

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
TREVOR C. WISDOM, OFFICER	:	
OF JANUS PETROLEUM, INC.	:	
for Revision of Determinations or for Refunds	:	
of Tax on Petroleum Businesses under Article	:	
13-A of the Tax Law for the Period May 1, 1992	:	
through August 31, 1993.	:	DETERMINATION
		DTA NOS. 814963
		814964 AND 815032

In the Matter of the Petition	:	
of	:	
TREVOR C. WISDOM, OFFICER	:	
OF JANUS PETROLEUM, INC.	:	
for Revision of a Determination or for Refund	:	
of Motor Fuel Tax under Article 12-A of the	:	
Tax Law for the Period May 1, 1992 through	:	
August 31, 1993.	:	

Petitioner, Trevor C. Wisdom, Officer of Janus Petroleum, Inc., 875 Cedar Swamp Road, Old Brookville, New York 11545-2108, filed petitions for revision of determinations or for refunds of tax on petroleum businesses under Article 13-A of the Tax Law for the period May 1, 1992 through August 31, 1993, and for revision of a determination or for refund of tax on motor fuel under Article 12-A of the Tax Law for the period May 1, 1992 through August 31, 1993.

A consolidated hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on December 17, 1996 at 9:15 A.M., with all briefs submitted by April 23, 1997, which date began the six-month period for the issuance of this determination. Petitioner appeared by Norman R. Berkowitz, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (John E. Matthews, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation may assert penalty against a responsible officer pursuant to Tax Law § 289-b(2) in the amount of the unpaid tax, penalty and interest assessed against a corporation under Article 13-A of the Tax Law.

II. Whether the notices of determination herein which asserted penalty against petitioner in the amount of unpaid tax, penalty and interest assessed against Janus Petroleum, Inc. under Article 13-A of the Tax Law violated petitioner's due process rights because such notices did not contain a reference to Tax Law § 315.

III. Whether the Division of Taxation properly determined that petitioner was under a duty to act for Janus Petroleum, Inc. in complying with the requirements of Tax Law Articles 12-A and 13-A and was therefore properly subject to penalty pursuant to Tax Law § 289-b(2).

IV. Whether the Division of Taxation properly resorted to the use of a test period method in its audit of Janus Petroleum, Inc. for the period September 1990 through August 1993.

V. Whether petitioner has shown any error in the results of the audit of Janus Petroleum, Inc.

FINDINGS OF FACT

1. At all times relevant herein, petitioner, Trevor Wisdom, was president of Janus Petroleum, Inc. ("Janus"), which operated a petroleum business located at 52-00 2nd Street, Long Island City, New York and 56-15 58th Street, Maspeth, New York. Petitioner was also a shareholder of Janus.

2. The Division of Taxation ("Division") commenced an audit of Janus by mailing an audit appointment letter to Janus's accountant and authorized representative, Mr. Stuart Doloboff, dated September 28, 1993. The letter advised Mr. Doloboff that the Division would be performing an audit of Janus's Article 12-A and 13-A tax returns and motor fuel tax refund applications and also a limited scope audit of Janus's sales tax returns. The letter further advised that the audit period would be September 1990 through November 1993 and also stated:

"Our audits are usually performed on a test period basis. Normally, the test period selected is a month or quarter within the last twelve months of the audit period inasmuch as those records are more readily available."

3. During the course of the Janus audit the Division requested all purchase and sales records of Janus for the six-month period June through November 1992. Janus complied with this request.

4. During the audit the Division was advised by Janus's representative that a related company, On-Site Petroleum, Inc. ("On-Site"), purchased all of its diesel fuel from Janus during the audit period and sold and delivered the fuel so purchased directly to construction work sites. Janus's representative further advised the Division that all of On-Site's sales were reported on Janus's tax returns filed under Articles 12-A and 13-A. On-Site was not registered as a distributor under Article 12-A. Janus and On-Site maintained separate books and records.

5. The Division reviewed all invoices of sales made by Janus to purchasers other than On-Site for the six-month period June through November 1992 and determined audited sales of diesel fuel totaling 62,208.7 gallons for that period. The Division also reviewed On-Site's sales journal for the six-month test period, which indicated diesel fuel sales totaling 437,940.5 gallons for this period. For petroleum business tax and diesel motor fuel tax purposes, the Division attributed the On-Site sales to Janus because On-Site was not registered as a distributor and because On-Site's sales were reported on Janus's petroleum business tax returns. The Division accepted the amount of On-Site sales as reported in On-Site's sales journal. The Division's review also revealed that, during the test period, Janus had failed to include sales of white water kerosene in its reported taxable sales of diesel motor fuel product. Janus's records indicated white water kerosene sales of 48,748.7 gallons during the test period.

6. The Division then totaled the gallons of diesel motor fuel and white water kerosene sold by Janus and the diesel fuel sold by On-Site which, as noted above, was deemed sold by Janus and determined that Janus had audited taxable sales of diesel motor fuel of 548,897.9 gallons during the test period. Janus's motor fuel tax/petroleum business tax returns reported taxable sales of 508,832.57 gallons during the same period. The Division thus determined that Janus had underreported its sales of diesel motor fuel for the period June through November 1992 by 40,065.33 gallons or 7.87%. The Division then applied this error rate to Janus's

reported sales of diesel motor fuel for the entire audit period and calculated additional sales of diesel motor fuel totaling 215,419.91 gallons for the period September 1990 through August 1993.

7. Based on these additional sales of diesel motor fuel, the Division calculated additional tax due under Article 12-A of \$44,087.28 for the September 1990 through August 1993 period. Also based on the additional sales of diesel motor fuel determined as noted above the Division calculated additional petroleum business tax due under Article 13-A of \$49,056.62 for the September 1990 through August 1993 period.

8. On audit the Division also determined that Janus had improperly claimed credits for taxes paid under Article 13-A after refunds had been issued with respect to the same amounts. Specifically, the Division issued refunds of petroleum business tax paid under Article 13-A to Janus as follows:

<u>Tax Period</u>	<u>Refund Amount</u>	<u>Check Date</u>
September 1990	\$52,925.04	November 29, 1990
October 1990	\$58,463.10	November 29, 1990
November 1990	\$56,288.75	January 2, 1991
December 1990	\$54,833.46	February 1, 1991

Janus subsequently claimed credits on its petroleum business tax returns corresponding to the previously granted refunds. On audit the Division disallowed the claimed credits and recalculated Janus's reported tax liability under Article 13-A accordingly. The Division determined additional tax due under Article 13-A of \$195,922.15 for the period September 1990 through August 1993 as a result of the disallowance of the claimed credit.

9. The audit of Janus thus determined additional tax due of \$44,087.28 under Article 12-A and \$244,978.77 under Article 13-A for the period September 1, 1990 through August 31, 1993. The Division subsequently issued statutory notices to Janus which assessed tax due in the amounts determined on audit, plus penalty and interest.

10. On June 5, 1993 the Division issued to petitioner, Trevor Wisdom, a Notice of Determination under Article 13-A of the Tax Law which assessed \$263,797.01 in penalty for the period May 1, 1992 through August 31, 1993. The amount of the penalty was based on the

unpaid amount of the Article 13-A tax, penalty and interest assessed against Janus as a result of the disallowance of the claimed credit. The notice indicated the Division's position that petitioner was liable for Janus's unpaid liabilities as an officer and responsible person pursuant to Tax Law § 289-b(2). This notice bore assessment identification number L-010427695-4.

11. On June 9, 1993 the Division issued to petitioner a second Notice of Determination under Article 13-A which assessed \$58,230.31 in penalty for the period May 1, 1992 through August 31, 1993. The amount of the penalty was based on the unpaid amount of the Article 13-A tax, penalty and interest assessed against Janus resulting from the audit determination that Janus made additional sales of diesel motor fuel. This notice also indicated the Division's position that petitioner was liable for Janus's unpaid liabilities as an officer and responsible person pursuant to Tax Law § 289-b(2) of the Tax Law. This notice bore assessment identification number L-010427694-5.

12. Also on June 9, 1995 the Division issued to petitioner a Notice of Determination under Article 12-A of the Tax Law which assessed \$49,753.12 in penalty for the period May 1, 1992 through August 31, 1993. The amount of the penalty was based on the unpaid amount of the Article 12-A tax, penalty and interest assessed against Janus as a result of the audit. Like the notices issued to petitioner assessing penalty under Article 13-A, this notice indicated the Division's position that petitioner was liable for Janus's unpaid liabilities as an officer and responsible person pursuant to Tax Law § 289-b(2) of the Tax Law. This notice bore assessment identification number L-010427696-3.

13. All three of the statutory notices advised petitioner of his protest rights in connection therewith.

14. As president of Janus, petitioner was authorized to sign, and did in fact sign, tax returns for the corporation. The Division entered into evidence copies of several returns filed by Janus which had been signed by petitioner as president. Specifically, the Division submitted copies of Janus's monthly petroleum business tax returns for the period March 1, 1995 through June 30, 1995; sales and use tax returns for the periods December 1991, January 1992, and June

1992 through October 1992; reports of sales tax prepayment on motor fuel/diesel motor fuel for the periods October and November 1992; and a corporation franchise tax return for the fiscal year ended August 31, 1994. Petitioner signed all such returns as president of Janus.

15. The Division also entered into evidence several other documents signed by petitioner as president of Janus. Specifically, the Division submitted a 1983 application made by Janus for registration as a distributor of diesel motor fuel; a letter dated May 10, 1995 requesting a refund of corporation franchise tax in connection with Janus's return for the year ended August 31, 1994, which was filed on May 15, 1995; a distributor bond dated January 31, 1989 filed pursuant to Articles 12-A and 28 of the Tax Law; corporate powers of attorney dated October 15, 1993, March 15, 1995 and January 30, 1996; and checks remitted in payment of New York State taxes dated January 29, 1990 and April 20, 1995.

16. The Division also submitted into evidence an officer questionnaire which was given by the auditor to Janus's accountant during the audit and was subsequently completed and returned to the auditor. The auditor did not know who completed the officer questionnaire, which indicated that petitioner had been president of Janus from its inception to the then current time; that he was listed as an officer on bank cards and on corporate resolutions filed with banks; that he had check signing authority and signed checks and tax returns; that he was authorized to hire and fire employees; and that he negotiated loans for Janus.

17. In making its determination to assert personal liability against petitioner for the unpaid portion of the Janus assessments, the Division relied on the officer questionnaire and corporate powers of attorney dated October 15, 1993 and signed by petitioner as president of Janus in connection with the Janus audit.

CONCLUSIONS OF LAW

A. During the period at issue Article 12-A of the Tax Law imposed an excise tax on the sale or use of diesel motor fuel at the aggregate rate of ten cents per gallon (see, Tax Law § 282-a[1]; §§ 282-b, 282-c). The tax under Article 12-A is payable by "distributors" as defined in that article (see, Tax Law § 282). Insofar as relevant herein, Article 13-A imposes a tax on

petroleum businesses for the privilege of engaging in or doing business in New York (see, Tax Law § 301-a[a]). The tax under Article 13-A is imposed on the number of gallons of diesel motor fuel used or sold by a petroleum business in New York during the reporting period (see, Tax Law § 301-a[c]). The rate of the tax varied during the period at issue. There is no dispute that Janus was a petroleum business properly subject to tax under Article 13-A and a distributor properly subject to tax under Article 12-A.

Tax Law § 289-b(2) provides for the imposition of a penalty against certain individuals as follows:

"Any officer, director, shareholder or employee of a corporation . . . who as such officer, director, shareholder or employee is under a duty to act for such corporation . . . in complying with any requirement of [Article 12-A] . . . which fails to pay the taxes imposed by or pursuant to [Article 12-A], shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax not paid, plus penalties and interest . . . as if such person were a distributor. If the tax commission determines that such failure was due to reasonable cause and not due to willful neglect, it shall remit all or part of such penalty imposed under this subdivision."

Section 315(a) of Article 13-A of the Tax Law provides, in relevant part, the following:

"The provisions of . . . article twelve-A of this chapter, including those provisions of such article twelve-A relating to penalty and interest, shall apply to the administration of and procedure with respect to the tax imposed under this article in the same manner and with the same force and effect as if the language of such . . . article twelve-A had been incorporated in full into this article and had expressly referred to the tax under this article, except to the extent that any such provision is either inconsistent with a provision of this article or is not relevant to this article"

B. The first issue to be addressed is whether the Division may assess penalty against an officer or responsible person for unpaid tax, penalty and interest assessed against a corporation under Article 13-A. Petitioner asserts that while Tax Law § 289-b(2) authorizes the assertion of penalty against officers for unpaid corporate assessments of Article 12-A taxes, said section does not authorize responsible officer penalty assessments for unpaid tax imposed under Article 13-A. Petitioner contends that, unlike Article 12-A, the petroleum business tax imposed pursuant to Article 13-A of the Tax Law contains no provision for the imposition of penalties against a responsible person or officer.

Petitioner's contention is rejected. As the Division correctly notes, Tax Law § 315(a)

specifically makes the penalty provisions of Article 12-A of the Tax Law "relating to the imposition of penalty and interest" applicable to Article 13-A. Such penalty and interest provisions include Tax Law § 289-b. The Tax Law thus authorizes the imposition of penalty against a responsible officer for unpaid corporate taxes imposed under Article 13-A.

C. A second threshold issue raised by petitioner is whether the Division violated petitioner's due process rights by its failure to reference Tax Law § 315 on the Article 13-A notices of determination issued to petitioner (see, Findings of Fact "10" and "11"). These notices did refer to Article 13-A of the Tax Law and advised petitioner of the Division's position that, as an officer and responsible person, he was liable for a penalty in the amount of the unpaid tax, penalty and interest owed by Janus pursuant to Tax Law § 289-b(2). The notices also informed petitioner of his protest rights. The notices thus clearly comport with the fundamental requirements of due process by apprising petitioner of the nature of the Division's claims against him and of the opportunity to present his objections (see, Alvarado v. State Div. of St. Athletic Comm'n, 110 AD2d 583, 488 NYS2d 177, 178). Petitioner's due process rights thus were not violated. Indeed, the fact that the notices were adequate is evident from petitioner's timely protest (see, Pepsico, Inc. v. Bouchard, 102 AD2d 1000, 477 NYS2d 892, 893).

As to petitioner's claim that the notices were defective since they failed to reference Tax Law § 315, it is noted that the content of a notice issued under Article 13-A is not prescribed by the Tax Law (see, Tax Law § 288). While a reference to Tax Law § 315 might have more completely stated the Division's statutory authority, the notices, as issued, were neither erroneous nor misleading. Moreover, even if the absence of a section 315 reference were deemed a defect, given the lack of any prejudice to petitioner, such a defect would not be fatal (see, Matter of A & J Parking, Tax Appeals Tribunal, April 9, 1992; cf., Matter of Cheakdkaipejchara, Tax Appeals Tribunal, April 23, 1992). Finally, any confusion regarding the Division's statutory authority to assess a responsible officer penalty against petitioner should have been resolved by the explicit reference to Tax Law § 315 in the Division's answers filed in

connection with petitioner's Article 13-A petitions.

D. The next issue presented is whether petitioner was under a duty to act for Janus in complying with the requirements of Articles 12-A and 13-A and thus subject to penalty under Tax Law § 289-b(2). Given the parallel language contained in the Tax Law's sales tax and income tax responsible officer provisions (see, Tax Law § 685[g]; § 1133[a]), it is appropriate to apply the same standard in determining responsible officer status under Articles 12-A and 13-A. In this regard, it is well established that "the question to be resolved in any particular case is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee" (Matter of Constantino, Tax Appeals Tribunal, September 27, 1990). Factors to consider in determining responsibility include:

"the individual's status as an officer, director or shareholder; authorization to write checks on behalf of the corporation; the individual's knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; the individual's economic interests in the corporation [citations omitted]" (Matter of Constantino, supra).

The evidence in this case establishes that petitioner was president of Janus during the relevant period; that he owned stock; that he signed corporate tax returns and checks in payment of corporate taxes; that he was invested with the various indicia of authority as set forth on the officer questionnaire; and that he signed various other documents on behalf of Janus (see, Findings of Fact "1", "14", "15", "16"). This evidence establishes that petitioner was indeed under a duty to act on behalf of Janus in connection with its Article 12-A and 13-A obligations and was therefore properly subject to penalty under Tax Law § 289-b(2).

Petitioner's arguments on this issue center on the evidence upon which the Division's auditor made his determination to assert personal liability against petitioner herein (see, Finding of Fact "17"). Specifically, petitioner questioned the accuracy of the officer questionnaire because the auditor did not know who completed this document. On this point, considering the fact that the questionnaire was given to petitioner's representative during the audit and subsequently returned to the auditor, it is reasonable to conclude that the questionnaire was

completed by petitioner, his representative or a subordinate. If petitioner had evidence showing that the questionnaire was inaccurate, he should have produced it. In the absence of any evidence to the contrary, the assertions made in the questionnaire are properly accepted as fact herein. Indeed, it is noteworthy that petitioner submitted no evidence to support his assertion that he was not a responsible officer of Janus during the relevant period. Additionally, petitioner's focus on the information relied on by the auditor in making his determination is misplaced. The Division properly submitted, and this determination properly considered, evidence of petitioner's responsible officer status which was not reviewed by the auditor on audit.

E. The next set of issues presented involves the audit of Janus Petroleum, Inc. Specifically, petitioner contends that Janus's books and records were complete and accurate and that Janus did not consent to the use of a test period audit method. Accordingly, petitioner asserts that the Division's use of a test period audit method to determine Janus's tax liability was improper. For its part the Division contends that its audit of Janus's books and records for the test period showed that Janus had underreported its sales by a significant amount. The Division further asserts that such underreporting establishes the inaccuracy of Janus's books and records for the entire audit period and thus justifies the use of an estimate method to determine Janus's tax liability for that period. It should be noted that the Division did not assert (and the record does not indicate) that Janus consented to the use of the estimate methodology.

As a distributor under Article 12-A of the Tax Law and a petroleum business under Article 13-A of the Tax Law Janus was subject to certain recordkeeping requirements (see, Tax Law § 286). In determining the propriety of estimate methodologies to determine tax due under Article 12-A, the Tax Appeals Tribunal has predicated the use of such methods on a finding of incomplete or inaccurate records (see, Matter of Dart Petroleum, Tax Appeals Tribunal, April 15, 1993; Matter of Mira Oil Co., Tax Appeals Tribunal, July 19, 1990). Applying this standard to the instant matter, it becomes clear that the Division improperly resorted to an estimate methodology in its audit of Janus. Since the Division neither requested nor reviewed

Janus's records for the periods September 1990 through May 1992 and December 1992 through August 1993, the Division could not reasonably conclude that Janus' records for those periods were incomplete or inaccurate. In this regard, the rule which has been applied in determining the validity of sales tax audits is properly applicable herein. That is, to determine whether a taxpayer's records are complete and accurate, the Division must request and examine such records for the entire period of the proposed assessment (see, e.g., Matter of Sandrich, Inc., Tax Appeals Tribunal, April 15, 1993). Here, the Division failed to request and review Janus's records with respect to two and one-half years of a three-year audit period. The Division's calculation of Janus's tax liability under Articles 12-A and 13-A for the periods September 1990 through May 1992 and December 1992 through August 1993 using the error rate methodology as described herein was therefore improper. Accordingly, the Division is directed to recompute the penalty assessed against petitioner in the notices bearing assessment identification numbers L-010427694-5 and L-010427696-3.

F. With respect to the test period of June 1992 through November 1992, petitioner has failed to establish error in the Division's audit method or result (see, Matter of Mira Oil Co., supra). Accordingly, the portion of the penalty assessments arising from this portion of the corporate assessments are sustained.

Petitioner objected to the fact that the Division did not audit the On-Site sales which were attributed to Janus for tax purposes, but rather accepted sales of diesel motor fuel as reported in On-Site's sales journal. Petitioner, however, presented no evidence to show that On-Site's sales journal was inaccurate. The audit of the test period is therefore sustained.

G. The Article 13-A assessment against petitioner arising from the Division's disallowance of credits claimed by Janus is sustained. Petitioner made no specific objections and submitted no proof to refute this portion of the penalty assessments. Petitioner has thus failed to meet his burden of proof with to show entitlement to the claimed credits (id.).

H. The petition of Trevor Wisdom is granted to the extent indicated in Conclusion of Law "E". The petition is in all other respects denied. The Division of Taxation is directed to

recompute the notices of determination bearing assessment identification numbers L-010427694-5 and L-010427696-3 in accordance with Conclusion of Law "E". The Notice of Determination bearing assessment identification number L-010427695-4 is sustained in its entirety.

DATED: Troy, New York
October 9, 1997

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE