

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
THOMAS RUSSELL : DETERMINATION
for Review of a Cancellation of Registration as a : DTA NO. 821377
Retailer of Heating Oil Only under Articles 12-A and :
13-A of the Tax Law. :

Petitioner, Thomas Russell, filed a petition for review of a cancellation of his registration as a retailer of heating oil only under Articles 12-A and 13-A of the Tax Law.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on May 3, 2007 at 10:30 A.M., with all briefs and additional documents submitted by July 19, 2007, which date began the six-month period for the issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Daniel Smirlock, Esq. (Michelle M. Helm, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly cancelled petitioner's registration as a retailer of heating oil only under Articles 12-A and 13-A of the Tax Law.

FINDINGS OF FACT

1. Petitioner was a registered New York State retailer of heating oil only who did business under the business names of Reliable Oil and Prompt Oil.

2. On or about May 10, 2006, the Division of Taxation's (Division) Registration and Bond Unit issued to petitioner a Notice of Cancellation of Your Registration as a Retailer of Heating Oil Only under Articles 12-A and 13-A of the New York State Tax Law, which stated that petitioner's registration as a retailer of heating oil only under Tax Law § 282-a was canceled as of midnight on May 10, 2006. The notice specified the following two independent bases for the cancellation:

a) that petitioner failed to comply with the filing requirements set forth in a ten-day demand letter, dated April 12, 2006; and

b) that petitioner had been convicted of a felony bearing on his duties and obligations as a registered retailer of heating oil only while doing business as Prompt Oil.

The notice stated further:

A thorough review and analysis of the applicant's tax filing history and his continued non-compliance with the tax laws of New York State has led to the issuance of this Notice of Cancellation as a Retailer of Heating Oil Only.

3. Petitioner was notified by letter, dated April 12, 2006, sent to him by certified mail, return receipt requested (and actually signed for on April 17, 2006), that the Division's records indicated he had not filed petroleum business tax quarterly returns (forms PT 200 and 201) for the periods September through November 2005 and December through February 2006, and sales and use tax returns for the period November through February 2006. The letter demanded that the returns be filed within ten days of the date of the letter to avoid the possible cancellation of his registration under Articles 12-A and 13-A of the Tax Law as prescribed by Tax Law § 283.

4. As of April 30, 2007, over a year after the demand, a search of the Division's records indicated that no petroleum business tax quarterly returns for the periods September through November 2005 and December through February 2006 had been filed by petitioner for either of

his businesses, Prompt Oil or Reliable Oil. In addition, a second search of the Division's records, completed on April 30, 2007, revealed that no sales and use tax return for the period November 1, 2005 through February 28, 2006 had been filed by petitioner for either of his business entities.

5. Petitioner was arrested on November 23, 2005 and arraigned in the Town of Bethel Court for selling home heating oil that was delivered to skid tanks equipped with nozzles, which was then used in diesel-powered construction equipment. No sales and use taxes or petroleum business tax was paid on these sales. Petitioner was charged with 16 felony counts of attempting to evade or defeat motor fuel tax and two felony counts of being an unregistered distributor of diesel motor fuel.

6. On April 6, 2006, petitioner pled guilty in Sullivan County Court to the Class E felony of being an unregistered distributor of diesel motor fuel under Tax Law § 1812-a(a) in satisfaction of the 18 counts that had been filed in the Town of Bethel.

7. On June 14, 2006, petitioner was sentenced in the same court to 5 years probation, 100 hours of community service, \$5,265.08 in restitution and a surcharge of \$270.00.

8. By letter, dated May 1, 2006, from petitioner to the Division's auditor, Gary Zirpoli, petitioner explained that investigators from the Division had visited him and inspected his receipts the previous summer and then again two months later. Each time the investigators told him "everything was fine." However, when the investigators returned a third time on November 23, 2005, they placed him under arrest. Petitioner concluded the letter by informing Mr. Zirpoli that his lawyer and accountant had instructed him not to file his quarterly returns until the case was completed.

SUMMARY OF THE PARTIES' POSITIONS

9. Petitioner believes that he was misled and misinformed by the Division's investigators who came to his business on two separate occasions prior to his arrest on November 23, 2005. At those times, after inspecting records, petitioner contends that he was assured that his records were in order and that he was doing all that was required of him.

10. Petitioner also contends that he pled guilty to the felony charge in Sullivan County Court to avoid the possibility of going to jail and adversely affecting his family, even though he believes he did nothing wrong. Petitioner continues to assert that he did not sell diesel motor fuel and that he was not responsible for what his customers did with the heating oil he sold and delivered to them.

11. The Division contends that petitioner's registration was cancelled properly, consistent with the Tax Law, on either of the two bases listed in the Notice of Cancellation: that he failed to comply with the requirements set forth in the ten-day letter and that he was convicted of a felony bearing on his duties and obligations as a registered retailer of heating oil only.

CONCLUSIONS OF LAW

A. The very narrow issue to be decided in this matter is whether the Division's cancellation of petitioner's registration as a retailer of heating oil only should be sustained. Tax Law § 282-a(2) allows for the registration of a distributor of diesel motor fuel that sells said fuel to consumers solely for heating purposes and provides that the full registration provisions of Tax Law § 283 are applicable to such registration of retailers.

Tax Law § 283(4) provides that the Division may cancel the registration of a diesel motor fuel distributor, including a registration as a retailer of heating oil only, when the registrant has

been convicted of a felony in a court of competent jurisdiction within or without New York State, which felony has a bearing on the registrant's duties and obligations.

Although petitioner contends that his conviction was the result of a decision he made based on expediency, not guilt or innocence, it remains that he pled guilty in Sullivan County Court to the Class E felony of being an unregistered distributor of diesel motor fuel under Tax Law § 1812-a(a). By his plea, petitioner admitted that he made sales of motor fuel in excess of 2,900 gallons within a 90-day period while not registered as a distributor of motor fuel, an action which had a direct bearing on his duties and obligations as a registered retailer of heating oil only. The conviction alone forms a sufficient basis for the cancellation of petitioner's registration as a retailer of heating oil only under Articles 12-A and 13-A of the Tax Law.

It is acknowledged that while petitioner raised several compelling allegations which might have had an impact at a trial, the proper forum for those arguments and the presentation of proof was before a trier of fact in the Sullivan County Court. Here, the only issue to be addressed was whether the Division of Taxation properly cancelled petitioner's registration based upon the provisions of the Tax Law. It is determined that based upon Tax Law § 283(4) the Division's action was proper.

B. The second ground listed on the Notice of Cancellation was that petitioner failed to comply with the requirements set forth in the demand for returns or payment of taxes due pursuant to Articles 12-A, 13-A, 28 and 29 of the Tax Law for the periods September through November 2005 and December through February 2006 and the sales and use tax return for the period November 2005 through February 2006.

Tax Law § 283(5) provides that the Division of Taxation may cancel a distributor's registration if he does not file a return or pay the taxes due within ten days after the date the

demand therefor is sent by certified or registered mail to him. The evidence indicates that the demand was received on April 17, 2006, but the Division had not received the petroleum business tax or sales and use tax returns or payment of tax by April 30, 2007- - three days prior to the hearing in this matter and in excess of a year after the demand. Therefore, the Division of Taxation had a second statutory basis for the cancellation of petitioner's registration.

C. The petition of Thomas Russell is denied and the Division of Taxation's Notice of Cancellation of his registration as a retailer of heating oil only, dated May 10, 2006, is sustained.

DATED: Troy, New York
January 10, 2008

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE