

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
GETTY TERMINALS CORPORATION	:	DECISION
for Revision of a Determination or for Refund of Motor	:	DTA No. 810743
Fuel Tax under Article 12-A of the Tax Law for the Years	:	
1987 through 1989.	:	

Petitioner Getty Terminals Corporation, 125 Jericho Turnpike, Jericho, New York 11753, filed an exception to the determination of the Administrative Law Judge issued on November 18, 1993. Petitioner appeared by Dornbush, Mensch, Mandelstam & Schaeffer (Daniel J. Barsky and Peter J. Venaglia, Esqs., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Patricia L. Brumbaugh and John Matthews, Esqs., of counsel).

Both petitioner and the Division of Taxation filed briefs. Petitioner filed a reply brief. Oral argument was heard on June 16, 1994, which date began the six-month period for the issuance of this decision.

Commissioner Koenig delivered the decision of the Tax Appeals Tribunal. Commissioner Dugan concurs.

ISSUE

Whether petitioner has established that certain underpayments of motor fuel tax were due to reasonable cause and not due to willful neglect, thus, justifying a waiver of penalties and interest above the minimum.

FINDINGS OF FACT

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

Petitioner, Getty Terminals Corporation ("Getty"), is a registered New York distributor of

petroleum products with its principal offices in Jericho, New York. As a registered distributor, it was required to file monthly motor fuel tax returns within 20 days of the last day of the month for which it was reporting.

Throughout the period in issue, Getty timely filed monthly motor fuel tax returns where it estimated its tax liability and paid the estimated amount. Within 60 days of the filing of the estimated return, an amended return was filed which reported the exact amount of tax due. Getty paid any difference between its original estimate and the actual amount due with its amended return. Overpayments were carried forward as a credit towards the next month's tax liability. The Division of Taxation ("Division") conducted a desk audit review of Getty's motor fuel tax returns for the period July 1, 1987 through December 31, 1989. The audit disclosed that 11 of the 30 timely filed estimated returns underreported the amount of motor fuel tax due, and 19 of the 30 estimated returns reported greater amounts than the tax actually due. Amounts reported on Getty's returns are summarized as follows:

<u>Month</u>	<u>Estimated Payment</u>	<u>Actual Tax Due</u>	<u>Overpayment</u>	<u>Underpayment</u>
July 1987	\$2,126,000	\$2,158,989	\$ 0	\$ 32,989
August 1987	2,000,000	1,934,410	65,590	0
September 1987	2,000,000	2,229,498	0	163,908
October 1987	2,100,000	1,729,349	370,651	0
November 1987	2,400,000	2,379,694	390,956	0
December 1987	2,400,000	2,217,125	573,832	0
January 1988	2,000,000	2,199,848	373,983	0
February 1988	1,800,000	1,688,907	485,076	0
March 1988	2,150,000	2,543,181	91,896	0
April 1988	2,100,000	2,371,994	0	180,098
May 1988	2,760,000	2,801,610	0	41,610
June 1988	2,200,000	2,314,881	0	114,881
July 1988	2,400,000	1,997,812	402,188	0
August 1988	2,500,000	2,468,468	433,720	0
September 1988	2,200,000	2,233,551	400,169	0
October 1988	2,300,000	2,217,874	482,295	0
November 1988	2,100,000	2,111,934	470,362	0
December 1988	2,300,000	2,374,205	396,157	0
January 1989	2,600,000	2,681,910	314,247	0
February 1989	1,800,000	1,926,173	188,074	0
March 1989	2,000,000	1,809,481	190,519	0
April 1989	1,700,000	1,487,399	212,601	0
May 1989	2,050,000	1,916,998	133,002	0

June 1989	1,975,000	1,936,738	38,262	0
July 1989	2,141,000	2,305,879	0	164,879
August 1989	2,450,000	2,514,611	0	64,611
September 1989	1,700,000	2,032,200	0	332,200
October 1989	1,600,000	2,212,322	0	612,322
November 1989	1,600,000	1,869,834	0	269,834
December 1989	1,600,000	2,356,554	0	756,554

The Division issued to Getty a Notice of Determination (assessment number L-002088487-8) imposing penalties in the amount of \$386,351.24 plus interest on the late payments of motor fuel tax due. Total penalties and interest amounted to \$503,437.09.

In February 1985, Getty substantially increased its assets by acquiring the assets of Texaco, consisting primarily of 1,900 service stations and eight terminals. The Texaco acquisition increased petitioner's sales volume by a factor of eight and expanded the number of states in which petitioner was operating from five to thirteen.

Getty's tax returns were prepared by its Tax Department which consisted of approximately nine employees, five of whom were responsible for gathering and preparing New York State tax returns of various kinds. Following the acquisition of Texaco in 1985, Getty began filing estimated monthly motor fuel tax returns.

A completed motor fuel tax return requires the attachment of a number of schedules showing, for instance: receipts in New York from out-of-state sources, receipts in New York from sources within the state, direct shipments out of New York, direct shipments in New York, sales to customers out-of-state, etc. It was Getty's practice to file a timely estimated return, without the attachment of the required schedules, based on the information available to the Tax Department at the end of each month. Within 60 days of the filing of the original return, an amended return would be filed by Getty, including all of the required schedules. The amended return completed and if necessary corrected the original return. In her testimony, Michele Friedman, identified as petitioner's motor fuel tax administrator, testified that she "was under the impression that I had 60 days to get a final return in" (Tr., p. 30).

The preparation of a monthly motor fuel tax return requires the compilation of a great

deal of information, including records of all sales to retailers and wholesalers; documentation of imports and purchases within New York whether from barges, trucks, pipelines or by book transfers within terminals; and records of all disbursements. The Tax Department received this information from several other departments within Getty. Much of this information was maintained on computer. Apparently, transactions which occurred in one month might not be posted to the appropriate Getty account until the next month. When the estimated return was filed, such a transaction would not be reported. It would later be reported in the amended return. This is the kind of event that caused the overpayments and underpayments at the time the estimated returns were filed. Getty did not attempt to estimate its tax obligations for one month based on its tax obligations for previous months because the transactions subject to motor fuel tax fluctuated from month to month. In preparing its estimated returns, Getty had a policy of over-estimating its tax liability by rounding the numbers up in an effort to overpay rather than underpay the amount actually due.

The most serious underreporting of motor fuel tax due occurred in the last six months of 1989. Prior to the Texaco acquisition, Getty began redesigning and upgrading its computer system to handle the increased volume of business. Outside consultants were engaged and Getty hired about 13 new employees for its own computer department. Getty found it difficult to keep these new employees, and about 15 individuals resigned in the period 1987 through the end of 1989. Getty began using the new computer system in August 1989. When it began preparing the amended return for July 1989, Getty realized that the computer was not tracking all transactions necessary for the preparation of a motor fuel tax return. As a result, the July estimate of tax due resulted in an underpayment of tax in the amount of \$164,879.00. Getty immediately began steps to correct the computer system. This required extensive modifications. In addition, Getty began extensive on-the-job training of its personnel to familiarize them with the recordkeeping necessary for purposes of the motor fuel tax law.

At the same time that Getty was experiencing problems with its new computer system, it

was also having difficulties hiring and retaining qualified personnel in its Tax Department and computer operations department (known as "MIS"). From July 1989 through January 1990 five individuals left Getty's Tax Department. The first to leave was Essie Wall, a bookkeeper who was primarily engaged in preparing New Jersey income tax returns and who also maintained information necessary for the preparation of New York motor fuel tax returns. Ms. Wall was replaced by Andrew Palozzi who worked in the Tax Department from July 1989 to November 1989 and then resigned. From 1985 through September 1989, one individual, Frank Becoate, had the primary responsibility for preparing New York State motor fuel tax returns. Mr. Becoate resigned and was replaced in November 1989 by Richard Manzo. His work proved unsatisfactory, and he left in January 1980. Another bookkeeper, June Lord, whose primary responsibilities were in the areas of sales tax, truck mileage tax and other miscellaneous taxes also resigned in July 1989.

Because experience in motor fuel tax law is not common, Getty attempted to hire and train individuals with backgrounds in accounting and other taxes. The supervisor of the Tax Department stated that it takes approximately six months to adequately train an individual to prepare motor fuel tax returns. The departure of five employees in approximately six months placed a burden on the remaining members of the Tax Department to recruit and train new employees and to fill in where necessary.

During 1987, petitioner was audited by the New York State Department of Taxation and Finance with regard to its motor fuel tax liability for the period June 1984 through December 1986. Apparently, no mention or objection was made during the course of the audit of Getty's filing practices.

Petitioner submitted 25 proposed findings of fact. Proposed findings of fact "2," "3," "4," and "5" were rejected as unnecessary to the determination. Proposed finding of fact "13" essentially asked that the administrative law judge take official notice of a conclusion reached in

an administrative law judge determination in a prior hearing involving Getty.¹ As administrative law judge determinations have no precedential value (Tax Law § 2010[5]), facts and conclusions reached in another determination cannot be cited or relied on in this determination (see, Matter of Katz, Tax Appeals Tribunal, November 14, 1991). Proposed finding of fact "13" was rejected for this reason. The remaining proposed findings of fact were substantially incorporated into this determination.

OPINION

In the determination below, the Administrative Law Judge referenced the filing requirements for a distributor, pointing out that Tax Law § 289-b(1)(a) provides for the imposition of a penalty when a distributor fails to file a return or pay any tax within the 20-day time period set forth at Tax Law § 287(1). The Administrative Law Judge in discussing the imposition of penalty: 1) pointed out that under Tax Law § 289-b(c) if it is determined that the failure to timely pay all tax when due is attributable to reasonable cause and not willful neglect, all or part of the penalty may be remitted, and 2) stressed that it cannot be emphasized too strongly that there are no safe harbor provisions in Article 12-A for avoiding penalties by filing estimated tax returns.

The Administrative Law Judge: 1) held that petitioner has failed to show reasonable cause for its failure to accurately report and pay over motor fuel taxes due in a timely fashion; 2) rejected petitioner's practice of filing estimated returns holding that while petitioner notes that the Division conducted an audit of its motor fuel tax returns for a period before the one in issue and did not object to petitioner's method of filing, the record contains no information regarding the scope and nature of the prior audit; 3) held that there is no evidence the Division approved of petitioner's filing practices, only that it failed to disapprove on a prior audit; and

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The Administrative Law Judge determination was affirmed in Matter of Getty Terminal Corp. (Tax Appeals Tribunal, May 18, 1989); however, the Tribunal did not repeat the conclusion reached by the Administrative Law Judge.

4) held that it did not appear reasonable for petitioner to believe that the filing of estimated returns was an acceptable practice.

As to petitioner's argument that it could not assemble the required information within 20 days after the end of each month because of the sheer volume of the transactions it was required to report and, therefore, it was reasonable for it to estimate the tax due based on the information available to it at the close of each month, the Administrative Law Judge held: 1) petitioner's inability to "obtain and assemble essential information required for the preparation of a complete return" was not an occasional occurrence but a tolerated condition of its operations; 2) the evidence does not show that it was impossible for petitioner to obtain the required information in a timely fashion; and 3) the evidence shows that petitioner had difficulties in meeting its tax reporting obligations and chose not to address this problem by investing more resources in tax compliance but instead chose to adopt a practice of filing what it knew were incomplete returns and then correcting those returns by later filing amended returns (Determination, conclusion of law "C").

As to petitioner's argument relating to the purchase of a new computer system to enable it to comply with its reporting obligations, the Administrative Law Judge held that: 1) the evidence does not show that the new computer system was installed in an effort to comply with petitioner's increased tax compliance burden; 2) there is no evidence that petitioner ever made any attempt to change its practice of filing estimated returns before or after it installed a new computer system; and 3) the evidence shows that petitioner became aware of and made an effort to correct the problems with the computer's failure which caused it to underestimate tax due in July when information was being assembled for the amended July return, or sometime after August 20, 1989; what it does not show is that petitioner made any effort at all to comply with its reporting obligations by finding alternative ways to obtain the information necessary to file accurate and timely returns, since it filed presumably accurate amended returns within 60 days of the original returns.

The Administrative Law Judge in discussing 20 NYCRR 416.3(c)(3) (Reasonable Cause) held that because petitioner failed to inform the Division of the computer problem that had arisen at the time each original return was filed, it was precluded from now claiming reasonable cause on the basis that factors outside of its control resulted in the underpayment of tax when due. The Administrative Law Judge concluded that petitioner was relying on its amended returns to correct any errors on the original returns rather than making a good faith effort to assemble all of the necessary information and include it in the original returns.

The Administrative Law Judge also held that: 1) employee turnover in petitioner's tax department does not establish reasonable cause; 2) petitioner had the financial resources to meet its tax compliance obligations; 3) the evidence does not show that meeting its tax reporting obligations was outside of petitioner's control; and 4) the record does not show a good faith effort by petitioner to file true, complete and accurate returns within 20 days of the end of each month.

Petitioner takes exception to the Administrative Law Judge's suggestion that Getty did not timely file motor fuel tax returns as well as the Administrative Law Judge's characterization of job responsibilities of a number of individuals.

Petitioner also takes exception to the Administrative Law Judge rejecting a proposed finding of fact. Petitioner argues that "the opinion of the Division of Tax Appeals in Matter of the Petition of Getty Terminals Corp. (TSB-D-88[2]M, June 23, 1988) (the "Tax Appeals Decision"), is significant since that decision specifically states that Getty's Motor Fuel Tax filing record was 'unblemished'" (Petitioner's exception, Exhibit "A"). Petitioner objects to all of the conclusions of law as held by the Administrative Law Judge and proposes 23 findings of fact and 15 conclusions of law.

Petitioner argues that a confluence of factors, all of which were outside of its control, led to the sporadic underpayments of monthly motor fuel taxes during the period in question and, therefore, such underpayments were due to reasonable cause and not willful neglect.

Petitioner, in reply to cases cited by the Administrative Law Judge and the Division, argues that:

"Getty's overall tax compliance record, and the myriad problems which Getty experienced during the Audit Period, distinguishes Getty's situation from other proceedings in which it was held that the taxpayers had failed to carry their burden of proving reasonable cause or lack of willful neglect" (Petitioner's brief, p. 19).

Petitioner further argues that:

"[t]he bottom line is that the evidence presented at the hearing demonstrates that Getty's underpayment of taxes was due to reasonable cause and not due to willful neglect. As such, the instant case, involving a number of factors which explain the inadvertent underpayments, presents a compelling case for the abatement of penalties" (Petitioner's brief, p. 30).

The Division argues that: 1) there is no evidence in the record which establishes the nature of petitioner's tax compliance history; 2) while petitioner suggests that its practice of estimating its tax liability was an acceptable method of meeting its reporting and payment obligations under the Tax Law and implies that this was the only practical means available to it, such estimation of tax liability is: a) not authorized by the Tax Law; b) a resort to estimation techniques and demonstrates a per se lack of good faith; and c) there is no provision in the Tax Law to offset quarterly underpayments by comparable overpayments in other quarters; 3) estoppel against the State does not lie under the facts and circumstances presented in this case; and 4) petitioner is now precluded from establishing an entitlement to the protections which are furnished by section 416(3)(c)(3).

In reply, petitioner: 1) points out that the Law Bureau's letter brief failed to address the majority of the arguments set forth in petitioner's original brief; 2) references its original brief and cases cited therein; 3) argues that its net overpayment of taxes in the amount of \$5,480,094.00 during the first 24 months in question caused by its policy of overestimating its tax obligations establishes its excellent record; 4) argues it timely filed its tax returns based upon the information available at the time the returns were filed and when additional information became available which demonstrated that either additional tax was due or that it

had overpaid its taxes, revised returns were filed; 5) argues its underpayments were not willful; and 6) argues that computer difficulties and employee turnover constitute reasonable cause for its underpayment of taxes.

We affirm the determination of the Administrative Law Judge.

In addition, because we find that the Administrative Law Judge completely and adequately addressed the issues before her, we see no reason to analyze these issues further. Therefore, we affirm the Administrative Law Judge for the reasons stated in her determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Getty Terminals Corporation is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Getty Terminals Corporation is denied; and
4. The Notice of Determination imposing penalties is sustained.

DATED: Troy, New York
November 17, 1994

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

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