p. 35).

19. The Division contends that Wizard Petroleum's outstanding tax liability of more than \$15,000,000.00 is a sufficient basis for the proposed cancellation of petitioner's license because both Wizard Petroleum and petitioner were owned and operated by the same two individuals, Ashley Jarwood and petitioner Trevor Wisdom. Similarly, the fraudulent conduct of Wizard Petroleum as found by the Tax Appeals Tribunal in Matter of Wizard Petroleum (March 24, 1994) was a sufficient basis for the proposed cancellation of petitioner's license because of the common ownership and management of Wizard Petroleum and petitioner.

20. In its responsive brief, petitioner emphasized that "an outstanding tax liability of an affiliated corporation for a period not within the preceding five years is not a valid ground for cancellation" of petitioner's license. Similarly, petitioner maintains that the fraudulent act of an affiliated corporation, which occurred more than five years ago, is not a valid ground for cancellation of petitioner's license.

21. The Division, in its responsive brief, continues to maintain that "The Tribunal's Wizard decision is a valid basis for the [notice of cancellation] and was properly raised at the hearing" (Division's responsive brief, p. 6). The Division also rejected the various technical arguments raised by petitioner:

(1) It was not improper to treat this matter as an expedited proceeding because petitioner has not claimed that it was not given adequate time to prepare for the hearing;

(2) The answer was full and complete and under State Administrative Procedure Act § 306, the documents attached to the answer were properly admitted into the record;

(3) The use of the name "Wizard Corporation" on the notice of proposed cancellation instead of "Wizard Petroleum, Inc." did not violate any of petitioner's rights since they were not prejudiced by such facial defect;

(4) The failure to pay an open liability is not subject to the five-year limitation and acts of fraud are available as grounds for cancellation of a license regardless of when the acts occurred.

(5) The Commissioner has implied power to delegate to his subordinates and Mr. Tanzman's decision to propose the cancellation of petitioner's license was not an abuse of discretion. In any event, the review of such decision is de novo in the Division of Tax Appeals.

### ***CONCLUSIONS OF LAW***

A. Under Tax Law § 283-b(4), petitioner's license as a terminal operator may be cancelled or suspended by the Division:

"[W]here a licensee, or an officer, director, shareholder, employee or partner of the registrant [sic] who as such officer, director, shareholder, employee or partner is under a duty to act for such licensee or any shareholder directly or indirectly owning more than ten percent of the number of shares of stock of the licensee . . . fails to file a bond or other security when required . . . or 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 with respect to motor fuel adopted pursuant to such articles . . . or, knowingly aids and abets another person in violating any of the provisions of such articles or of any such rule or regulation with respect to motor fuel, or transfers its license as a terminal operator. A license may also be cancelled or suspended if the

commissioner determines that a licensee or an officer, director, shareholder, employee or partner of the licensee who as such officer, director shareholder, employee or partner is under a duty to act for such licensee or any shareholder directly or indirectly owning more than ten percent of the number of shares of stock of the licensee . . . :

(i) commits fraud or deceit in his operations as a terminal operator or has committed fraud or deceit in procuring his license;

(ii) has been convicted in a court of competent jurisdiction, either within or without the state, of a felony . . . bearing on such terminal operator'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; or

(iv) has knowingly aided and abetted the distribution of motor fuel which he has knowledge of as being 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 license may also be cancelled or suspended if the commissioner determines that a licensee or an officer, director, shareholder, employee or partner of the licensee who as such officer, director, shareholder, employee or partner is under a duty to act for such licensee or any shareholder directly or indirectly owning more than ten percent of the number of shares of stock of the licensee . . . 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 . . . 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."

B. It is initially observed that in determining whether petitioner's license as a terminal operator should be cancelled, a de novo review of the available administrative record is properly conducted by the administrative law judge in order to determine whether there are sufficient grounds to cancel such license (see, Matter of Shore Line Oil Company, Inc., Tax Appeals Tribunal, February 15, 1996). Consequently, petitioner's contention that Mr. Tanzman's decision to issue the notice of proposed cancellation was improper and without authority is irrelevant. In any event, under Tax Law § 170, the Commissioner of the Department of Taxation and Finance has explicit power to delegate his authority, and, Bonnim Tanzman, who, as noted in Finding of Fact "14" manages the Division's Registration Bond Unit, would have the

authority as manager of such unit to decide whether or not to issue a notice of proposed cancellation of a terminal operator's license.

C. Because the documents, which would provide the basis for any determination that sufficient grounds exist for cancelling petitioner's license, came into the record as attachments to the Division's answer, it is necessary to address at this point the issue whether the answer and/or the attachments to the answer should be struck from the record.

The Rules of Practice and Procedure promulgated by the Tax Appeals Tribunal, effective November 1, 1995, which are codified at 20 NYCRR Part 3000, provide in relevant part, as follows, with reference to the purpose of pleadings in the Division of Tax Appeals:

"Section 3000.4 Pleadings, amended pleadings.

(a) Purpose. The purpose of the pleadings is to give the parties and the division of tax appeals fair notice of the matters in controversy and the basis for the parties' respective positions. All pleadings shall be liberally construed so as to do substantial justice.

(b) Answer. (1) The office of counsel shall serve an answer on the petitioner or the petitioner's representative, if any, . . .

(2) The answer as drawn shall contain numbered paragraphs corresponding to the petition and shall fully and completely advise the petitioner and the division of tax appeals of the defense. It shall contain:

(i) a specific admission or denial of each statement contained in the petition; however, if the division of taxation is without knowledge or information sufficient to form a belief as to the truth of a statement, then the answer shall so state, and such statements shall have the effect of a denial;

(ii) a statement of any additional facts to be proven by the division of taxation either as a defense, or for affirmative relief, or to sustain any issue raised in the petition upon which the division of taxation has the burden of proof; and

(iii) the relief sought by the division of taxation."

D. Petitioner claims that the Division should be defaulted or have its documents stricken from the record because the Rules of Practice of the Tax Appeals Tribunal do not authorize the submission of documentary evidence as attachments to the answer. It is first observed that under 20 NYCRR 3000.4, there is no basis for defaulting the Division. Even if the Division



were to fail to answer a petition, it would not be defaulted.<sup>9</sup> As noted in Findings of Fact "6" and "7", the Division in its answer specifically denied all of the "facts" asserted by petitioner in its petition and made the Division's position clear that it was relying on the decision of the Tax Appeals Tribunal in Matter of Wizard Petroleum, Inc. (March 24, 1994) as the basis for its proposal to cancel petitioner's license because, simply put, petitioner's officers and major owners were the officers and major owners of a corrupt enterprise, Wizard Petroleum.

As noted in Findings of Fact "8", "9", "10" and "11", the Division attached to its answer all of the documents it intended to introduce at the hearing in this matter. Although attaching documents or evidence to a pleading is an unusual practice, there is nothing to prohibit such practice in the Tribunal Rules of Practice and Procedure. There is also no basis to conclude that doing so impedes the purpose of the pleadings as specified in such rules, i.e., to give the parties and the Division of Tax Appeals fair notice of the matters in controversy and the basis for the parties' respective positions. Rather, it can be said that the attachment of documents to the Division's answer helped to advance this matter for hearing. Moreover, there is absolutely no proof or even an allegation that petitioner was prejudiced by the attachment of documents to the answer.

The State Administrative Procedure Act § 306(2) provides as follows:

"All evidence, including records and documents in the possession of the agency of which it desires to avail itself, shall be offered and made a part of the record, and all such documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference."

Pursuant to this provision, the Division has the authority to introduce into the record documents in its possession. There is no requirement that a foundation be established for such documents through the testimony of a witness. Since the Division would have been able to introduce the documents attached to its answer at the hearing without utilizing a witness, there is no harm to the petitioner that the documents came into the record as attachments to the

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<sup>9</sup>Under 20 NYCRR 3000.4(b)(4), where the Division fails to answer a petition, all material allegations of facts set forth in the petition are deemed to be admitted.

Division's answer. In addition, it cannot be said that petitioner's due process rights were violated by permitting the Division to voir dire the authenticity of petitioner's documents while the Division's documents were accepted into the record as attachments to its answer without an auditor to provide a foundation for such documents given the generous language of State Administrative Procedure Act § 306(2) with regard to accepting the Division's records and documents into an administrative record. The burden on a taxpayer to show that its due process rights have been violated is steep and was unmet by petitioner (see, RAF General Partnership, Tax Appeals Tribunal, November 9, 1995). Furthermore, the Division produced Mr. Tanzman so that petitioner could call him as its witness, and it is observed that no questions were posed to Mr. Tanzman by petitioner concerning the authenticity of the documents attached to the Division's answer.

E. As noted above, by attaching its documents to its answer, the Division, in effect, speeded up the time frame leading to an administrative hearing. A review of the relevant dates (November 8, 1995 for the petition, November 30, 1985 for the answer with attached documents, and December 12, 1995 for the hearing) shows that the resolution of the issue whether petitioner's license as a terminal operator should be cancelled, is on a fast-track. Under Tax Law § 283(6)(a), there is a statutory requirement that in the case of a denial of an application for a registration, the person whose application is denied has the right to an expedited hearing:

"In the case of a person applying to register, a notice of proposed refusal to register shall be issued promptly after application for registration is received by the commissioner. Upon timely application therefor, a hearing shall be scheduled in the division of tax appeals, and within three months from such application for hearing (determined with regard to any postponements of any scheduled hearing or conference or other delay made at the request of the applicant) the administrative law judge shall render a determination either upholding the commissioner's refusal to register or ordering the commissioner to register the applicant. Within fifteen days after the giving of notice of the administrative law judge's determination, the applicant or the commissioner may take exception to the determination. If an exception is taken, the tax appeals tribunal, within seventy-five days from the date of notice to the tribunal that exception is being taken to an administrative law judge's determination, shall issue a decision either affirming or reversing such determination. If the administrative law judge renders a determination ordering the

commissioner to register the applicant and the commissioner takes exception to such determination, the commissioner shall not be required to register such applicant unless and until the tax appeals tribunal issues a decision affirming such determination. The applicant shall not be registered until there has been filed a bond or other security in the required amount."

Petitioner is correct that this statutory requirement for an expedited hearing applies to an applicant for a registration, whose application has been denied by the Division. Similarly, the Rules of Practice and Procedure of the Tax Appeals Tribunal provide at 20 NYCRR 3000.18 for an expedited hearing in the following circumstances:

"(a) Hearing preference. Whenever a petition is filed protesting a statutory notice which advises a person of the denial of such person's application for a license, permit, registration or certificate of authority or which advises a person of an increase in the amount of a bond or other security required to be filed, an expedited hearing shall be granted. Section 3000.4, which provides for pleadings and amended pleadings, shall not apply when a preference for an expedited hearing is exercised; however, a petition for an expedited hearing shall be acknowledged and reviewed for timeliness and acceptability as to content. With the exception of the time limitations described in subdivision (b) of this section for the rendering of expedited determinations and decision, all other provisions of this Part shall apply. Within 10 business days of the receipt of the petition for an expedited hearing . . . , a hearing will be scheduled . . . .

(b) Determinations and decision. The administrative law judge or presiding officer shall render a determination within 30 days<sup>10</sup> or issue a notice of refusal to register from the date of the petition for the expedited hearing. Where exception is taken to an administrative law judge's determination, the tribunal shall issue its decision within 3 months<sup>11</sup> from the date of the petition for the expedited hearing. Any request by the petitioner which delays the expedited hearing process shall extend the time limitations imposed on the tribunal or the administrative law judge or presiding officer to issue a decision or determination."

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By Laws of 1993 (ch 57, § 132), the Tax Appeals Tribunal was directed to affirm or reverse the administrative law judge's determination in an expedited matter within 75 days from receipt of a notice of exception, and the administrative law judge was required to render a determination either upholding the commissioner's refusal to register or ordering the commissioner to register the applicant within three months. The tighter time frame specified in the Tax Appeals Tribunal Rules of Practice and Procedure does not reflect this amendment to the underlying statute, which is applicable to administrative hearings beginning on and after April 15, 1993, pursuant to Laws of 1993 (ch 57, § 418[15]). This more liberal time frame for issuance of the administrative law judge's determination as specified in the amended statute is applicable herein.

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See Footnote "10".

Except for the provision in the statute which requires the petitioner to take an exception to the administrative law judge's determination within 15 day after the giving of notice of the administrative law judge's determination, instead of the normal 30 days under Tax Law 2006(7), it is fair to conclude that the requirement of an expedited hearing is beneficial to a petitioner who wishes to challenge the proposed cancellation of a registration or a license by the Division of Taxation unless the taxpayer knows it has a losing case and merely wishes to delay its day of reckoning. Moreover, petitioner has not pointed to any prejudice or harm resulting from the expediting of the hearing process. Consequently, the Division of Tax Appeals has not violated any statutory or due process right of the petitioner by proceeding with this matter as an expedited matter, so long as petitioner is provided with 30 days and not 15 days to take an exception to the administrative law judge's determination if it so chooses.

F. It is also noted that the administrative law judge properly denied petitioner's request to exclude Mr. Tanzman from the hearing room until his testimony was to be given. Under the Tax Appeals Tribunal Rules of Practice and Procedure, 20 NYCRR 3000.15(d), upon a finding of good cause, the administrative law judge may decide to segregate witnesses so that one witness does not hear the testimony of another witness. The administrative law judge exercised, in a reasonable fashion, his discretion in denying petitioner's request to exclude Mr. Tanzman from the hearing room. As noted in Finding of Fact "17", Mr. Doloboff's testimony was narrow and limited, and it is clear that permitting Mr. Tanzman to hear Mr. Doloboff's testimony had no effect on his own testimony. It is fair to conclude that petitioner's request to exclude Mr. Tanzman from the hearing room was motivated more for the tactical reason of making it more difficult for the Division's attorney to obtain any assistance from Mr. Tanzman in the course of the hearing and an annoyance on petitioner's part that it was being required to call Mr. Tanzman as its own witness.

G. Petitioner's contention that the Notice of Proposed Cancellation was invalid because it incorrectly referenced Wizard Petroleum, Inc. as "Wizard Corporation" reflects an exercise in

pettifoggery. This error did not prejudice petitioner's ability to effectively challenge the notice, and therefore there is no basis to find it invalid (see, Pepsico, Inc. v. Bouchard, 102 AD2d 1000, 477 NYS2d 892). Moreover, as noted in footnote "7", petitioner is the source for any confusion concerning the use of "Wizard Corporation" instead of Wizard Petroleum, Inc.

H. Finally turning to the heart of this matter, whether sufficient grounds exist to support the proposed cancellation of petitioner's license as a terminal operator under Article 12-A of the Tax Law, it is initially noted that petitioner has the burden of proving that the grounds stated by the Division do not support its proposed cancellation of its license (see, Matter of Janus Petroleum, Inc., Tax Appeals Tribunal, January 11, 1991, annulled on other grounds, 180 AD2d 53, 583 NYS2d 983).

The Division has clearly set forth the general basis for its proposed cancellation of petitioner's license: the decision of the Tax Appeals Tribunal in Wizard Petroleum, Inc. (*supra*) established that Wizard Petroleum was a corrupt enterprise, and because petitioner's officers and major owners were the officers and major owners of Wizard Petroleum, petitioner's license should be cancelled. In Wizard Petroleum, the Tribunal upheld three notices of determination of sales and use taxes due each dated July 20, 1990. The first notice asserted tax due of \$4,204,879.96 plus fraud penalty and interest for a total due of \$8,466,445.58 for the period June 1, 1986 through July 31, 1987.<sup>12</sup> The second notice asserted tax due of \$234,707.30 plus fraud penalty and interest for a total due of \$445,644.91 for the period August 1, 1987 through September 30, 1987. The third notice asserted penalty only for the period June 1, 1986 through November 30, 1987 in the amount of \$443,958.72. In sum, the Tribunal sustained an assessment of approximately \$10,000,000.00.

I. Petitioner has not introduced evidence to challenge the merits or substance of the Division's grounds for proposing the cancellation of its license. Rather, petitioner's primary argument is that the five-year statute of limitations provided in Tax Law § 283-b(4) bars the

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<sup>12</sup>Presumably the interest and penalty were calculated as of the date of the notice of July 20, 1990.

Division from cancelling the registration of Janus Petroleum based upon corrupt acts by Wizard Petroleum for the period beginning June 1, 1986 and ended September 30, 1987. In Conclusion of Law "A", this statutory provision is quoted at length. A close review of the statutory language specifying the five-year statute of limitations is necessary:

"A license may also be cancelled . . . if the commissioner determines that a licensee or an officer . . . of the licensee who as such officer . . . is under a duty to act for such licensee or any shareholder directly . . . owning more than ten percent of the number of shares of stock of the registrant . . . was an officer . . . shareholder . . . of another person who as such officer, . . . shareholder . . . was under a duty to act for such person or was a shareholder directly or indirectly owning more than ten percent of the number of shares of stock of such other person . . . at the time such other person committed any of the acts or omissions which are . . . specified in this subdivision within the preceding five years."

Petitioner is correct that this five-year statute of limitations bars the Division from basing the proposed cancellation of its registration on any of the five grounds specified in the amended notice of proposed cancellation as detailed in Finding of Fact "2". It is observed that the Division in its reply brief has incorrectly cited to Tax Law former § 283(6)(a) which provided an exception to the five-year statute of limitations "in the case of acts involving falsity or fraud". No such exception exists in the current statute.

However, as noted in Finding of Fact "9", the Division has offered proof that the assessment of approximately \$10,000,000.00 sustained by the Tribunal against Wizard Petroleum remains unpaid. The Tribunal in its recent decision in Matter of Shore Line Oil Company, Inc. (February 15, 1996) affirmed the administrative law judge's determination that the five-year statute of limitations does not apply to the failure to pay tax which is an act or omission which occurs each day that the tax remains unpaid. It is of interest to note that in Matter of Shore Line Oil Company, Inc., the amount of unpaid tax was a mere \$2,000.00 while in the matter at hand the unpaid assessment against the related corporation was approximately \$10,000,000.00. Consequently, the additional grounds for proposing the cancellation of petitioner's license as set forth in the Division's answer, as noted in Finding of Fact "3", provide an adequate basis for the cancellation of petitioner's registration.

J. It is noted that petitioner has introduced no evidence to contravene the documents introduced by the Division that Trevor Wisdom and Ashley Jarwood were corporate officers and owners of petitioner's stock. Further, as noted in Finding of Fact "10", the Division has introduced into the record substantial documentation to establish that Trevor Wisdom and Ashley Jarwood were officers and major owners of Wizard Petroleum. Moreover, in Matter of Ashley Jarwood, Officer of Wizard Petroleum, Inc. (Tax Appeals Tribunal, January 25, 1996), the Tribunal determined that Ashley Jarwood was a "responsible officer" of Wizard Petroleum. Consequently, Ms. Jarwood would be collaterally estopped from denying herein that she was not a responsible officer of Wizard Petroleum (see, Matter of Waite, Tax Appeals Tribunal, January 12, 1995). It is observed that in Matter of Trevor Wisdom, Officer of Wizard Petroleum, Inc. (Tax Appeals Tribunal, March 21, 1996), the Tribunal decided that Mr. Wisdom's petition was untimely so that it upheld the assessment against Mr. Trevor as a responsible officer of Wizard Petroleum without actually addressing the merits of whether he was a responsible officer.

Consequently, Mr. Trevor would not be collaterally estopped from reaching the merits of such issue in the matter at hand. However, as noted in Finding of Fact "15", petitioner made no attempt to introduce any evidence concerning the status of Mr. Wisdom or Ms. Jarwood as responsible officers and/or major shareholders of either petitioner or Wizard Petroleum or of the issues concerning the corrupt nature of Wizard Petroleum. In sum, the Division is correct that Wizard Petroleum's outstanding multi-million dollar liability for unpaid taxes is a sufficient basis for the proposed cancellation of petitioner's license because both Wizard Petroleum and petitioner were owned and operated by Ashley Jarwood and Trevor Wisdom (see also, Matter of Peterson Petroleum of New Hampshire, Inc., Tax Appeals Tribunal, January 18, 1996).

L. The petition of Terminelle Corporation is denied and the amended Notice of Proposed Cancellation of Terminal Operator License under Article 12-A of the Tax Law dated June 28, 1995 is sustained.

DATED: Troy, New York  
May 23, 1996

/s/ Frank W. Barrie  
ADMINISTRATIVE LAW JUDGE