

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**LINDA M. SMITH D/B/A J.J. SMITH** : DETERMINATION  
for Review of a Denial, Suspension, Cancellation or : DTA NO. 816344  
Revocation of a License, Permit or Registration under :  
Article 12-A and Article 13-A of the Tax Law. :

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Petitioner, Linda M. Smith, 3 Vigars Place, Albany, New York 12205, filed a petition for review of a denial, suspension, cancellation or revocation of a license, permit or registration under Article 12-A and Article 13-A of the Tax Law.

A hearing was held before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on March 6, 1998 at 9:15 A.M. with all briefs to be submitted by May 15, 1998. Pursuant to Tax Law §283(6)(a) this determination is due on August 6, 1998. Petitioner appeared *pro se*. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Michael B. Infantino, Esq., of counsel).

***ISSUE***

Whether petitioner has established that the Division of Taxation erred in refusing to register her as a distributor of diesel motor fuel under articles 12-A and 13-A of the Tax Law.

***FINDINGS OF FACT***

1. On July 22, 1997, the Division of Taxation (“Division”) received from petitioner, Linda M. Smith, an Application for Registration as a Distributor of Diesel Motor Fuel. The application indicated that petitioner was the sole owner of a business named J.J. Smith and intended to enter into the business of selling diesel motor fuel upon registration by the Division.

2. Petitioner's initial application was deficient in several respects. Item 7 asks the date business began or will begin in New York State. Petitioner answered "Upon Approval of Registration." Petitioner indicated that she was not registered as a sales tax vendor, and she failed to submit an application for registration as required. Rather than list all suppliers of diesel motor fuel, she stated: "Going to Apply at Amerada Hess, Sears Petroleum, Pal Oil Corp." No business history was provided, and several questions were left unanswered.

3. The Division returned the application to petitioner with a cover letter explaining that required documentation was needed to process the application. The Division enclosed a copy of an information booklet for completing an application for registration. Among other things, the instructions state that all applicants must submit a letter from each supplier including certain specific information:

- that the supplier has or will supply aviation gasoline or diesel motor fuel or kero-jet fuel to you;
- the terminals from which the diesel motor fuel will be shipped and the method of shipment (ocean vessel, barge, tank truck, pipeline, etc.);
- the quantity that the supplier agrees to furnish or has furnished per month and type of product;
- delivery terms; and
- payment and/or credit terms.

In addition, all applicants are instructed to submit "a current financial statement prepared by a person or persons not employed by the applicant."

4. Petitioner returned a copy of the original application to the Division where it was received on September 4, 1997. No additional information was provided.

5. The Division wrote to petitioner again, on or about September 9, 1997. The letter asks petitioner to submit the information necessary to process her application. The items listed in the information booklet about supplier letters and a certified financial statement are specifically requested in the letter. In addition, the letter asks petitioner to complete four separate items in the application: Line 7 which asks for the date that the applicant began doing business in New York; Line 12 which asks the applicant to indicate the name of the individual who will perform certain duties within the organization; Line 15 which asks for information regarding the applicant's sales tax registration or completion of an Application for Registration as a Sales Tax Vendor (form DTF-17) (a sales tax registration form was enclosed for petitioner's use); and Line 25 which asks for the total monthly diesel motor fuel the applicant expects to sell or use (petitioner had indicated on her application that the number of tax exempt gallons she intended to sell exceeded the total number of gallons, exempt and not exempt, that she intended to sell).

6. On September 23, 1997, the Division received a copy of the same application that it had previously returned to petitioner. Changes were made to the application. On Line 7, petitioner indicated that she began doing business on June 11, 1997. Petitioner indicated that she would perform all of the duties related to the financial affairs of the business as enumerated in the information brochure. As stated in the brochure those duties are:

- a. signing checks on the company's bank account;
- b. signing the business tax returns;
- c. paying creditors;
- d. making the final decision on which bills are to be paid;
- e. conducting the business general financial affairs;
- f. filing returns or paying taxes imposed by Article 12-A of the Tax Law;
- g. complying with any other requirement of the Tax Law.

Petitioner corrected Line 25 by indicating that she expected to sell a total of 125,000 gallons of diesel motor fuel per month, and of that total, 100,000 gallons were expected to be tax exempt.

She did not submit an Application for Registration as a Sales Tax Vendor as requested. She attached a copy of a letter sent to her by Polsinello Fuels, Inc. ("Polsinello") which states that Polsinello would be happy to sell her petroleum once all state registrations and certificates of insurance were supplied. The letter states that petroleum product would be lifted from the Apex terminal via petitioner's trucks and would be sold COD unless credit approved in amounts necessary to meet petitioner's requirements. Petitioner also enclosed a copy of a Pal Oil Co., Inc. ("Pal"), information sheet dated September 2, 1997. Petitioner did not submit a certified financial statement.

7. Petitioner's application was acknowledged by the Division on September 24, 1997. On the same date, the application was forwarded to the Division's field audit management unit requesting them to review the application and make a recommendation for approval or denial.

The following memorandum was included with the forwarded application:

The above company has the same home address as J.D. Smith/J.D. Smith and Sons, Inc. Mr. Smith applied for registration as a Diesel Distributor in May, 97 but failed to respond to my letter and the application was closed. Linda Smith [sic] original application was received in July, 97 but returned twice for information.

8. As part of its review procedure, the field audit management unit conducted an interview with petitioner at her residence, which is the same address as her business. Ms. Smith provided the information which was later memorialized in a memorandum from the interviewer to the supervisor of the field audit management unit. The memorandum contains the following facts:

(a) Petitioner is starting a fuel oil business to employ her brother, Joel D. Smith. He has an outstanding tax liability and was unable to obtain a diesel motor fuel distributor license for that reason. Petitioner has full-time employment elsewhere and no experience in the motor fuel business.

(b) Petitioner's brother was receiving calls from former customers requesting deliveries to be made. All motor fuel would be purchased from Polsinello and PAL on a tax paid basis. Joel D. Smith would pick up all purchases, and he would make all deliveries on a COD basis. The business had no truck and no storage capacity at the time of the interview. Petitioner stated that her brother would borrow a truck initially. Petitioner stated that the business would have no kerosene sales. When asked what her responsibilities would be, petitioner stated that she would oversee the billings to ensure customer payments.

(c) During the course of the interview, petitioner asked the auditor to speak with her brother by telephone. Mr. Smith said that he would simply be an employee of the business, driving and making deliveries. However, he mentioned that he was interested in getting back in the motor fuel business and stated that he would be buying a truck in the near future. He also stated that the kerosene fuel would be sold to trailer parks.

On the basis of information received during the interview and the conflicts between information received from petitioner contrasted with that received from her brother, the auditor recommended that the application not be approved. If the application were approved, the auditor recommended a bond of \$250,000.00 based on projected sales as stated in the application.

9. A copy of petitioner's 1996 Federal income tax return was attached to the interviewer's memorandum. It indicates that her income for that year was almost entirely from wages and salary.

10. The Division's computer record-keeping system shows that the Division issued 10 notices and demands to Joel D. Smith as a person responsible for collection and payment of tax on behalf of J.D. Smith & Sons, Inc. The tax liability on these 10 notices totaled \$139,368.10. Penalties and interest were also asserted. After the application of payments and credits, the

balance due on these assessments, as of February 27, 1998, was \$159,734.23. Notices and demands in the same amounts were also issued to J.D. Smith & Sons, Inc. and also remain unpaid.

11. On November 18, 1997, the Division issued to petitioner a Notice of Proposed Refusal to Register as a Distributor of Diesel Motor Fuel under Articles 12-A and 13-A of the Tax Law.

The notice lists the following facts as the forming the basis for the refusal:

(1) Joel D. Smith is an employee under a duty to act for Linda M. Smith d/b/a J.J. Smith, and petitioner failed to include Joel D. Smith on the application as a responsible person.

(2) Joel D. Smith was the president and sole owner of J.D. Smith & Sons, Inc., a corporation with outstanding tax liabilities and one which had its registration as a motor fuel distributor cancelled within the preceding five years.

(3) Joel D. Smith was the president and sole owner of a corporation that failed to comply with the provisions of section 287 of the Tax Law relating to the filing of petroleum business tax returns and the payment of petroleum business tax.

(4) Petitioner's supplier letter did not contain required information.

(5) Petitioner failed to provide an audited financial statement as requested by the Division in its letter of September 9, 1997.

12. A conference was conducted in the Bureau of Conciliation and Mediation Services ("BCMS") on December 17, 1997. Petitioner appeared *pro se*. After hearing all the evidence presented, BCMS issued a Conciliation Order, dated January 30, 1998, denying petitioner's request for a reversal of the Division's proposed refusal to license, and sustaining the statutory notice.

13. At the hearing, petitioner presented no evidence. She did not deny any of the facts that form the basis for the Division's Notice of Proposed Refusal to Register as a Distributor of Diesel Motor Fuel under Articles 12-A and 13-A of the Tax Law. She stated that her brother Joel's ex-wife was granted registration as a diesel fuel distributor, and petitioner found it extremely unfair that her brother's ex-wife would be treated differently than petitioner herself. In addition, petitioner believes that it is unfair to deny her registration because of the tax problems of her brother. Petitioner believes that she should not be denied the right to employ her brother in the motor fuel business since he is the person most knowledgeable about that business.

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

A. In ***Matter of OK Petroleum*** (Tax Appeals Tribunal, November 1, 1990), the Tax Appeals Tribunal held that the proper standard to be applied by an Administrative Law Judge reviewing a proposed refusal to register or a cancellation of registration is a *de novo* review of the application (*see also, Matter of Shoreline Oil Company*, Tax Appeals Tribunal, February 15, 1996). Based upon the evidence presented in this proceeding, I find that the Division's decision to refuse to register petitioner as a diesel motor fuel distributor was the correct one.

B. New York has imposed a tax on motor fuel since 1929 (L 1929, ch 364). By the early 1980s, it became apparent that the State was plagued by systematic tax evasion by sellers and importers of motor fuel. The Governor's Task Force on Administration of Taxes on Petroleum Business was established in November 1983 to address this problem. As a result of the Task Force report, the Legislature adopted comprehensive legislation to ensure the correct collection of the taxes imposed under articles 12-A, 13-A, 28 and 29 of the Tax Law (*see*, Memorandum in Support, Governor's Bill Jacket, L 1985, ch 44).

Article 12-A requires the registration and licensing of all persons who have a role in selling motor fuel, importing motor fuel or causing it to be imported into New York, including diesel motor fuel distributors (Tax Law § 283). Distributors, importing transporters and terminal operators are all required to keep records and file reports of the motor fuel transactions in which they are involved (Tax Law §§ 286, 286-a, 286-b). The returns and information reports filed by these licensees enable the Division to trace the import and sale of motor fuel in this State. Accordingly, the reporting and registration provisions are essential components of New York's statutory scheme to combat tax evasion. The purpose of the registration provisions is to provide the Commissioner of Taxation and Finance with the opportunity to decide whether an applicant can be relied on to properly exercise its filing, reporting, collection and payment responsibilities under the Tax Law (*Matter of Shoreline Oil Co., supra*; *Matter of OK Petroleum, supra*).

C. Petitioner's failure to provide the Division with a current financial statement and a complete and accurate application for registration provide sufficient grounds for the Division's refusal to register petitioner as a distributor of diesel motor fuel.

Tax Law § 283(1) provides, as relevant here:

The department of taxation and finance, upon the application of a person, shall register such person as a distributor under this article except as provided in subdivisions two and five of this section. The application shall be in a form and contain such data as the department of taxation and finance shall prescribe.

Section 411.1 of the Division's regulations states as follows:

(b) Before any person may be registered as a distributor of motor fuel, such person must submit to the department:

(1) a completed application for registration as a distributor of motor fuel (form TP-128.3);

(2) current unqualified financial statements certified by a certified public accountant pursuant to an audit conducted by such accountant; and



- (3) an estimate of the monthly number of gallons of motor fuel expected to be:
- (i) imported or caused to be imported into the State for use, distribution, storage or sale within the State;
  - (ii) produced, refined, manufactured or compounded within the State;  
and
  - (iii) sold, transferred, used or otherwise distributed within the State.

Information obtained by the Division during the course of its interview with petitioner warranted the Division's conclusion that petitioner's brother is a person responsible for performing certain essential duties for the business. Petitioner admitted having no knowledge or experience in the motor fuel business, plus she holds a full-time job unrelated to the motor fuel business. Petitioner stated that her brother would pick up the fuel at the supplier's place of business paying for it on a COD basis, deliver the fuel to customers, and receive payment. It would appear that petitioner intended to operate the business on a cash basis with her brother primarily in charge of handling the cash. From this, it was reasonable for the Division to conclude that Joel D. Smith is an individual responsible for carrying out some of the duties enumerated in question 12 of the application: signing checks on the company's bank account; paying creditors, and conducting the business general affairs. Inasmuch as petitioner failed to list her brother as a responsible individual, the application filed with the Division was incomplete and inaccurate.

In addition, petitioner's final application did not include a supplier letter for PAL, although she stated in an interview that the business planned to purchase motor fuel from PAL. The application indicated that petitioner intended to apply to do business with Amerada Hess and Sears Petroleum as well, but no supplier letters were provided for those companies. Petitioner did

not submit a current financial statement as requested. She indicated at hearing that this is an onerous requirement and that her failure to satisfy the requirement should not preclude her from being registered as a distributor of diesel motor fuel. This is an unpersuasive position for an applicant to take. The Tax Law imposes an array of onerous duties on diesel motor fuel distributors. The filing and record-keeping requirements imposed on distributors are complex, and distributors are required to comply with those requirements even if no tax is due the State (*see*, 20 NYCRR 413.1 *et seq.*). Petitioner's failure to provide complete and accurate information to the Division in her application is directly related to the question of whether she can be relied on to properly exercise her filing, reporting, collection and payment responsibilities under the Tax Law, and this failure supports the Division's refusal to register petitioner as a diesel motor fuel distributor.

D. As relevant here, Tax Law § 283(2) provides that the Commissioner of Taxation and Finance may refuse to register an applicant where the Commissioner ascertains that any one of several circumstances exists with regard to an employee of such applicant who is under a duty to file a return under or pursuant to the authority of Article 12-A or to pay taxes imposed by Article 12-A on behalf of the applicant. The circumstances that apply to Joel D. Smith are the following: (1) taxes imposed under the Tax Law have been finally determined to be due from Mr. Smith and have not been paid in full (Tax Law § 283[2][a]); (2) Joel D. Smith was an officer of J.D. Smith & Sons, Inc., a corporation which has finally-determined tax liabilities which have not been paid in full (Tax Law § 283[2][e]); (3) Joel D. Smith was an officer and 100 percent owner of J.D. Smith & Sons, Inc., when its registration as a motor fuel distributor was cancelled pursuant to Tax Law § 283(4) within the preceding five years (Tax Law § 283[2][e]).

Petitioner does not deny the existence of the three circumstances described above. She insists, however, that her brother would be nothing more than an employee in her business and that he would not be under a duty to file returns and pay taxes on behalf of petitioner. This contention is rejected.

The Division concluded that Joel D. Smith is an individual under a duty to file returns and pay the taxes imposed by article 12-A of the Tax Law on behalf of petitioner. This conclusion was warranted by facts uncovered during the course of the interview with petitioner. Petitioner stated that her only responsibility would be to oversee billing. Her brother was to be responsible for obtaining customers, obtaining a truck to pick up and deliver fuel, collecting payment from customers and paying suppliers. Petitioner's brother appeared more knowledgeable about the business than she did and contradicted information which she gave the interviewer. For instance, petitioner stated that her brother would borrow a truck with which to make deliveries, and he stated that he would be buying a truck. Neither of them stated that petitioner would be responsible for obtaining the truck, the asset most essential to operating the business. Based on the evidence presented, I conclude that the Division reasonably and rationally determined that Joel D. Smith is a person responsible for collection and payment of taxes on behalf of petitioner. Petitioner declined to offer testimony or other evidence at the hearing. Thus, she has failed to carry her burden of proof to show that the Division's determination was incorrect.

The Division presented evidence that taxes imposed under the Tax Law have been finally determined to be due from Joel D. Smith and from the corporation he owned and that the taxes remain unpaid. These outstanding tax liabilities form the basis for the Division's refusal to register petitioner as a diesel motor fuel distributor pursuant to section 283(2), (4) of the Tax Law. Petitioner argues that it is unfair to refuse to register her as a motor fuel distributor based

on the actions of her brother. This argument is ill founded. The registration provisions of Tax Law § 283 are designed, among other things, to prevent persons who have demonstrated that they cannot be relied on to carry out the duties of a motor fuel distributor from obtaining registration. The statutory scheme prevents Joel D. Smith from registering as a diesel motor fuel distributor as long as he has outstanding tax liabilities. It also provides the grounds for denying registration to any entity in which Joel D. Smith is involved as an officer, director, partner, major shareholder, or employee under a duty to act for the business in complying with the Tax Law (*see, Matter of Shoreline Oil Co., supra*). Although petitioner continually states that her brother will be merely an employee of the business, the evidence shows that he would be in charge of every aspect of the business. In fact, the evidence presented by the Division is sufficient to establish that petitioner applied for registration merely to circumvent the Tax Law and to enable her brother to buy and sell diesel motor fuel. Under these circumstances, the Division's decision to refuse registration to petitioner was the correct one.

E. The petition of Linda M. Smith d/b/a J.J. Smith is denied, and the Notice of Proposed Refusal to Register as a Distributor of Diesel Motor Fuel under Article 12-A and Article 13-A of the Tax Law is sustained.

DATED: Troy, New York  
June 11, 1998

/s/ Jean Corigliano  
ADMINISTRATIVE LAW JUDGE