

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JANUS PETROLEUM, INC.	:	DETERMINATION
	:	DTA NO. 814951
for Review of a Denial, Suspension, Cancel-	:	
lation or Revocation of a License, Permit or	:	
Registration under Articles 12-A and 13-A of	:	
the Tax Law.	:	

Petitioner, Janus Petroleum, Inc., 56-15 58th Street, Maspeth, New York 11378, filed a petition on May 10, 1996 for review of a proposed cancellation of petitioner's registration as a diesel motor fuel distributor under Articles 12-A and 13-A of the Tax Law.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on June 11, 1996 at 9:15 A.M., with all briefs to be submitted by August 28, 1996, which date began the six-month period for the issuance of this determination. Petitioner appeared by Norman R. Berkowitz, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (John E. Matthews, Esq., of counsel).

On December 10, 1996, this matter was assigned to Arthur S. Bray, Administrative Law Judge, to render a determination.

ISSUES

I. Whether the Division of Taxation is prohibited from asserting as a ground for cancelling petitioner's registration as a distributor of motor fuel the same ground which was asserted and then withdrawn by the Division of Taxation at a prior hearing.

II. Whether the Commissioner of Taxation and Finance may delegate his authority to cancel the registration of a distributor of motor fuel and, if so, whether the Commissioner delegated said authority to the Division of Taxation thereby permitting employees of the Division of Taxation to cancel petitioner's registration as a distributor of motor fuel.

III. Whether the cancellation of petitioner's registration as a distributor of motor fuel was an abuse of discretion.

FINDINGS OF FACT

1. Petitioner, Janus Petroleum, Inc., is in the business of buying and selling petroleum products, in particular, diesel fuel.

2. The Division of Taxation ("Division") issued to petitioner a Notice of Proposed Cancellation of Your Registration as a Diesel Motor Fuel Distributor Under Article[s] 12-A and 13-A of the Tax Law. The notice, which was dated February 13, 1995,¹ stated six grounds for cancelling Janus Petroleum's registration as follows:

"1) Trevor Wisdom, President, and owner of two-thirds of the stock of Janus Petroleum Inc., was an officer and 50% owner of Wizard Corporation at the time that Wizard Corporation committed fraud in its operations as a distributor.²

2) Ashley Jarwood, Secretary, Treasurer, and owner of one-third of the stock of Janus Petroleum Inc., 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, President and owner of two-thirds of the stock of Janus Petroleum Inc., 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) Ashley Jarwood, Secretary, Treasurer, and owner of one-third of the stock of Janus Petroleum Inc., is an officer and 50% owner of Wizard Corporation, a corporation which has failed to comply with provisions of Art. 12-A, 28 and 29 of the [T]ax [L]aw with respect to automotive fuel.

5) Ashley Jarwood, Secretary, Treasurer, and owner of one-third of the stock of Janus Petroleum Inc., is an owner and officer of Terminelle Corporation[,], a corporation which knowingly aided and abetted Wizard Corporation in violating the provisions of Articles 28 and 29 of the Tax Law with respect to automotive fuel.

6) Trevor Wisdom, President and owner of two-third[s] of the stock of Janus Petroleum Inc., is an owner and officer of Terminelle Corporation[,], a

¹This notice was the subject matter of a prior proceeding and provides a context for events that predated the notice of proposed cancellation, dated February 14, 1996, under review in this proceeding.

corporation which knowingly aided and abetted Wizard Corporation in violating the provisions of Articles 28 and 29 of the Tax Law with respect to automotive fuel."

3. A conciliation conference with the Division's Bureau of Conciliation and Mediation Services was held on June 14, 1995 and resulted in an order sustaining the Division's proposed cancellation. Petitioner challenged this order by filing a petition with the Division of Tax Appeals.

4. In a letter dated June 28, 1995, to petitioner's representative, Norman R. Berkowitz, Esq., Bonnim Tanzman, Audit Group Manager, confirmed that certain changes, which were discussed at the conciliation conference, were made to item #4. Specifically, the letter confirmed that the Division had withdrawn ground number 4, set forth in Finding of Fact "2" above, and reasserted it as follows:

"Terminelle Corporation has failed to comply with provisions of Article 12A of the [T]ax [L]aw with respect to automotive fuel."³

5. The Division, in its answer dated November 30, 1995, clarified the proposed grounds for cancellation. It further clarified those grounds in a letter dated December 4, 1995 to Mr. Berkowitz.

6. At the first hearing held on December 12, 1995, the Division's representative initially sought to add a seventh ground to support the cancellation of petitioner's registration:

"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."

7. Petitioner's representative claimed surprise, objected to this new ground for denial and to the introduction of evidence of the prior assessments, and argued that the taxpayer had the right to review its files to ascertain if the assessments were correct. Therefore, petitioner's representative requested that petitioner's hearing be adjourned to another date. The Division's representative objected to the adjournment request and proposed, in the alternative, that the

hearing proceed and that, if it was necessary, the parties could return to complete the hearing at a later date. The Administrative Law Judge ruled as follows:

"ALJ BARRIE: All right. I am not going to at this point determine whether the matter should be continued or adjourned. Do you have more documents pertaining to Janus Petroleum?"

"MR. MATTHEWS: No, I don't have. I have nothing else."

"ALJ BARRIE: I think my position will be that we will take into the record today as much evidence as we possibly can with regard to Janus Petroleum and with regard to Terminelle Corporation, and then I will make a decision concerning a continuation, a continuation to permit the taxpayer to expand on his evidence, and I think that would protect the taxpayer's rights."

"MR. MATTHEWS: What kind of --"

"ALJ BARRIE: So I am not going to adjourn at this point the matter pertaining to Janus Petroleum, or the word should probably be continued, the matter pertaining to Janus Petroleum. An adjournment from my point of view would be the matter hasn't been heard at all in the first instance. So the issue really is whether to continue and I think the parties are closer in agreement than it might appear at first look off the bat."

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

"So the Division is withdrawing that exhibit and withdrawing the two grounds, one for each corporation [for petitioner and Terminelle Corporation] based on that exhibit."

9. Mr. Matthew's withdrawal of the issue was made at the suggestion of Mr. Tanzman who did not wish to "muddy the water". In addition, Mr. Tanzman did not look forward to spending another day on the witness stand. Mr. Tanzman also thought that the new ground would stand by itself in another matter. At the time the issue was withdrawn, there was no discussion with respect to whether the withdrawal was with or without prejudice.

10. The Division issued a letter to petitioner, dated December 29, 1995, which bore the title "DEMAND FOR NEW YORK STATE TAXES DUE PURSUANT TO ARTICLES 12-A, 13-A, 28 AND 29". The letter, which was signed by Peter J. Spitzer, Tax Auditor II, stated, in part:

"This letter is to inform you that pursuant to Tax Law Section 283(5), a demand is hereby made for payment of any taxes due under Articles 12-A, 13-A, 28 and 29."

The following petroleum business tax and sales tax assessments are open and outstanding as of 12/15/95:

L010377224-3, L010399571-1, L010399572-9, L009364537-6,
L010106656-1, L010074261-6, L011133068-1

If payment is not received within 10 (ten) days of the date of this letter, your registration(s) under Articles 12-A and 13-A will be cancelled, pursuant to Tax Law Section 283(5)."

11. The liabilities asserted in the letter dated December 29, 1995 were the same liabilities which formed the basis of the grounds for cancellation which were withdrawn at the first hearing (Finding of Fact "8"). After the foregoing letter was mailed, several of the outstanding assessments were paid and closed. Mr. Spitzer learned of the payments by checking the information on the Department of Taxation and Finance's case resource and tracking system ("CARTS"). He did not check with anyone to see if the information on the CARTS system was correct. However, he was aware that petitioner was attempting to enter into a deferred payment agreement and that, in accordance with this plan, payments were made.

12. In a letter addressed to Mr. Spitzer, dated January 9, 1996, petitioner's representative, Mr. Berkowitz, stated that at the hearing held on December 12, 1995 the Division withdrew the issue of nonpayment of taxes as a ground for cancellation of petitioner's registration. Mr. Berkowitz maintained that the assertion of the same issue as a ground for cancellation of petitioner's registration as a diesel motor fuel distributor was precluded by law.

13. In a letter dated January 29, 1996, Mr. Spitzer responded to the foregoing letter by writing to Trevor Wisdom of Janus Petroleum, Inc. First, Mr. Spitzer stated that he was responding to Mr. Wisdom because the Division did not have a power of attorney on file authorizing Mr. Berkowitz to appear on the matter set forth in the letter dated December 29, 1995. Next, Mr. Spitzer explained that he had been informed by Counsel's office that the 10-day demand letter was appropriate, as was the cancellation of the registration if petitioner failed to make full payment as required by the demand. Lastly, the Division stated:

"As I'm sure you realize, the 10 days have passed and payment has not been made. In an effort to resolve this matter without necessitating the immediate cancellation of your registration, we will grant you an additional 10 days from the date of this letter in which to make payment. You must realize, however, that the biggest part

of the outstanding liabilities at issue results from your having accepted refunds of almost \$200,000 for taxes which you also took as credits on your returns. We must, therefore, insist that full payment be made by that time or we will have no alternative but to cancel your registration as stated in my Demand letter."

14. At the time he wrote the foregoing letter, Mr. Spitzer could not locate a power of attorney for Mr. Berkowitz in the files of the TTTB Registration Bond Unit.

15. At some juncture, Mr. Berkowitz's power of attorney was located. However, Mr. Tanzman was told by Mr. Matthews, the Division's representative, that Mr. Berkowitz's power of attorney was inadequate because the matter referred to in the power of attorney concerned a "[p]roposed cancellation of registration."

16. In an effort to resolve the difficulty over the power of attorney, Mr. Matthews sent Mr. Berkowitz a facsimile of a power of attorney with a more specific description of the proceeding in issue. The message on the fax transmittal cover sheet, dated February 9, 1996, stated:

"MR. TANZMAN INFORMS ME THAT THE POA YOU SUBMITTED WITH YOUR LETTER DATED 2/5/96 IS NOT SUFFICIENTLY SPECIFIC. PLEASE HAVE THE FOLLOWING POWER EXECUTED AND RETURNED BY FAX TO ME AT ONCE. I WILL SEE THAT MR. TANZMAN RECEIVES A COPY AND THAT YOU GET A RESPONSE TO YOUR LETTER OF 1/9/96."

17. Eventually, Mr. Matthews decided that the power of attorney appointing Mr. Berkowitz as petitioner's representative, dated February 5, 1996, was acceptable and Mr. Spitzer was so advised.

18. As of February 13, 1996, the full payment demanded in the letter of December 29, 1995 had not been made. As a result, on February 14, 1996, the Division issued a letter which advised petitioner that its registration as a diesel motor fuel distributor under section 282-a of the Tax Law was cancelled effective midnight February 14, 1996. The letter explained that the reason for the cancellation was because petitioner failed to pay the taxes due within ten days of the demand letter dated December 29, 1995 and because petitioner did not submit the past due payment within the additional ten-day period granted by the letter of January 29, 1996.

Facts Regarding Delegation of Authority to Cancel Registration

19. At the time the letter demanding payment was issued, Harris Sitrin was in charge of the Audit Division. In this position, he reported directly to the Commissioner of Taxation and Finance. Within the Audit Division there was a Transaction & Transfer Tax Audit Bureau ("TTTB") headed by Lawrence Keeley. Peter Ramo was the program chief of TTTB. The Fuel, Alcohol, Cigarette & Carrier Tax Section ("FACCTS") was part of TTTB and was supervised by William Frank, Program Manager.

20. Bonnim Tanzman held the position of Audit Group Manager. On an organization chart he would be located directly below FACCTS. At the time of the hearing, one of Mr. Tanzman's duties included supervising Peter Spitzer who was in charge of the TTTB Registration Bond Unit. Mr. Spitzer's duties included supervising excise tax registrations for petroleum business taxes, alcoholic beverage taxes, and cigarette taxes. He also supervised the bonding and delinquency units.

21. The decision to grant a motor fuel license was made at Mr. Spitzer's level. However, the decision to cancel a license was made at a higher level such as program manager, program chief or director. The recommendation to cancel petitioner's license was made by Mr. Tanzman after consultation with the office of counsel and the director of TTTB, Mr. Keeley. In accordance with this decision, Mr. Tanzman asked Mr. Spitzer to prepare the 10-day demand set forth in the letter dated December 29, 1995. At this time, Mr. Spitzer knew that the same grounds were raised and then withdrawn at the hearing on December 10, 1995. Mr. Spitzer did not discuss the matter with anyone other than Mr. Tanzman. Mr. Tanzman reviewed the letter before it was mailed.

22. The Commissioner of Taxation and Finance was not consulted on the decision to cancel petitioner's license.

Factors Concerning the Exercise of Discretion

23. Petitioner employed Stewart Doloboff as its accountant. At one juncture, Mr. Doloboff made an offer, on petitioner's behalf, to enter into a deferred payment agreement. After the offer for the deferred payment agreement was submitted, petitioner was asked to

provide additional information. On the basis of discussions with individuals in the Brooklyn District Office of the Department of Taxation and Finance, it is Mr. Doloboff's understanding that the request for additional information was out of the ordinary. In order to show its good faith, Janus made various payments of \$3,000.00 in contemplation of having a deferred payment agreement. Ultimately, the deferred payment agreement was not executed because the Division felt that it needed more funds and additional information than petitioner was apparently able to provide.

24. Of the seven liabilities referred to in the demand letter of December 29, 1995, the four most significant were:⁴

<u>Date of Notice</u>	<u>Notice Number</u>	<u>Tax Assessed</u>
February 27, 1995	L010106656	\$25,399.63
May 22, 1995	L010377224	195,922.15
May 30, 1995	L010399571	49,056.61
May 30, 1995	L010399572	44,087.26

25. The four largest liabilities were the result of a field audit of petitioner's sales tax and petroleum business tax returns for the period September 1, 1990 through November 30, 1993. In the course of the field audit, it was found that for the same underlying transaction petitioner had both claimed a credit on a return and received a refund of the same amount resulting in an improper refund of approximately \$195,000.00.

26. Although petitioner made certain voluntary payments on the outstanding assessments, most of the payments were the result of a levy.

27. As of June 10, 1996, the total amounts due on these liabilities, including tax, penalty, and interest, were as follows:

<u>Notice</u>	<u>Payment</u>	<u>Amount Remaining Due</u>
L010377224	\$ 0	\$324,509.61
L010399571	0	79,939.59
L010399572	30,471.01	41,389.67
L010106656	32,816.50	0
L009364537	3,436.27	40.63
L010074261	198.00	0

⁴The remaining notices assessed only penalty and interest and reflected a balance due of less than \$200.00.

L011133068

0

51.39

28. The Division's policies in the area of cancellation of licenses concern procedural matters. Registrations have been cancelled because the distributor was delinquent in filing tax returns, failed to meet bond requirements or for a myriad of other reasons. It has been the practice of the Division to issue a 10-day demand when the liabilities are of the magnitude of those involved here. The Division does not have a written or oral policy regarding the issuance of notices cancelling a registration as a distributor of motor fuel.

SUMMARY OF THE PARTIES' POSITIONS

29. Petitioner first argues that the Commissioner of Taxation and Finance failed to properly exercise his discretion in this matter. It is submitted that Tax Law § 283(5) provides that a registration may be cancelled or suspended by the Commissioner of Taxation and Finance for nonpayment of certain taxes. Petitioner posits that the use of the term "may" in Tax Law § 283(5) indicates that the Legislature intended to confer discretionary authority in the Commissioner.

30. Petitioner's brief next focuses upon the testimony of Mr. Spitzer where he stated that there was no written or oral policy with respect to cancellation of licenses and that there are currently no recommendations for such a policy. Petitioner also calls attention to Mr. Tanzman's testimony that, until sometime in the early 1990's, the Commissioner personally approved of each instance where a registration was cancelled, whereas in this instance the Commissioner was not made aware of the cancellation. It is contended that the Legislature never conferred the discretion to cancel a corporate taxpayer's registration on anyone other than the Commissioner. It is further submitted that the testimony of Mr. Spitzer and Mr. Tanzman show that no thought, review or analysis was made with respect to the cancellation of petitioner's registration.

31. Petitioner next argues that the Commissioner of Taxation and Finance can not and did not properly delegate his discretion and authority to cancel registrations. According to

petitioner, the record does not reveal any delegation of authority by the Commissioner with respect to the matter in issue. As a result, the cancellation was unauthorized.

32. Lastly, petitioner contends that the Division is precluded from asserting as a ground for cancelling petitioner's registration the same ground which was withdrawn at a previous hearing. Petitioner notes that the the outstanding assessments were asserted as a basis for cancelling petitioner's registration at the hearing held on December 12, 1995. According to petitioner, the matter was closed by the Division's withdrawal of the ground.

33. In its brief, the Division argues that its withdrawal of the additional ground for cancellation of the registration at the prior hearing and the assertion of the same ground in this matter is proper. The Division asserts that:

"In effect, the . . . developments which occurred at the December 12, 1995 administrative hearing comprised an attempt by the Division to amend its pleadings at the beginning of the hearing. Petitioner objected to such an amendment. The administrative law judge reserved ruling on the issue. Prior to such ruling, the Division withdrew its motion to amend. The administrative law judge then ruled that the proceeding would revert to its status prior to the Division's motion to amend." (Division's brief, p. 4.)

34. It is also argued that petitioner was given the opportunity to pay the outstanding liabilities within ten days in order to avoid the risk of the immediate cancellation of its registration. However, petitioner did not make the required payment within the original period or the extended period. The Division submits that since the letter of December 29, 1995 had not been issued at the time of the December 12, 1995 hearing, there can be no estoppel based on the mere assertion in the prior hearing that there were unpaid liabilities.

35. According to the Division, the Commissioner properly delegated his authority in licensing matters to the registration/bond unit. The Division contends that the Commissioner has both implied and explicit power to delegate his authority. The Division also posits that while the Tax Law sections relevant to this proceeding make numerous references to the Commissioner, the regulations only make reference to the Department. Thus, by the adoption of the regulations, the Commissioner has delegated his authority to subordinates. It is also

noted that Tax Law § 171 lists 27 separate duties required of the Commissioner. If the Commissioner could not delegate his duties, the Department could not function.

36. The Division's last argument is that there is a de novo review before the Division of Tax Appeals and therefore there should be no inquiry into an alleged abuse of discretion by Division employees. It is further argued that even if the Division of Tax Appeals were authorized to review the acts of the Division for an abuse of discretion, no such abuse took place.

37. In a reply brief, petitioner reiterates its point that the Division is precluded from reasserting the same ground which was withdrawn at the previous hearing. Petitioner asserts that "[t]he plain fact is that the Tax Department failed to reserve the right to re-assert the same ground in a subsequent matter." (Petitioner's reply brief, p. 3.) Petitioner further notes that Bonnim Tanzman testified that there were no discussions at the hearing on December 12, 1995 regarding whether the withdrawal was made without prejudice. Petitioner also argues that if the Division's position prevailed, it could make a practice of asserting a series of grounds, withdraw some of the grounds and then reassert the same point again and again.

38. Petitioner further argues that Tax Law § 283 does not provide for the Commissioner to delegate the authority at issue here.

39. Lastly, petitioner reiterates its argument that the Commissioner did not appropriately exercise his discretion in this matter. In this regard, petitioner notes that the record is devoid of evidence of the amount of tax owed by petitioner. While the Division stated that petitioner's liability exceeded \$400,000.00, no one was able to state the amount of tax due. Further, no one was able to testify as to the amount of tax paid by petitioner after the December 29, 1995 demand letter. Petitioner submits that there is no evidence that the payments of \$67,000.00 did not satisfy all of the taxes due on December 29, 1995 and, if this is so, the February 14, 1996 cancellation notice was invalid.

40. Petitioner posits that the Commissioner failed to exercise any discretion since he was unaware of the Division's cancellation of its registration. Further, the payments made by

petitioner were not considered since no one was aware of such payments or the correct amount of petitioner's liability for taxes. It is petitioner's contention that since the Division has no policy in this regard, the Division used no discretion and thereby denied petitioner due process.

41. In response to petitioner's brief, the Division submitted a letter brief which argued that the Commissioner of Finance has both implied and explicit authority to delegate his authority to subordinates with respect to the matters at issue here.

CONCLUSIONS OF LAW

A. Petitioner argues that the Division is precluded from asserting as a ground for cancelling its registration the same ground which was withdrawn at a previous hearing. In support of its position, petitioner has cited a series of cases where a waiver or estoppel was either claimed or found. Before proceeding to the merits of this argument, certain general principles should be set forth. Generally, the doctrine of estoppel does not apply to government acts unless there are exceptional facts which require the application of the doctrine in order to avoid a manifest injustice (Matter of Harry's Exxon Service Station, Tax Appeals Tribunal, December 6, 1988). When a taxing authority is involved, this rule is considered particularly applicable because public policy supports enforcement of the Tax Law (Matter of Glover Bottled Gas Corp., Tax Appeals Tribunal, September 27, 1990). In order to determine whether there should be an estoppel, the Tax Appeals Tribunal has utilized a test which asks if there was a right to rely on the representation, whether there was such reliance and whether the reliance was to the detriment of the party who relied upon the representation (see, Matter of Harry's Exxon Service Station, supra; see also, Matter of Bolkema Fuel Co., Inc., Tax Appeals Tribunal, March 4, 1993).

B. Petitioner has not established that an estoppel should be invoked in this instance. The first question is whether the Division made a representation upon which petitioner had a right to rely (see, Matter of Bolkema Fuel Co., Inc., supra). At the outset of the hearing on December 12, 1995, the Division sought to add a new ground in support of its position that petitioner's registration should be cancelled. However, the Administrative Law Judge did not

rule on the addition of a new ground and held the matter in abeyance. Later, at the conclusion of the hearing, before a ruling was made, the Division withdrew the new ground. The transcript does not reveal any discussion regarding whether the liability would be asserted again at a later date. Therefore, in order to accept petitioner's argument, one would have to conclude that the Division's withdrawal of the new ground at the hearing would lead one to reasonably conclude that the Division would never assert that same ground again. Because petitioner has not presented any basis for this belief, this criteria has not been satisfied.

C. The remaining criteria for an estoppel have also not been met. Petitioner has not shown any reliance upon the Division's initial withdrawal of the ground or that it relied to its detriment upon the Division's withdrawal of new ground. Accordingly, petitioner's argument that the Division may not assert Janus's unpaid liabilities as a basis for cancelling its registration is rejected.

It is noted that if the Division began a process of asserting, withdrawing and then reasserting the same ground, an appropriate remedy could be fashioned, as needed, to cure the abuse.

D. It is petitioner's position that there was an improper delegation of authority to the registration/bond unit. Petitioner's argument has several aspects. First, petitioner maintains that there is no evidence that the Commissioner ever delegated his authority with respect to licensing and suspensions of licenses to the registration/bond unit.

E. The cancellation of petitioner's registration was premised upon Tax Law § 283(5).

This section states, in part:

"[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. . . ."

Significantly, this section does not mention the Commissioner as a party who would perform the suspension or cancellation. In contrast, Tax Law § 283(4), which also sets forth grounds upon which a registration may be suspended or cancelled, explicitly refers to the

Commissioner as the party performing the cancellation or suspension of the registration. One might infer, from the failure to mention the Commissioner in Tax Law § 283(5), that the Legislature did not contemplate the need for the Commissioner's involvement when the cancellation or suspension of the registration is predicated upon the nonpayment of taxes.

F. Assuming that the authority to cancel or suspend a registration was expressly given to the Commissioner in the first instance, petitioner's argument still would not prevail. As noted by the Division, the authority of the Commissioner to delegate his authority to subordinates is set forth in Tax Law § 170. Subdivisions three and four of Tax Law § 170 are pertinent and provide, as follows:

"3. The commissioner of taxation and finance may establish such additional divisions and bureaus as he deems necessary. He may appoint the heads of such divisions and bureaus and fix their duties and he may consolidate, alter or abolish any divisions or bureaus. . . .

* * *

"4. The commissioner of taxation and finance may appoint and remove such officers, assistants and other employees as he may deem necessary for the exercise of the powers and duties of the department. . . ; and he may prescribe their duties, and fix their compensation within the amounts appropriated therefor. The commissioner of taxation and finance may transfer officers or employees from their positions to other positions in the department, or abolish or consolidate such positions. . . ."

The Commissioner's regulations at 20 NYCRR 411.6 pertain to the cancellation or suspension of a registration as a motor fuel distributor. This section provides, in part:

"(a) The registration of any distributor of motor fuel, in the circumstances described herein, may be cancelled or suspended by the Department of Taxation and Finance pursuant to the provisions of this section. A determination as to whether a registration should be cancelled or suspended and the duration of suspension will be made by the department on the basis of the circumstances in each case. The department may, in its discretion, continue such registration upon such terms and conditions as it may deem necessary in protection of the revenues under articles 12-A, 28 and 29 of the Tax Law." (Emphasis added.)

G. Through the promulgation of the foregoing regulation, the Commissioner of Taxation and Finance delegated his authority with respect to the cancellation of registrations to the Department. Moreover, Bonnim Tanzman, as the manager of the Division's Registration Bond Unit, would have the authority to decide whether to suspend a distributor's registration.

H. Of the cases cited by petitioner in support of its position, only two involved situations where the court held that the authority at issue could not be delegated. In Weinberg v. Town of Clarkstown (78 Misc 2d 464, 357 NYS2d 332), the court held that the disapproval of an application for a zoning change by the principal planner for the planning board was not the same as the disapproval of the application by the planning board itself. Therefore, General Municipal Law § 239-m did not require the Town Board to vote 4-1 in order to override the disapproval. In Vanderveer v. Vanrouwendaal (89 Misc 2d 604, 392 NYS2d 216), the court concluded that the city planning board could not delegate to the city planning department the authority to grant an extension of time to the county planning department to file a report. The court reasoned that the granting of an extension under General Municipal Law § 239-m is a discretionary act which affects a substantial right of the agency, namely, the number of votes needed by the City Planning Board to act.

I. The foregoing cases are clearly inapposite. The issue presented here is whether the Commissioner may delegate his authority to cancel a registration to an employee of the Division. As noted, the delegation is authorized by Tax Law § 170(3) and (4). In contrast, there was no authority for the matters which were delegated in either of the foregoing cases. Moreover, unlike the situations presented in Weinberg v. Town of Clarkstown (*supra*) and Vanderveer v. Vanrouwendaal (*supra*), the delegation of authority involved here did not have an impact upon the ability of an agency, i.e., the Department of Taxation and Finance, to conduct its business.

J. Petitioner's brief makes reference to Kiernan v. Bronstein (73 Misc 2d 629, 342 NYS2d 977). In this case, an Article 78 proceeding was brought by certain police officers employed by the City of New York for a judgment declaring section 210 of the Civil Service Law unconstitutional. The proceeding arose upon a finding by the City of New York that the police officers had engaged in an illegal strike. The petition's third cause of action alleged that there was an illegal delegation of authority by the Mayor to a Special Assistant to the Mayor to investigate and make determinations pursuant to Civil Service Law § 210.

The court concluded that this cause of action was without merit. It noted that section three of the New York City Charter allowed the Mayor to create positions within his executive office and authorized him to delegate functions, powers and duties except the power to act as a magistrate. The court then noted that:

"Where the statute delegates power to a single executive head, the general rule is that 'the legislature, understanding the impossibility of personal performance, impliedly authorized the delegation of authority to subordinates'. (Southerland, Statutory Construction, 4th Ed. Sec 4.14)" (Kiernan v. Bronstein, supra, 342 NYS2d at 980-981).

Similarly, in this instance one could find from the numerous duties imposed on the Commissioner by Tax Law § 170 and the impossibility of personal performance of all of these duties that the Legislature impliedly authorized the delegation of authority at issue here from the Commissioner to an employee of the Division. However, in view of the conclusion that there was an express delegation of authority, a finding that there was an implied delegation of authority would be superfluous.

K. It is petitioner's position that the cancellation of its registration was an abuse of discretion. Initially, petitioner argues that the record is devoid of evidence of the exact amount of tax owed by petitioner. According to petitioner, such evidence is important because Tax Law § 283(5) provides for the cancellation or suspension of a license for the nonpayment of taxes. Petitioner submits that "[t]here is no evidence that the payments did not satisfy 100% of the taxes due on December 29, 1995. If so, the February 14, 1996 cancellation notice was invalid" (Petitioner's brief, p. 12).

L. The evidence in the record shows that, as of June 10, 1996, there was no payment on assessment number L010377224 which involved an assessment of tax in the amount of \$195,922.15 (Findings of Fact "24" and "27"). There was also no payment on assessment number L010399571 which assessed tax in the amount of \$49,056.61 (Findings of Fact "24" and "27"). If petitioner had evidence that the grounds relied upon by the Division were not sufficient, the evidence should have been offered at the hearing (see, Matter of Janus Petroleum, Inc., Tax Appeals Tribunal, January 11, 1991, annulled on other grounds, 180 AD2d 53, 583

NYS2d 983). In the absence of such evidence, it is concluded that this argument is without merit.

M. It is next argued that "[t]he testimony of both Tanzman and Spitzer indicates that no thought, no review and no analysis was made with respect to the cancelation of the [p]etitioner's registration" (Petitioner's brief, pp. 9-10). This argument is also without merit. The Tax Appeals Tribunal has held on repeated occasions that the proper standard of review to be applied by the Administrative Law Judge reviewing a proposed refusal to register or a cancellation of registration is a de novo review of the application (Matter of Shore Line Oil Company, Inc., Tax Appeals Tribunal, February 15, 1996; Matter of Peterson Petroleum of New Hampshire, Inc., Tax Appeals Tribunal, January 18, 1996; Matter of OK Petroleum (Tax Appeals Tribunal, November 1, 1990). Therefore, the challenge to the grounds relied upon by the Division is rejected as irrelevant (Matter of Shore Line Oil Company, Inc., supra).

N. The current registration provisions of Article 12-A of the Tax Law represent "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" (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). In Matter of OK Petroleum (supra), the Tribunal explained the amendments to the registration provisions of Article 12-A as follows:

"[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.)

O. Tax Law § 283(5) permits the cancellation or suspension of a license upon the nonpayment of taxes. Petitioner submits that the use of the term "may" in Tax Law § 285(5)

contemplates the exercise of discretion. While this is an accurate statement, petitioner has not shown why this discretion should be exercised in its favor. As posed by the decision in Matter of OK Petroleum (supra), 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. It is clear that petitioner has not met this test.

P. The record shows that the four largest liabilities set forth in the letter of December 29, 1995 were the result of a field audit of Janus's sales tax and petroleum business tax returns for the period September 1, 1990 through November 30, 1990. The most significant finding of the field audit was that, for the same transaction, Janus had both claimed a credit on a return and received a refund of the same amount, resulting in a "double" refund to Janus of approximately \$195,000.00.

Q. Janus had 90 days from the issuance of the notices involved herein to file a petition (Tax Law § 288[5]; §§ 315, 1138[a]). However, Janus failed to protest any of the four major liabilities and, as a result, the liabilities became fixed and final. It is noteworthy that Janus did not offer any explanation for why the liabilities arose, why the liabilities were not promptly satisfied, or any assurance that similar liabilities would not arise in the future. In view of the questions presented by the presence of the outstanding liabilities, there is no basis to conclude that Janus could be relied upon to properly exercise its responsibilities as a distributor in the future.

R. The petition of Janus Petroleum, Inc. is denied.

DATED: Troy, New York
February 27, 1997

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE