

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
OK PETROLEUM PRODUCTS CORPORATION : DECISION
for Review of a Denial, Suspension, Cancellation or :
Revocation of a License, Permit or Registration under :
Article 12-A of the Tax Law. :

Petitioner OK Petroleum Products Corporation, 850 South Main Street, Farmingdale, New York 11735, filed an exception to the determination of the Administrative Law Judge issued on June 7, 1990 with respect to its petition for review of a denial, suspension, cancellation or revocation of a license, permit or registration under Article 12-A of the Tax Law (File No. 807334). Petitioner appeared by Whiteman, Osterman and Hanna (Heather D. Diddel, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

Both petitioner and the Division of Taxation filed briefs. Oral argument, at the request of petitioner, was held on September 25, 1990.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

- I. Whether petitioner should be denied a license as a distributor of diesel motor fuel.
- II. What standard of review should be used by the Division of Tax Appeals in reviewing the Division of Taxation's notice of proposed refusal to register petitioner.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. The Administrative Law Judge's findings of fact are set forth below.

The stock of petitioner, OK Petroleum Products Corporation ("OK"), is owned by its sole shareholder and president, John Musacchia. OK Petroleum is engaged in the business of the purchase and sale of gasoline.

On August 19, 1988, OK filed an application for registration as a distributor of diesel motor fuel under Article 12-A of the Tax Law. The application was dated August 11, 1988. In response to question 18 on the application, which asks whether the applicant or any owner, director, partner or responsible individual has been convicted of a crime within the preceding five years, petitioner responded "no".

Applications for registration as a distributor of diesel motor fuel are reviewed by the Registration/Bond Unit of the Transfer and Transaction Tax Bureau ("TTTB") of the Division of Taxation ("Division"), located in Albany, New York.

On August 24, 1988, TTTB received a copy of a newspaper article which appeared in the August 16, 1988 edition of Newsday. The article was sent by the TTTB unit located in New York City. The article stated that John Musacchia, a chief executive of OK, was convicted on August 15, 1988 by a Federal jury of seven counts of conspiracy to defraud and of evading Federal gasoline taxes.

On August 26 and 29, 1988, in response to the information contained in the newspaper article, TTTB returned to OK its Application for Registration as a Distributor of Diesel Motor Fuel. TTTB advised OK Petroleum that if it still desired to be registered as a distributor of diesel motor fuel, it should update and resubmit the application for further consideration.

On September 1, 1988, OK Petroleum resubmitted its Application for Registration as a Distributor of Diesel Motor Fuel. In response to question 18, petitioner indicated that John Musacchia was convicted on August 15, 1988 of seven counts of aiding and abetting others in filing false forms and failing to pay Federal excise taxes in 1983, pursuant to Internal Revenue Code § 7202. The application further indicated that John Musacchia was convicted in the United States District Court, Eastern District of New York, Suffolk Division. This application was

dated August 29, 1988. On November 18, 1988, TTTB notified OK Petroleum that in order to complete the review process, it was necessary for petitioner to provide a certified copy of the record of conviction, including the indictment and jury verdict, relating to the case of John Musacchia.

By way of a letter dated December 1, 1988, James O. Druker, Esq., Mr. Musacchia's attorney in the criminal matter, forwarded a certified copy of the record of conviction, the jury verdict and a copy of the indictment. Mr. Musacchia was indicted on May 25, 1988, found guilty on seven counts of the indictment on August 15, 1988 and sentenced to serve three years imprisonment on each count, with the prison terms to run concurrently, on October 27, 1988. Mr. Musacchia was also fined \$70,350.00. The conviction was upheld on appeal by the United States Court of Appeals, Second Circuit, on March 21, 1990.

The seven counts on which John Musacchia was convicted were as follows: conspiracy to defraud the Federal government of gasoline excise taxes and to commit offenses under the Internal Revenue Code, specifically 26 USC §§ 7201, 7202 and 7206(2) (18 USC § 371) (count 1); willfully attempting to evade or defeat the excise tax by filing false Quarterly Federal Excise Tax Returns (IRS form 720) for the quarters ended March 31, 1984 and June 30, 1984 (26 USC § 7201) (counts 2 and 4); willfully failing to truthfully account for and pay excise taxes for the quarters ended September 30, 1983, March 31, 1984 and June 30, 1984 (26 USC § 7202) (counts 3, 5 and 7); and willfully attempting to evade or defeat the excise tax by falsely representing that OK was registered for Federal excise tax purposes and possessed a valid Registration for Tax Free Transactions (IRS form 637) (26 USC § 7201) (count 6). On each of counts 2 through 7, Mr. Musacchia was convicted as a principal by reason of his aiding and abetting another to commit the crime (18 USC § 2). The acts which gave rise to the indictment and conviction occurred between July 1983 and July 1984.

The seven counts involved gasoline excise tax of approximately \$1,045,000.00 on 11,600,000 gallons of gasoline.

According to counts 1 through 7 of the indictment, John Musacchia and a co-defendant were involved in a conspiracy to evade and defeat the payment of Federal gasoline excise taxes to the Internal Revenue Service. The indictment alleged that Mr. Musacchia formed two sham petroleum corporations, A.K.A. Petroleum Sales Corporation ("AKA") and C.W.M. Petroleum Corporation ("CWM"), opened business checking accounts and obtained business addresses for the corporations. However, the corporations were operated out of OK's office.

John Musacchia, through OK, AKA and CWM, took possession of gasoline from his supplier, who had received it from various producers. This gasoline was sold by John Musacchia to other distributors and retail service stations. The producers would invoice Musacchia's supplier for the gasoline that was later delivered to OK, AKA and CWM. The supplier would not invoice OK, AKA or CWM, but would instead create false invoices showing tax-free sales to other distributors. The supplier also falsified its books and records to indicate tax-free sales to other distributors. In exchange, the president of the supplier would receive between one and two cents per gallon of gasoline from Musacchia for creating the false invoices and records.

The producers of the gasoline were paid by Musacchia out of the checking accounts of AKA and CWM. The supplier did not receive the Federal excise taxes properly due from OK, AKA or CWM and such taxes were therefore not paid to the Internal Revenue Service. OK had guaranteed payments to the producers for any indebtedness owed the producers by the supplier.

The indictment further alleged, in counts 1 through 7, that Musacchia, as part of the conspiracy, (1) ordered the president of the supplier to file false quarterly Federal excise tax returns which did not reflect \$775,000.00 in taxes from sales of 8,600,000 gallons of gasoline to OK, AKA and CWM; (2) ordered the president of the supplier to fail to truthfully account for and pay over to the Internal Revenue Service Federal gasoline excise taxes in the amount of \$775,000.00 on the sale of 8,600,000 gallons of gasoline sold to OK, AKA and CWM; and (3) attempted to evade Federal gasoline excise taxes in the amount of \$270,000.00 on the sale of 3,000,000 gallons of gasoline by falsely representing that OK was registered and possessed a valid Registration for Tax Free Transactions (IRS Form 637).

On December 19, 1988, the Division issued to OK a notice of proposed refusal to register the applicant as a distributor of diesel motor fuel. The notice set forth two grounds for the Division's determination:

"You have not responded to our earlier communication concerning unpaid liabilities finally determined to be due or delinquent returns. T.L. Sec. 282-a(5), 283(2)(a), 283(2)(g), 283(4).

* * *

You have not filed the automotive fuel tax surety bond or alternative security as requested in our earlier correspondence. T.L. Sec. 282-a(5), 283(2)(g), 283(3), 283(4)."

On March 8, 1989, the Division asserted an additional ground for refusing to register OK as a distributor of diesel motor fuel:

"You have been convicted of a felony bearing on duties and obligations under the Tax Law within the last five years. (T.L. Sec. 283.2(g), 283.4[ii])."

The Division determined that as a condition of OK being registered as a distributor of diesel motor fuel, it would have to file an automotive fuel tax surety bond in the amount of \$48,000.00. The bond amount was computed by multiplying an average monthly taxable gallonage of 50,000 gallons by the tax rate of 16 cents per gallon to arrive at a monthly tax liability of \$8,000.00. That figure was then multiplied by six to compute OK's six-month potential tax liability of \$48,000.00. OK does not contest the bond determination and states that it will immediately file a \$48,000.00 bond should it be determined that the criminal conviction of John Musacchia is not a bar to OK being registered as a distributor of diesel motor fuel.

During the period commencing with OK's application to register as a distributor of diesel motor fuel and continuing through the hearing process, petitioner has conducted its business operations pursuant to temporary authorizations issued by the Division. OK has filed returns of tax on diesel motor fuel during the period September 1988 through August 1989 and has paid all taxes due and owing. Subsequent to Mr. Musacchia's conviction in 1988, the Federal government issued a 637 number for OK to purchase heating oil tax free, by registering OK for tax-free transactions under chapters 31, 32 and 38 of the Internal Revenue Code.

In 1983, OK hired an accounting firm, (Jerome S. Raifman, C.P.A.), to review its books and records, file its tax returns and apprise petitioner of any tax obligations. At the hearing, Mr. Raifman and one of his staff accountants testified that Mr. Musacchia never refused to pay any State taxes that were determined to be due. They also testified that Mr. Musacchia never asked either of them to conceal OK's liabilities or assets, nor had they seen or heard evidence of any improper conduct by Mr. Musacchia or OK. Finally, Mr. Raifman testified that any State taxes collected from OK's activities had been remitted to the Department of Taxation and Finance.

OPINION

The Administrative Law Judge found that the Division's decision to refuse to register petitioner as a diesel motor fuel distributor was appropriate in light of all the circumstances presented.

Petitioner argues on exception that the Division's refusal to register petitioner because of the Federal felony conviction of petitioner's president was not a reasoned exercise of discretion, that the refusal was an excessive and unfair sanction, not warranted by the facts, and that because the acts underlying the Federal conviction occurred more than five years ago, the conviction cannot be a proper basis to deny registration to petitioner. Petitioner also argues that the Administrative Law Judge applied an incorrect standard of review in making his determination. In addition, petitioner claims that events which have occurred since the hearing, consisting of the Department of Justice's motion to vacate some of the counts for which petitioner's president was convicted and the U.S. Court of Appeals' remand of one of the counts for a new trial, are new evidence which require that the matter be remanded to the Division of Taxation for a redetermination of the license application.

The Division argues that the felony conviction of petitioner's president was a sufficient ground for refusal to register petitioner, that the motion to vacate three counts of the conviction does not require a remand for reconsideration of petitioner's application, that the notice of

proposed refusal to register was timely, and that the Administrative Law Judge applied the proper legal standard in making his determination.

We uphold the determination of the Administrative Law Judge.

We deal first with petitioner's claim that the Division's notice of proposed refusal to register petitioner was untimely as a matter of law. There is no dispute that the Federal conviction of petitioner's president would be a felony conviction in New York State and that this conviction took place in June of 1989, a few days after petitioner had submitted its application for registration. However, petitioner claims that the conviction cannot be a basis for denial of the application to register because the date of the Division's notice of proposed refusal to register was more than five years after the acts committed by petitioner's president which were the basis of the conviction.

We do not agree that this is the correct interpretation of the statute.

Tax Law § 283(2) permits the Commissioner of Taxation and Finance to refuse to register an applicant as a distributor of diesel motor fuel if the applicant, an officer of the applicant, or a shareholder owning more than ten percent of the stock of the applicant, "has committed any of the acts specified in subdivision four of this section within the preceding five years" (Tax Law § 283[2][g]). Subdivision 4 of section 283 provides for the cancellation or suspension of the registration of any distributor for various reasons including that a registrant, or an officer or shareholder:

"has been convicted in a court of competent jurisdiction, either within or without the state, of a felony, within the meaning of subdivision eight of this section, bearing on such distributor's duties and obligations under this chapter;" (Tax Law § 283[4][ii]).

Tax Law § 283(6)(a) states that the Commissioner's notice of proposed refusal "must be given to such person within five years from the date of the act or omission referred to in subdivision two or four of this section."

In our view, it is clear from reading the entire section that the act which must occur within the preceding five years of the refusal to register is the felony conviction itself. Section 283(2)(g) states that the commission of any of the acts specified in subdivision four may result in refusal to

register. Section 283(4) lists as one of the acts, not "has committed acts which resulted in a felony conviction", but, "has been convicted" of a felony (Tax Law § 283[4][ii]). If the Legislature had intended that the acts underlying a conviction, rather than the conviction itself, be disqualifying, it could clearly have said so.¹ Petitioner's interpretation requires a strained reading of the statutory language.²

We deal next with petitioner's assertion that the Administrative Law Judge did not use the proper standard in reviewing the Division's proposed denial of petitioner's application. Petitioner asserts that the Administrative Law Judge is required to make a de novo review of the registration application. Instead, petitioner claims that the Administrative Law Judge improperly utilized the standard imposed on New York courts in reviewing administrative actions, i.e., whether the administrative action was arbitrary and capricious and supported by substantial evidence, and whether the sanction imposed, the denial of petitioner's application, was "shocking to one's sense of fairness", a standard enunciated in Matter of Pell v. Board of Education (34 NY2d 222, 356 NYS2d 833, 841, 842).

The Division of Taxation asserts that since Tax Law § 283(2) and (4) delegate the discretionary authority in licensing and registration of diesel dealers to the Commissioner of Taxation and Finance, the review of such matters by the Administrative Law Judge should be limited to determining if there has been an abuse of discretion.

We agree with petitioner that the proper standard of review to be applied by the Administrative Law Judge is a de novo review of the application.

¹We agree with the Division of Taxation that a conviction can be considered as disqualifying pursuant to Tax Law § 283(2)(g) even if all appeals of that conviction have not been exhausted. In a subsequent subdivision of section 283 which defines a felony conviction for the purpose of the section, the Legislature specifically articulated what was to happen upon the reversal of "any such conviction" (Tax Law § 283[8]). This language would be unnecessary if the reference to "conviction" in subdivision 2 meant only a conviction after all appeals had been exhausted.

²Even if petitioner's statutory interpretation is correct, it should be noted that the Division of Taxation's notice of proposed refusal pursuant to Tax Law § 283(6)(a) issued on March 8, 1988 was within five years of most, if not all, of the acts of petitioner's president which were the basis of his conviction, as reflected in the indictment. Although it is not entirely clear, petitioner may also be suggesting that since the present proceeding is more than five years from the illegal conduct, this conduct cannot be considered as a matter of law. Clearly this position is not supported by the statute which says only that the Division's notice of proposed refusal must occur within five years (Tax Law § 283[2] and [6]).

The Division of Tax Appeals is an independent division within the Department of Taxation and Finance. It is administered by the three member Tax Appeals Tribunal. The powers, functions, duties and obligations of the Division are separate from and independent of the authority of the Commissioner of Taxation and Finance (Tax Law § 2002). The purpose of the Division is to provide "the public with a just system of resolving controversies with [the] department of taxation and finance and to ensure that the elements of due process are present with regard to such resolution of controversies" (Tax Law § 2000).

The Division of Tax Appeals' enabling legislation with respect to the review authority of the Tribunal and the authority of the Administrative Law Judges to conduct hearings, contains no statutory limitations such as those contained in Article 78 of the Civil Practice Law and Rules which is applicable to judicial review of administrative decisions (CPLR 7803[3] and [4] [which limit judicial review of administrative decisions to questions of whether the administrative action was arbitrary and capricious]). This is consistent with the function, nature and purpose of the Division of Tax Appeals as an independent administrative body which performs an adjudicative function.

Moreover, to impose an Article 78 standard on the Division of Tax Appeals would disregard the clear intent of the Legislature as expressed in § 2016 of the Tax Law, that the decision of the Tribunal be the final administrative decision to be reviewed by the courts under the Article 78 standard. Further, the application of such a standard of review by the Division of Tax Appeals would result in three redundant adjudicative determinations, i.e., the determination of the Administrative Law Judge, the decision of the Tribunal and the decision of the Appellate Division, all determining whether the action of the Division of Taxation was based on substantial evidence or was arbitrary or capricious.

In the case before us, it appears that the Administrative Law Judge applied the correct standard of review. Although the Administrative Law Judge cited Matter of Pell v. Board of Education (supra), a case which discusses the test to be applied by the courts in an Article 78 proceeding when determining whether an agency action has been an abuse of discretion, a review

of the Administrative Law Judge's conclusions as a whole indicates that the Administrative Law Judge did not limit his review to the standards used by the courts. He specifically noted that the review of a decision of the Division of Taxation by the Division of Tax Appeals is not as limited as that of an appellate court, citing our decision in Matter of Small (Tax Appeals Tribunal, August 11, 1988). Additionally, the Administrative Law Judge appears to have weighed the factors presented by this case, the reasons given by the Division for its denial of the registration and the mitigating factors and arguments presented by petitioner, and concluded that the Division's decision to deny registration was the correct one.

In any event, the matter need not, as petitioner argues, be remanded to the Administrative Law Judge for a new determination. On exception, the Tribunal may affirm, reverse or modify the Administrative Law Judge's determination, and otherwise make any decision the Administrative Law Judge might have made (see, Tax Law § 2006[7]; 20 NYCRR 3000.11[e]). As the issue of the standard of review was not raised at the hearing level, petitioner had the opportunity to introduce at the hearing all matters it thought necessary for the Administrative Law Judge to decide the case using the de novo review standard that petitioner thought the Administrative Law Judge was required to use. The Tribunal, therefore, has the full record before it, and can make its own independent decision as to whether petitioner should be registered.

We turn next to the issue of whether petitioner's application for registration as a diesel fuel distributor should be denied.

The Administrative Law Judge's findings of fact which describe the acts for which petitioner's president was convicted have not been contested by petitioner. Nor have additional findings of fact been requested.³ Petitioner's president and sole shareholder was convicted of

³Although petitioner has not challenged the findings of fact, and specifically states that the basis of petitioner's challenge to the proposed refusal to license is not a claim that petitioner's president is innocent of the charges for which he was convicted, (Petitioner's Brief to the Administrative Law Judge, p. 3; see, Oral Argument Tr., p. 5), petitioner's briefs and the statements of petitioner's representative make it clear that petitioner's view of the facts is very different from those reflected in the Administrative Law Judge's determination. Nevertheless, in the absence of specific challenges to the findings of fact and given that the findings are otherwise supported by the record, we rely
(continued...)

several Federal felonies, all related to his scheme to defraud the Internal Revenue Service of more than \$1 million of gasoline excise taxes. This scheme involved the use of invoices falsely indicating tax-free sales and the creation of sham corporations which were operated out of the offices of petitioner.

It was to deter tax evasion with respect to motor fuel sold in the State and particularly to combat tax evasion schemes similar to the one perpetrated by petitioner's president that the Legislature enacted numerous changes to Articles 12-A and 28 of the Tax Law in 1985 and 1986 (Memorandum in Support, Governor's Bill Jacket, L 1985, ch 44; see, Memorandum of Senator Lack, 1985 NY Legis Ann, at 55; Memorandum of State Department of Taxation and Finance, McKinney's Session Laws, 1986, ch 276, at 2882). These changes eliminated tax-free sales between registered distributors and imposed excise and sales taxes on the motor fuel at the time of its importation into the State (Tax Law §§ 284, 1102). In addition, changes 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). These amendments applied the registration requirements to diesel motor fuel distributors (Tax Law § 283-a[2]). Section 283 grants the Commissioner the discretion to refuse to register an applicant where, inter alia, the applicant, an officer, or shareholder has been convicted of a felony bearing on a distributor's duties and obligations under Article 12-A (Tax Law § 283[2] and [4]).

³(...continued)

on the findings as expressed in this decision in evaluating the conduct of petitioner's president as it relates to the appropriateness of a decision not to license petitioner.

In light of the legislative purpose of the registration requirements, the felony conviction of petitioner's president for conduct directly related to tax evasion in the motor fuel area provides an appropriate basis to deny registration to petitioner. We are not persuaded that petitioner's president's wrongful conduct was too long ago to be considered in determining whether petitioner should be licensed. We agree with the Division and the Administrative Law Judge that factors such as petitioner's claim that it has not failed in its tax responsibilities with regard to State taxes, do not outweigh the significance of petitioner's president's fraudulent behavior and disregard for his tax collection responsibilities.⁴ After weighing all the facts presented here we, therefore, find that petitioner's application for registration as a diesel fuel operator should be denied.⁵

We turn now to petitioner's argument that events which have occurred subsequent to the hearing are in the nature of new evidence which require that this matter be remanded to the Division of Taxation for a redetermination of the registration application. Petitioner has submitted with its brief on exception a copy of a Department of Justice motion to the United States Court of Appeals for the Second Circuit requesting that three of the seven counts for which petitioner's president was convicted be remanded to the District Court for the purpose of vacating the convictions on these counts. At oral argument, petitioner's representative stated that the Circuit Court had recently granted that request and remanded an additional count to the District Court for a new trial.

We do not agree that this information requires that this registration application be remanded to the Division of Taxation for reconsideration. Even if these counts are not considered as a basis for petitioner's denial, the remaining three counts, which, it is uncontested, are also felony convictions for offenses related to gasoline tax evasion, and the acts of petitioner's

⁴Petitioner argues that its hiring of a qualified accountant to handle its tax affairs is a mitigating factor which indicates that petitioner's president wished to insure that his tax obligations were identified and complied with. It is hard to credit this as a mitigating factor in light of the fact that the illegal conduct which was the basis of the Federal conviction took place after the accountant was hired.

⁵Even if the Division of Taxation's position with regard to the standard of review to be used by the Division of Tax Appeals is correct, we would find that the Commissioner's proposed refusal to register petitioner is supported by the record and is not an abuse of discretion or an excessive sanction.

president which warranted these convictions would be sufficient basis for denial.⁶ Petitioner was and is, of course, free to reapply for registration at any time, and could have done so during the pendency of the present proceeding before the Tribunal.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner OK Petroleum Products Corporation is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of OK Petroleum Products Corporation is denied in all respects; and
4. Petitioner's temporary authorization to act as a distributor of diesel motor fuel is

revoked as of this date.

DATED: Troy, New York
November 1, 1990

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner

⁶It should be noted that the three counts remaining are counts 2 and 4, willfully attempting to evade or defeat the payment of excise tax on gasoline by filing false returns, and count 6, willfully attempting to evade or defeat the excise tax on gasoline by falsely representing that petitioner was registered for Federal excise tax purposes and possessed a valid Registration for Tax Free Transactions.