STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GETTY TERMINALS CORPORATION	:	DETERMINATION DTA NO. 810743
For Revision of a Determination or for Refund of Motor 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 a petition for revision of a determination or for refund of motor fuel tax under Article 12-A of the Tax Law for the years 1987 through 1989.

A hearing was held before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York on April 13, 1993 at 10:15 A.M. Petitioner filed a brief and proposed Findings of Fact and Conclusions of Law on June 11, 1993. The Division of Taxation filed a brief on July 1, 1993. Petitioners filed a reply brief on July 30, 1993, which began the six-month statutory period for issuance of a determination.[1] Petitioner appeared by Daniel J. Barsky, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Patricia L. Brumbaugh, Esq., and John Matthews, Esq., of counsel).

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.

[1]The Division of Taxation submitted a letter, dated August 3, 1993, in response to petitioner's reply brief; whereupon petitioner submitted a letter dated August 10, 1993 responding to the Division of Taxation. Inasmuch as neither party requested permission to file additional arguments after the final brief dates passed, the contents of the letters were not considered in arriving at a determination.

FINDINGS OF FACT

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:

Month	Estimated Payment	Actual Tax Due	Overpayment	Underpayment
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

Month	Estimated Tax Due	Actual Tax Due	Overpayment	Underpayment
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.[2] 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.

CONCLUSIONS OF LAW

A. Tax Law § 287(1) provides as follows:

> "Every distributor shall, on or before the twentieth day of each month, file with the department of taxation and finance a return, on forms to be prescribed by the tax commission [now, the commissioner of taxation and finance] and furnished by such department, stating the number of gallons of motor fuel imported, manufactured or sold by such distributor in the state during the preceding calendar month . . . ."

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 penalty imposed is 10 percent of the amount of tax determined to be due "plus one percentum of such amount for each month or fraction thereof during which such failure continues after the expiration of the first month after such return was required to be filed or such tax became due". If it is determined that the failure to timely pay all tax when due is attributable to reasonable

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[2]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.

cause and not to willful neglect, all or part of the penalty may be remitted (Tax Law § 289-b[c]). 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 (compare, Tax Law § 287 with Tax Law § 213).

Petitioner claims that its failure to timely report and pay all tax due during the period in issue resulted from a combination of events which, taken together, constitute reasonable cause pursuant to 20 NYCRR 416.3(c)(5). That regulation states:

> "Any other cause for delinquency which would appear to a person of ordinary prudence and intelligence as a reasonable cause for delay and which clearly indicates an absence of willful neglect may be determined to be reasonable cause."

Petitioner identifies the factors that led to its underpayment of tax as the sudden increase in the volume of transactions brought about by the Texaco acquisition, the installation of a new computer system and the rapid turnover in personnel in its Tax Department and MIS.

The Division argues that each of the reasons set forth by petitioner have been considered and rejected by the Tax Appeals Tribunal and, in some cases, by the courts. In its brief, the Division cites to Matter of Philip Morris (Tax Appeals Tribunal, April 29, 1993) where the petitioner's "increased business, turnover of staff and poorly designed software" were held not to constitute reasonable cause for failure to comply with tax reporting requirements. In addition, the Division points out that petitioner consistently failed to file complete and accurate returns by the twentieth day of each month and instead adopted a practice and policy of filing incomplete estimated returns followed within 60 days by complete amended returns. The Division argues that this evidence shows that petitioner never made a good faith effort to comply with the reporting requirements of the Tax Law.

For the reasons stated below, I agree with the Division 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.

B. Petitioner addresses the issue of reasonable cause as though the question was whether it had reasonable cause for underestimating its tax liability on its estimated returns. The more

critical and fundamental question is whether it was reasonable for Getty to follow a practice of filing estimated returns as it did. As evidence that its filing practices were reasonable, 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. One flaw in this argument is that the record contains no information regarding the scope and nature of the prior audit. There is no evidence the Division approved of petitioner's filing practices, only that it failed to disapprove on a prior audit. When this evidence is weighed against clear statutory and regulatory directives requiring that true, correct and complete returns be filed by the twentieth of each month (Tax Law § 287; 20 NYCRR 413.1), petitioner's belief that the filing of estimated returns was an acceptable practice does not appear reasonable.

The taxpayer in Matter of Liberty Coaches v. State Tax Commn. (79 AD2d 775, 435 NYS2d 69) made an argument similar to petitioner's which was rejected by the court. There, the taxpayer argued that the Division had acquiesced in the taxpayer's method of claiming certain tax credits on diesel fuel by not objecting to the methodology in the past. The court rejected this argument, stating that the State Tax Commission was free to correct a past error. Furthermore, the court confirmed the assessment of penalties based on the taxpayer's faulty filing practices.

C. Petitioner argues 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. Thus, it argues that it was reasonable for it to estimate the tax due based on the information available to it at the close of each month. The Division's regulations provide for situations where it is not possible for a taxpayer to assemble the necessary information for reasons beyond the taxpayer's control. 20 NYCRR 416.3(c)(3) which provides examples of reasonable cause for purposes of article 12-A states:

> "The inability, for reasons beyond the taxpayer's control, to timely obtain and assemble essential information required for the preparation of a complete return, despite the exercise of reasonable efforts, may constitute reasonable cause provided a return is timely filed and the tax is timely paid over on that portion of the tax liability which can be ascertained. The relevant facts affecting that portion of the tax liability which cannot be ascertained must be fully disclosed with the timely filed

return. . . ."

In petitioner's case, the 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. I agree with the Division that the evidence does not show that it was impossible for petitioner to obtain required information in a timely fashion. Rather, 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 by adopting a practice of filing what it knew to be incomplete returns and correcting those returns by later filing amended returns. As the Tax Appeals Tribunal stated in Matter of Paramount Pictures Corp. (Tax Appeals Tribunal, March 14, 1991): "If a taxpayer decides to allocate its resources in a manner which places a low priority on tax compliance, then it should also assume the additional costs brought on by this decision."

D. Petitioner's other arguments are equally fruitless. Petitioner states that after the Texaco acquisition it recognized its increased tax compliance burden and designed and installed a new computer system to enable it to comply with its reporting obligations. However, the evidence does not show that the new computer system was installed in an effort to comply with petitioner's increased tax compliance burden. From the beginning of this audit period, petitioner had a practice of filing estimated returns. There is no evidence that petitioner ever made any attempt to change this practice, before or after it installed a new computer system. By filing estimated returns, it took the risk that it would incur penalties and interest. It attempted to minimize the risk by estimating high, but there is no evidence that petitioner made a conscientious and diligent attempt to comply with the filing requirements of Tax Law § 287(1).

Petitioner asserts that the failure to accurately estimate its tax liability for the last six quarters of the audit period resulted from the failure of its new computer system to capture certain transactions and a high degree of employee turnover in its Tax Department and computer systems department. The evidence shows that petitioner became aware of the computer 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. The evidence also shows that petitioner made an effort to correct the problems it was having with the computer. What it does not show is that petitioner made any effort to comply with its reporting obligations by finding alternative ways to obtain the information necessary to file an accurate and timely return. Apparently, it was capable of obtaining that information in some fashion, since it filed presumably accurate amended returns within 60 days of the original returns. Furthermore, it would seem that this is the sort of situation to which 20 NYCRR 416.3(c)(3) was intended to apply. However, petitioner did not take advantage of the regulation by informing the Division of the computer problem that had arisen at the time each original return was filed. I agree with the Division that petitioner's failure to so inform the Division precludes it from now claiming reasonable cause on the basis that factors outside of its control resulted in the underpayments of tax when due. Weighing all of the evidence in the record, I must conclude 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.

Likewise, employee turnover in petitioner's Tax Department does not establish reasonable cause. Of the five employees mentioned, only Mr. Becoate and his successor, Mr. Manzo, were responsible for the preparation of motor fuel tax returns. The other individuals were bookkeepers whose primary responsibilities were for other taxes. Mr. Romano, petitioner's tax administrator, testified that one individual was solely responsible for filing motor fuel tax returns (Mr. Becoate until his resignation) and that petitioner encountered problems in hiring qualified personnel and training them to prepare motor fuel tax returns. His testimony did not reveal the steps taken to insure that petitioner's motor fuel tax returns were accurately prepared while new employees were being hired and trained.

Petitioner's sales reached $1.3 billion in 1986, and its motor fuel tax liability for the audit period was in excess of $65 million. Clearly, it had the financial resources to meet its tax compliance obligations, if it chose to devote those resources to tax compliance. While any

single individual's decision to leave petitioner's employ might have been outside of its control, the evidence does not show that meeting its tax reporting obligations was outside of petitioner's control (see, Matter of Philip Morris, supra; Matter of Paramount Pictures, supra).

E. Petitioner argues that it is the unique combination of factors present which demonstrates reasonable cause. Thus, it argues that the increase in its volume of business, the failure of its computer system and the rapid turnover in personnel must be viewed as a whole, taking into account the affect which each problem had on the other. The Tax Appeals Tribunal has repeatedly reiterated that in considering abatement of penalty the most important factor to be taken into account is the taxpayer's efforts to comply with its obligations under the Tax Law (e.g., Matter of Northern States Contracting, Tax Appeals Tribunal, February 6, 1992). I agree with the Division that, taken as a whole, 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.

F. The petition of Getty Terminals Corporation is denied, and the Notice of Determination assessing penalties is sustained.

DATED: Troy, New York
November 18, 1993

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE