

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MARIA FUEL CORPORATION	:	DETERMINATION
for Review of a Denial, Suspension, Cancellation or	:	DTA NO. 816153
Revocation of a License, Permit or Registration under	:	
Articles 12-A and 13-A of the Tax Law.	:	

Petitioner, Maria Fuel Corporation, c/o Maria Jacobellis, 3312 Northside Drive, Key West, Florida 33040, filed a petition for review of a denial, suspension, cancellation or revocation of a license, permit or registration under Articles 12-A and 13-A of the Tax Law.

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on November 26, 1997 at 10:15 A.M., with all briefs to be submitted by January 23, 1998. As an expedited matter, the due date for this determination, including allowance for the filing of briefs and post-hearing documents, is April 2, 1998. Petitioner appeared by Maria Jacobellis, president. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Michael B. Infantino, Esq., of counsel).

ISSUE

Whether the Division of Taxation's proposed refusal to register petitioner as a distributor of diesel motor fuel under Articles 12-A and 13-A of the Tax Law should be upheld.

FINDINGS OF FACT

1. On March 20, 1996, the Division of Taxation (“Division”) received an Application for Registration as a Distributor of Diesel Motor Fuel (Form TP-600) as filed by Maria Jacobellis, on behalf of an entity known as Maria Fuel Corporation (“Maria Fuel”). The Division returned the application to Maria Jacobellis on April 3, 1996 with the statement that the application was missing pertinent information and could not be completed for processing until all information was received. The Division further outlined in its letter the information that would be required to complete the processing of the application. On May 2, 1996, the Division acknowledged receipt of Maria Fuel’s Application for Registration as a Distributor of Diesel Motor Fuel. As is relevant to this proceeding, the application lists the following information:

- Item “12” - Maria Jacobellis owns 100% of Maria Fuel and holds the title of president of Maria Fuel;

- Item “22” - (in response to the question of whether Maria Fuel or Maria Jacobellis had a motor fuel registration canceled, suspended or denied within the prior five years) petitioner responded “yes” with respect to Maria Fuel Corporation, in January 1996, explaining, “I realized the accountant didn’t transfer my name in 90 days. After promising in July 1994 to help me in transition.”

2. By letter dated May 2, 1996, the Division indicated to Maria Fuel, attention Maria Jacobellis, that the application could not be processed because the applicant had four unpaid sales tax liabilities and one unpaid corporation tax liability. The letter further stated that the application could not be processed until all appropriate returns were filed and all tax liabilities had been paid in full.

3. The Division responded to petitioner’s request for registration by proposing to deny such request in a letter dated September 17, 1996. The Division’s proposal to refuse registration was based on several grounds, specified as follows:

(a) The registration of Maria Fuel Corporation was canceled within the preceding five years (Tax Law § 283[2][f]); and

(b) Maria Jacobellis, current president of Maria Fuel Corporation, was a responsible person of Maria Fuel Corporation at the time that Maria Fuel Corporation failed to comply with provisions of section 287 of the Tax Law relating to the filing of petroleum business tax returns and the payment of tax thereon, and at the same time that Maria Fuel Corporation's registration was canceled (Tax Law §§ 283[2][g];[4]).

(c) Petitioner failed to provide a current certified unqualified financial statement (20 NYCRR 411.1).

The Division mailed the Notice of Proposed Refusal to Register by certified mail, return receipt requested. The receipt was signed by Maria Jacobellis.

4. The Division's proposed refusal to register Maria Fuel was challenged by a petition filed with the Division of Tax Appeals on October 6, 1997.

5. Maria Fuel Corporation began business operations in October 1973. It was owned and operated by Maria Jacobellis's father, Michael, and mother, Gelsomina. The corporation was located at 25 Sterling Place, Amityville, New York. Since 1989, it had been registered with the Division as a retailer of heating oil only and possessed a registration as a residual petroleum products business.

In July 1994, Michael Jacobellis suffered a heart attack and decided to retire to Key West, Florida for health reasons. Maria Jacobellis became owner and president of the corporation, and took over its daily operations. Even though registered, the corporation did not purchase or sell any residual product. Operations consisted of purchasing and selling #2 fuel oil and kerosene

for heating purposes to mostly residential accounts in Nassau and Suffolk counties. A prior PT-100 audit on Maria Fuel for the period June 1, 1991 through December 31, 1993 indicated average residential sales to be 98.53% of total sales. In late 1994 Maria Fuel entered into oral agreements to subcontract out its customers to other fuel oil companies. These companies would deliver #2 fuel oil to Maria Fuel's accounts using either their own trucks or the trucks of Maria Fuel. According to Maria Jacobellis, these other fuel oil companies were responsible for collecting, filing and paying the sales tax. Profits on the sale of fuel oil to Maria Fuel's customers were split between the other fuel oil companies and Maria Fuel. The arrangements with the other fuel oil companies ended in March 1995 and the business operation has been inactive since that time. The corporation's certified public accountant, Michael Gargiulo, was to assist Ms. Jacobellis in the ownership transition between her parents and herself, including notifying the Division of the ownership change and filing all necessary tax returns. Unfortunately, Mr. Gargiulo did not carry out these responsibilities. Ms. Jacobellis states that if she is granted the requested license, she will operate the business from Key West, Florida.

6. On March 3, 1995, the Division sent to Maria Fuel a Failure to File Petroleum Business Tax Return which indicated that petitioner had not filed Returns for Residual Petroleum Products (Form PT-103) and Returns for Retailer of Heating Oil Only (Form PT-106) for the months of June, July and August 1994 and had not filed Petroleum Business Tax Returns (Form PT-100) for the months of July and August 1994. On June 23, 1995, the Division issued a second Failure to File which indicated that petitioner had failed to file the three returns for the additional months of September 1994 through April 1995. A third Failure to File issued on August 10, 1995 added the month of May 1995 to the list of months in which Maria Fuel had failed to file the three petroleum business tax returns.

7. The Division sent to petitioner on September 7, 1995 a Demand for NY Petroleum Business Tax Return and/or Payment of Taxes Due Pursuant to Articles 12-A, 13-A, 28 and 29, demanding payment of an open sales tax assessment and the filing of the previously mentioned unfiled petroleum business tax returns. The Demand further stated that if payment and/or returns were not received within 10 days of the date of the Demand, Maria Fuel's registrations would be canceled, pursuant to Tax Law § 283(5).

8. Between September 12, 1995 and January 12, 1996, the Division issued to Maria Fuel five Failures to File Petroleum Business Tax Returns for the months of June 1995 through October 1995 which indicated that petitioner had failed to file PT-100s, PT-103s and PT-106s for each of such months. On November 9, 1995, the Division issued to Maria Fuel a Notice of Suspension of petitioner's residual petroleum product registration under Article 13-A and a Notice of Suspension of petitioner's registration as a retailer of heating oil only under Articles 12-A and 13-A. The reason given for the suspensions was petitioner's failure to comply with the requirements set forth in the Demand issued on September 7, 1995.

9. On October 27, 1995, the Division contacted Maria Fuel by telephone to advise it that the Division had not received the delinquent returns and was in the process of suspending Maria Fuel's license. As there was no answer at the telephone number called, a message was left on the answering machine. On the same day Maria Jacobellis returned the Division's telephone call and advised that Mr. Gargiulo was handling the past due returns. She was informed that the Division had no record of receiving the delinquent returns with payment of the tax and that Maria Fuel's registrations were in the process of being suspended. The next telephone contact came on December 21, 1995 when the Division left a message on the Maria Fuel answering machine that the Division was in the process of canceling Maria Fuel's

registrations. On January 22, 1996, the Division issued to petitioner two Notices of Cancellation of petitioner's registration as a retailer of heating oil only and of petitioner's residual petroleum product registration for failure to comply with the requirements set forth in the demand issued on September 7, 1995.

10. In June 1996, Maria Fuel filed with Division the missing Petroleum Business Tax Returns (PT-100s) and paid the delinquent tax of \$425.00, which represented the minimum tax due for the months at issue. All the returns were signed by Maria Jacobellis, as president. However, the Division does not consider the filing of PT-100s to be the equivalent of the "filing of a return" as it is merely a summary sheet with all the details and computations of tax due done on the various returns.

11. By fax dated August 6, 1996, petitioner's accountants, Gargiulo and Company, forwarded to the Division the compiled balance sheet of Maria Fuel as of December 31, 1995 and the related statements of income and retained earnings for the twelve months ending December 31, 1995. The report of the accountants explained:

"A compilation is limited to presenting in the form of financial statements information that is the representation of management (owners). We have not audited or reviewed the accompanying financial statements and, accordingly, do not express an opinion or any other form of assurance on them.

Management has elected to omit substantially all of the disclosures and the statement of cash flows required by generally accepted accounting principles. If the omitted disclosures and the statement of cash flows were included in the financial statements, they might influence the user's conclusions about the company's financial position, results of operations, and cash flows. Accordingly these financial statements are not designed for those who are not informed about such matters."

It is the position of the Division that the financial statements were inadequate because they were not prepared pursuant to an audit conducted by a certified public accountant and omitted

virtually all of the disclosure which would be used in determining the financial condition of the corporation.

12. After being informed by the Division of the inadequacies of the returns filed and the financial statements submitted, Maria Fuel again filed the PT-100s but this time attached the missing PT-103s and PT-106s. However, no further submissions were made with regard to the financial statements.

CONCLUSIONS OF LAW

A. Tax Law, article 12-A, § 282(a)(2), provides, inter alia, for the issuance of a registration as a distributor of diesel motor fuel, under which a registrant is allowed to enhance diesel motor fuel, sell or use diesel motor fuel, import diesel motor fuel into the state or produce, refine, manufacture or compound diesel motor fuel within the state. Section 282(a)(2) makes the full registration review provisions of Tax Law § 283, relating to motor fuel distributors, also applicable to the licensing of diesel distributors, as follows:

“No person shall engage within this state in the enhancement of Diesel motor fuel, make a sale or use of Diesel motor fuel (other than a retail sale not in bulk . . . , import or cause the importation of Diesel motor fuel into the state . . . unless such person shall be registered by the department of taxation and finance as a distributor of Diesel motor fuel All of the provisions of section two hundred eighty-three of [Article 12-A] shall apply to applicants for registration and registrants with respect to Diesel motor fuel, and, in addition, distributors with respect to Diesel motor fuel shall be subject to all other provisions of [Article 12-A] relating to distributors of motor fuel, including but not limited to, the keeping of records, the fixing, determination and payment of tax and filing of returns.”

B. The motor fuel tax and diesel motor fuel tax regulations provide that before any person may be registered as a distributor, such person must submit to the Division various documents, including current unqualified financial statements certified by a certified public accountant pursuant to an audit conducted by such accountant (20 NYCRR 411.1[b][2]). The

regulation further provides that:

“Generally, if an applicant or distributor fails to supply current unqualified financial statements as required by subdivisions (b) and (c) of this section, the applicant will not be registered or such distributor’s registration will be canceled. However, on petition, either through the hearing process or on the motion of the department, the requirement of submitting unqualified financial statements may be waived. If such requirement is waived, the applicant or distributor will be required to file a bond or deposit acceptable security in such amount as is deemed appropriate, regardless of the net worth or financial status of the applicant or distributor (20 NYCRR 411.1[d][2]).

C. Subdivisions (2) and (4) of Tax Law § 283 enumerate certain factors which must be considered by the Division upon its review of an application for registration as a motor fuel distributor. In this case, the Division has identified certain specific bases under Tax Law § 283 as reasons for its proposal to refuse petitioner’s request for registration. These bases include the cancellation of petitioner’s registration within the preceding three years, Maria Jacobellis’s being a responsible person when Maria Fuel failed to file petroleum business tax returns and pay the tax thereon and when petitioner’s registration was canceled and the failure of Maria Fuel to provide to the Division current unqualified financial statements certified by a certified public accountant pursuant to an audit conducted by such accountant.

D. To clarify the foregoing, the Division proposes to refuse Maria Fuel’s application for registration because Maria Jacobellis owned and operated Maria Fuel, during which period of ownership and operation the entity failed to timely file required tax returns, make remittances of taxes due and, as a result, had two of its registrations under Articles 12-A and 13-A canceled. Further, the Division points out that Maria Fuel failed to provide a current certified unqualified financial statement as a required component of its application. In response, Maria Jacobellis does not dispute that Maria Fuel failed to timely file required tax returns or make remittances of tax due. Furthermore, she does not dispute that Maria Fuel failed to provide a current certified

unqualified financial statement as part of the application of petitioner. In short, Ms. Jacobellis, while not disputing the factual basis for the Division's proposal to refuse registration to Maria Fuel, asserts that it was the fault of petitioner's accountant which caused the failure of the corporation to file tax returns and make remittances of the tax due. More specifically, Ms. Jacobellis states that at the time her father became ill and she took over the operation of the business, the accountant expressly promised to take care of all tax related matters and any necessary dealings with the Division, including the transfer of the ownership of Maria Fuel and the filing of all returns and the payment of any tax due. Ms. Jacobellis also points out that upon learning of the tax liability and the unfiled returns, she did everything in her power to quickly correct the situation.

E. After review of all the evidence submitted, the Division's proposed refusal to register Maria Fuel must be upheld. While not unsympathetic to Ms. Jacobellis' desire to get back into the diesel motor fuel business, nor disbelieving her intent to timely comply with all filing and payment requirements in the future, it remains that such good intent does not overcome Maria Fuel's past compliance record or provide a reasonable basis to assume that such intended ends would be carried out in the future. It is also noted that petitioner continues to employ the accountant claimed by Ms. Jacobellis to be responsible for the failure to file the required tax returns and pay the tax due, and petitioner still has not filed the required current certified unqualified financial statements.

The review of the Division's decision to deny registration to petitioner is to be made *de novo*, considering all the facts and circumstances surrounding the application (*OK Petroleum Products Corp.*, Tax Appeals Tribunal, November 1, 1990). In *Diamond Terminal Corporation* (Tax Appeals Tribunal, September 22, 1988, *confirmed*, 158 AD2d 38, 557 NYS2d 962, *lv*

denied, 76 NY2d 711, 563 NYS2d 767), the Tribunal found that the revision of Article 12-A by the Laws of 1986 (ch 276) was the “culmination of legislative and executive efforts to combat massive evasion of the excise and sales taxes imposed on motor fuel by Articles 12-A and 28 pursuant to the authority of Article 29 of the Tax Law.” In *OK Petroleum Products Corp.*, (*supra*) the Tribunal discussed the registration provisions of Article 12-A, and their underlying intent:

“[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). In 1988 similar legislative changes were made to address evasion and avoidance of the tax imposed on diesel motor fuel (L 1988, ch 261, sections 67-105).”

The legislative intent for the expansion of Tax Law § 283(2) explains that the subsection “is expanded to generally encompass an examination of the character and suitability of responsible officers . . . of the applicant, and to further enumerate acts which reflect negatively on character and suitability.” Pursuant to *OK Petroleum Products Corp.* (*supra*), the issue to be decided in a registration matter is whether an applicant can be relied upon to properly exercise its responsibilities as a distributor.

F. In order to try to eliminate the evasion of motor fuel taxes in New York, the Legislature imposed an elaborate system of registration, licensing and record keeping on all persons engaged in manufacturing, importing, selling, distributing and transporting motor fuel and diesel motor fuel in New York State. The licensing and registration provisions are necessary parts of this scheme, and are not mere legal technicalities to be ignored without consequence.

Considering all the facts in this matter, the Division's refusal to register is appropriate, and consistent with the stated purposes of the Tax Law and its legislative intent. Petitioner's past history as a dual registrant demonstrates that petitioner cannot be relied upon to properly exercise its duties as a distributor under the Tax Law. It demonstrated its unreliability by failing to file returns and to pay tax due when those returns were first due and then within ten days of receiving a demand. This resulted in the cancellation of its existing registrations within five years of the Proposed Refusal. This failure to file and the resulting cancellations occurred while Ms. Jacobellis was petitioner's responsible individual. Finally, petitioner has failed to produce the necessary current certified unqualified financial statements required by the Division to determine the corporation's fiscal responsibility. Thus, while each of the grounds advanced by the Division would technically be sufficient by itself to deny registration, and while the filing and payment record with respect to Maria Fuel is alone compelling reason to refuse registration, collectively the Division's position provides an "overwhelming basis to deny registration" (*see, Matter of Barrier Oil Co.*, Tax Appeals Tribunal, January 4, 1991; *Matter of Shaw v. Tax Appeals Tribunal*, 203 AD2d 720, 610 NYS2d 971, *lv denied* 84 NY2d 803, 617 NYS2d 137). Accordingly, based on all of the foregoing, the Division's proposed refusal to register Maria Fuel must be sustained.

G. The petition of Maria Fuel Corporation is hereby denied and the Division's proposed refusal to register is sustained.

DATED: Troy, New York
March 19, 1998

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE