

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

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

Petitioner, Janus Petroleum, Inc., 3-1 Park Plaza, Glen Head, New York 11545, filed an exception to the determination of the Administrative Law Judge issued on February 27, 1997. Petitioner appeared by Uncyk, Borenkind and Nadler, L.L.P. (Norman R. Berkowitz, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (John E. Matthews, Esq., of counsel).

The parties did not file briefs on exception, but instead chose to rely on the briefs filed below in support of their respective positions on exception. Petitioner's request for oral argument was denied. Thereafter, petitioner filed separate motions seeking recusal of Commissioner DeWitt and Commissioner Pinto. The Division of Taxation filed a response in opposition to the motions.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision. Commissioner Pinto took no part in the consideration of this decision.

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for cancelling petitioner's registration as a distributor of motor fuel the same ground which was asserted and then withdrawn by the Division of Taxation at a prior hearing.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

IV. Whether petitioner has advanced grounds sufficient to require that either Commissioner DeWitt or Commissioner Pinto, or both, should be disqualified from adjudicating this matter.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

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

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.

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.

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 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."

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.

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 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

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.

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."

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."

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."

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.

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)."

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. 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.

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.

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."

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.

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."

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."

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.

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

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.

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.

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.

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

FACTORS CONCERNING THE EXERCISE OF DISCRETION

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.

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

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

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

improper refund of approximately \$195,000.00.

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

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
L011133068		0	51.39

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.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

Petitioner argued to the Administrative Law Judge that the Division should be precluded from raising nonpayment of taxes as a basis for cancelling the registration because such basis had been asserted and then withdrawn at an earlier hearing (Janus II).⁵ The Administrative Law Judge rejected this argument and concluded, relying on our decisions in *Matter of Harry's Exxon Serv. Sta.* (Tax Appeals Tribunal, December 6, 1988), *Matter of Glover Bottled Gas Corp.* (Tax Appeals Tribunal, September 27, 1990) and *Matter of Bolkema Fuel Co.* (Tax Appeals Tribunal, March 4, 1993), that none of the criteria upon which an estoppel argument is

⁵We declined the opportunity to address this issue as raised on the exception in Janus II, stating: "[f]inally, we address whether the Division should be precluded from asserting at some later date a ground for cancelling petitioner's registration, when that ground was withdrawn without prejudice by the Division at the hearing in this matter. Once an issue is voluntarily withdrawn from our consideration, as it was here, we no longer have jurisdiction over it [citation omitted]" (*Matter of Janus Petroleum*, Tax Appeals Tribunal, April 24, 1997 [Janus II]).

based had been established. That is, petitioner had not shown that the Division's withdrawal of the ground at the prior hearing was done in a manner upon which petitioner could reasonably be led to conclude that such withdrawal was with prejudice and that the Division would never assert the same ground again. Furthermore, the Administrative Law Judge concluded that petitioner had not shown any reliance upon the Division's initial withdrawal, or that any reliance was to petitioner's detriment.

With respect to the issue of delegation of authority, the Administrative Law Judge held that the Commissioner of Taxation and Finance (hereinafter "Commissioner") has explicit power under Tax Law § 170(3) and (4) to delegate his authority to subordinates. The Administrative Law Judge concluded that the Commissioner delegated to the Division his authority to cancel registrations via the promulgation of 20 NYCRR 411.6, which specifically provides that a registration may be cancelled or suspended by the Department of Taxation and Finance. He further concluded that Bonnim Tanzman, as manager of the Registration Bond Unit, would have authority to decide whether to suspend or cancel a distributor's registration.⁶

Finally, the Administrative Law Judge held that the nonpayment of taxes was a valid basis for cancelling a registration. He further explained that petitioner had submitted no evidence to show that the unpaid assessments, upon which the cancellation was premised, had been satisfied. The Administrative Law Judge pointed out that the Division of Tax Appeals properly conducts a *de novo* review of the propriety of cancellations and, thus, held petitioner's argument that the Division had exercised no thought, review or analysis before cancelling petitioner's registration, and the fact that the Commissioner was not specifically aware of the cancellation, to be irrelevant. In sum, the Administrative Law Judge concluded that with no evidence of payment of the liabilities, no explanation of why they arose and why they were not

⁶On the issue of delegation, the Administrative Law Judge also stated that ". . . 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" (Determination, conclusion of law "J," citing *Kiernan v. Bronstein*, 73 Misc 2d 629, 342 NYS2d 977). The Administrative Law Judge pointed out, however, that since he had already concluded the Commissioner had express power to delegate, a conclusion that the Commissioner also had implicit authority to delegate would be superfluous.

promptly satisfied, and no assurance that similar liabilities would not arise in the future, there was no basis to conclude that petitioner could be relied on in the future to carry out its responsibilities as a distributor. Hence, the Administrative Law Judge rejected petitioner's claim that the cancellation was arbitrary and capricious and upheld such cancellation as a proper exercise of discretion.

ARGUMENTS ON EXCEPTION

Petitioner's arguments on exception are the same as those made to the Administrative Law Judge. First, petitioner points out 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 argues that the use of the term "may" in Tax Law § 283(5) indicates that the Legislature intended to confer discretionary authority to cancel a registration in the Commissioner, but never conferred the discretion to cancel a corporate taxpayer's registration on anyone other than the Commissioner. Thus, petitioner argues that the Commissioner failed to properly exercise his discretion in this matter, both by the delegation of authority to cancel a registration to employees of the Division and in the cancellation of petitioner's registration by such employees. Petitioner argues that the record in the instant case shows no thought, review or analysis was made concerning the cancellation of petitioner's registration, and notes that since the Commissioner was not specifically made aware of the cancellation he, therefore, could not have exercised his discretion.

As to the issue of the ground for cancellation, i.e., nonpayment of certain taxes, petitioner contends that the Division is precluded from asserting such ground because the same ground was asserted and then withdrawn at the earlier hearing (Janus II). Petitioner maintains that the Division failed to reserve, at that hearing, the right to reassert the nonpayment ground in a subsequent matter, noting that the testimony on the December 12, 1995 hearing date in Janus II included no discussion regarding whether the withdrawal was made without prejudice. Petitioner also argues that if the Division prevails on this issue, it could engage in a practice of asserting a series of grounds, withdraw some of the grounds, and then re-assert the same

grounds again and again.

Finally, petitioner reiterates its argument that the Commissioner did not appropriately exercise his discretion in this matter. In this regard, petitioner argues 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 it made 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.

The Division, in contrast, argues that its withdrawal of the nonpayment ground at the earlier hearing (Janus II) and the assertion of the same ground in this matter is proper. The Division asserts that:

"[i]n 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 post-hearing brief, p. 4).

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

Finally, the Division argues that there is a *de novo* review of cancellations when the same are challenged before the Division of Tax Appeals and, therefore, there should be no inquiry

into an alleged abuse of discretion by Division employees. Moreover, 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 in this case.

MOTION TO RECUSE

On March 21, 1997, petitioner filed two motions with the Tax Appeals Tribunal (hereinafter the "Tribunal") seeking, respectively, to have Commissioner DeWitt and Commissioner Pinto recused from taking part in the consideration of petitioner's exception.

Petitioner seeks to have Commissioner DeWitt recused because, prior to his appointment as a Commissioner of the Tribunal, he appeared as one of the Division's two representatives on an exception before the Tribunal in a prior matter involving the same petitioner (***Matter of Janus Petroleum*** [DTA No. 808240], Tax Appeals Tribunal, July 11, 1991; [hereinafter "Janus I"]). Petitioner maintains that in such capacity, Commissioner DeWitt participated in the preparation of the brief filed with the Tribunal and presented oral argument on behalf of the Division. Thus, petitioner asserts Commissioner DeWitt has a conflict of interest with respect to the present matter. Petitioner also notes that on July 1, 1996, Commissioner DeWitt voluntarily recused himself from the other earlier matter (described in the initial facts of this decision) involving petitioner (***Matter of Janus Petroleum*** [Janus II], *supra*).

Petitioner seeks to have Commissioner Pinto recused because on June 11, 1996, prior to his appointment as a Commissioner of the Tribunal, he was the Administrative Law Judge who presided at the hearing of this matter before the Division of Tax Appeals. Petitioner asserts that as the Administrative Law Judge conducting the hearing, Commissioner Pinto made a variety of rulings, heard testimony, received documentary evidence and briefs from both parties. Thus, petitioner maintains that Commissioner Pinto was involved in and had knowledge of this matter and "has formed an opinion and determined a conclusion relating to the facts, law and result of this matter" (Affidavit in support of notice of motion, ¶ 9).

In response to petitioner's motions, the Division agreed that since Commissioner DeWitt

was the advocate for the Division in Janus I, it would not object to the recusal of Commissioner DeWitt from this proceeding. However, the Division argues that Commissioner Pinto should not recuse himself from this proceeding. On this score, the Division points out that although Commissioner Pinto did conduct the hearing in this matter, he did not render the determination now on exception. Thus, the Division argues that there is no evidence of bias either in favor of or against petitioner. The Division also argues that the recusal of both Commissioners Dewitt and Pinto would result in a denial of justice because the Tribunal would be unable to act and render a decision on the exception for lack of a quorum of commissioners. On this basis, and citing to the so-called "Rule of Necessity" (*see, Matter of General Motors v. Rosa*, 82 NY2d 183, 604 NYS2d 14), the Division maintains that Commissioner Pinto should participate in rendering a decision on this matter. In sum, the Division apparently takes the position that it is preferable to have Commissioner Pinto, who previously participated in this very matter as the Administrative Law Judge remain involved, of necessity, as opposed to Commissioner DeWitt, who had involvement in another matter concerning this taxpayer but who has had no prior involvement in this matter.

OPINION

Petitioner's motion for recusal of Commissioner DeWitt is denied, and its motion for recusal of Commissioner Pinto is granted. As to the latter motion, although Commissioner Pinto did not issue the determination under consideration herein, he was the Administrative Law Judge who heard such matter and, thus, has had direct prior involvement in the matter at hand. Such being the case, it is appropriate that Commissioner Pinto not participate in deciding this exception, thereby leaving the particular facts and circumstances of this case open to fresh review by individuals having no prior knowledge thereof.

In contrast, Commissioner DeWitt has had no prior involvement in this matter, nor has petitioner alleged or established any bias on his behalf which would result in a need for recusal. Accordingly, on general grounds as discussed further below, Commissioner DeWitt should remain and participate in rendering the decision herein. Moreover, given the foregoing

conclusion that Commissioner Pinto will not participate in deciding this matter, the "Rule of Necessity" comes into play and compels a conclusion that Commissioner DeWitt should not be recused.

In *Matter of Manhattan & Queens Fuel Corp.* (Tax Appeals Tribunal, May 22, 1997), we discussed the issue of recusal. We pointed out that in the absence of prejudice or prejudgment, a Commissioner's former status as the Division's representative does not automatically serve to disqualify him from adjudicating a subsequent matter involving the same taxpayer. In *Manhattan & Queens*, as in the present matter, petitioner provided no evidence to support a contention that the particular Commissioner was (or is) biased or cannot render an impartial decision. The prior matter in which Commissioner DeWitt appeared as an advocate for the Division (Janus I) involved the Division's proposed denial of Janus' application for registration as a distributor of motor fuel. In contrast, the central issue in the present matter involves the propriety of the Division's revocation of Janus' registration on grounds of nonpayment of taxes. The issue of granting a registration in the first instance, versus the issue of cancelling a registration based on subsequent nonpayment of taxes, involves different facts and considerations. The critical facts in this case are essentially unrelated to the earlier matter, save for the fact that the petitioner is the same (*Matter of Manhattan & Queens Fuel Corp., supra*). The Tribunal's duty is to reach a decision by applying the law to the facts presented without prejudgment or prejudice. Given the lack of any evidence that Commissioner DeWitt's former status as an advocate for the Division has in any manner impaired his ability to render an impartial decision in this case, we believe that we have maintained the elemental fairness of rendering a decision without prejudgment or prejudice, and have afforded petitioner fair and impartial treatment herein.

In addition to the foregoing, even if petitioner had made a showing of bias we would not have granted the motion to recuse Commissioner DeWitt, for doing so would have rendered the Tribunal incapable of issuing a decision for lack of a quorum of commissioners (*see, Matter of Manhattan & Queens Fuel Corp., supra*). As in *Manhattan & Queens*, the request for recusal

of two commissioners calls into play the "Rule of Necessity," a narrow exception to the principle that an "unbiased adjudicator in the resolution of disputes is an essential element of due process of law . . ." (*Matter of General Motors v. Rosa, supra*, 604 NYS2d, at 16). Under this exception, a biased adjudicator should decide a case if the dispute cannot otherwise be heard. In this case, recusal of two out of three commissioners would leave the Tribunal unable to act, and also would leave the parties no other body or forum to turn to for resolution of the matter at hand (*Matter of Manhattan & Queens Fuel Corp., supra*). We have stated that "a Commissioner should recuse himself *sua sponte* from any matter in which he has had previous involvement or where there is any possibility of an appearance of impropriety. However, in certain circumstances, that luxury is not available" (*Id.*). Here, in order that the parties would not be deprived of the remedy provided by law, we conclude that the Rule of Necessity should be invoked and that Commissioner DeWitt should remain a participant in the decision resolving this matter.

We turn now to the merits.

Petitioner's position in this matter, detailed above, may be summarized as consisting in essence of three main points, to wit, 1) that the Division is precluded from raising certain unpaid tax liabilities as the basis for cancellation because such ground was asserted and then withdrawn during the course of the earlier hearing (Janus II); 2) that the cancellation is invalid because it was carried out by employees of the Division rather than by the Commissioner who, according to petitioner, alone has the non-delegable discretion and authority to cancel registrations and; 3) that the cancellation based on nonpayment of certain liabilities was an abuse of discretion.

We affirm the Administrative Law Judge's conclusion that the Division was not precluded from asserting nonpayment of taxes as the basis for cancelling petitioner's registration notwithstanding its assertion and withdrawal of such ground at a prior proceeding. Our review of the record reveals that petitioner's main objection to the additional ground of nonpayment, as raised at the prior proceeding (Janus II), was based on surprise and an inability to verify and

respond to the issue of the alleged unpaid liabilities. At no point has petitioner alleged that it was misled into believing that the issue of the unpaid liabilities was withdrawn with prejudice. In fact, the Division's witness, Mr. Tanzman, stated his belief that such ground would stand by itself (as a basis for cancellation) in another (i.e., separate) matter. Petitioner, if unaware of the unpaid liabilities, was certainly put on notice of the same and of their potential future re-assertion by this statement at the earlier hearing (Janus II). The Division's withdrawal of such ground at the earlier hearing in order that the proceeding could continue on the other multiple stated grounds for cancellation, without delay, was not with prejudice to such outstanding assessments or to the Division's right to assert such ongoing or continuing violations as grounds for cancellation (*see, Matter of Shore Line Oil Co.*, Tax Appeals Tribunal, February 15, 1996). Petitioner had the opportunity to verify the validity of the assessments and pay the same, both after the initial hearing and, certainly, during the period between the December 29, 1995 demand letter and the time of the hearing in this matter. Under the facts of this case, we find no prejudice to petitioner and agree that the Division is not estopped or precluded from asserting the unpaid liabilities as grounds for cancellation notwithstanding their prior assertion and withdrawal at the earlier hearing. Finally, we agree with the Administrative Law Judge's observation 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" (Determination, conclusion of law "C").

The Administrative Law Judge also concluded, based upon a thorough review and analysis of the facts of this case and of the relevant case law, that the Commissioner properly and reasonably delegated, to employees of the Division, his authority to cancel petitioner's registration as a distributor of motor fuel. We affirm the determination of the Administrative Law Judge on this issue. In fact, we have already addressed the issue of delegation of such authority by the Commissioner. First, we have held that in determining whether a registration should be cancelled, ". . . a de novo review of the available administrative record is properly conducted by the Administrative Law Judge in order to determine whether there are sufficient

grounds to cancel such registration" (*Matter of Janus Petroleum* [Janus II], *supra*).

Accordingly, petitioner's argument that because a subordinate of the Commissioner made the decision to issue the notice of cancellation, such notice was improper and without authority, is irrelevant. Furthermore, and in any event, in *Janus II*, and in the companion *Matter of Terminelle Corp.* (Tax Appeals Tribunal, April 24, 1997), we concluded that the Commissioner does indeed have the explicit power under Tax Law § 170(3) and (4) to delegate to his subordinates his authority to cancel registrations. We further concluded that the Commissioner's delegation of such authority to employees of the Division's registration/bond unit, was proper. Petitioner here has opted to refile and rely on the briefs and arguments presented to the Administrative Law Judge. Moreover, petitioner has not taken exception to any of the facts found by the Administrative Law Judge. No new arguments on the issue of delegation differing from those raised before the Administrative Law Judge in this matter or those raised in *Janus II* or *Terminelle* have been presented, and, thus, our reasoning and conclusion concerning the Commissioner's delegation of authority in those cases is dispositive of such arguments.

Finally, the Administrative Law Judge correctly concluded that the ground asserted as the basis for the cancellation, i.e., nonpayment of taxes, is clearly a valid basis for the cancellation or suspension of a registration. In this regard, Tax Law § 283(5) provides, in pertinent part:

"a registration may be cancelled or suspended without a 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 . . ."

The record below shows that at least four major liabilities owed by Janus for the period September 1, 1990 through November 30, 1990 were unpaid and had become fixed and final. In turn, there is no evidence to show that such liabilities have been satisfied or, even if paid, that similar liabilities would not arise in the future. We agree with the Administrative Law Judge's determination that "there is no basis to conclude that Janus could be relied upon to properly exercise its responsibilities as a distributor in the future" (Determination, conclusion of law

"Q"). Accordingly, we affirm the determination of the Administrative Law Judge and sustain the cancellation of petitioner's registration.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The motion for recusal of Commissioner DeWitt is denied;
2. The motion for recusal of Commissioner Pinto is granted;
3. The exception of Janus Petroleum, Inc. is denied;
4. The determination of the Administrative Law Judge is sustained;
5. The petition of Janus Petroleum, Inc. is denied; and
6. The Notice of Cancellation of Janus Petroleum, Inc.'s Registration as a Distributor of Diesel Motor Fuel Under Articles 12-A and 13-A of the Tax Law, dated February 14, 1996, is sustained.

DATED: Troy, New York
October 2, 1997

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner