

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions :
of :
GETGO GAS STATION CORP. : DETERMINATION
for Revision of a Determination or for Refund of : DTA NO. 820290
Sales and Use Taxes under Articles 28 and 29 of the :
Tax Law for the Periods September 1, 1999 through :
February 28, 2002 and June 1, 2003 through :
August 31, 2003. :

Petitioner, Getgo Gas Station Corp., 980 Montauk Highway, Shirley, New York 11967, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods September 1, 1999 through February 28, 2002 and June 1, 2003 through August 31, 2003.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on March 8, 2006 at 10:30 A.M., with all briefs to be submitted by August 18, 2006, which date commenced the six-month period for the issuance of this determination. Petitioner appeared by Carl S. Levine, Esq. and Diane J. Moffet, Esq. The Division of Taxation appeared by Mark F. Volk, Esq. (Robert A. Maslyn, Esq., of counsel).

ISSUES

I. Whether exhibits attached to petitioner's post-hearing brief should be received in evidence.

II. Whether the Division of Tax Appeals has subject matter jurisdiction over a petition filed in protest of a notice and demand issued as a consequence of the execution of an agreement to the assessment of tax by petitioner.

III. Whether, under the instant facts and circumstances, the petition filed by a corporation in protest of a notice and demand may be deemed to include notices of determination issued to certain individuals as responsible officers of such corporation.

IV. Whether, as the result of an audit, the Division of Taxation properly determined additional sales tax due from Getgo Gas Station Corp., or whether petitioner has shown error in the audit method or results.

V. Whether Baki Akkaya is liable for the sales and use taxes due from Getgo Gas Station Corp. as a person responsible for the collection and payment of sales tax pursuant to Tax Law §§ 1131 and 1133.

VI. Whether petitioner has established facts or circumstances warranting the reduction or abatement of penalties imposed pursuant to a Notice of Determination dated January 26, 2004.

FINDINGS OF FACT

1. Petitioner, Getgo Gas Station Corp., owned and operated a gas station located on the east end of Long Island at 2051 Wading River Road, Wading River, New York. Petitioner sold regular and premium graded unleaded gasoline and diesel fuel¹ under the name “Jetgo.” The vast majority of petitioner’s motor fuel sales were of unleaded regular gasoline. Petitioner’s president and sole shareholder at all times relevant herein was Kemal Akkaya.

¹ Petitioner also sold a mid-grade gasoline during the first sales tax quarter of the audit period. Petitioner apparently did not sell a mid-grade product subsequently.

2. On April 25, 2002, the Division of Taxation (“Division”) sent a letter to petitioner’s representative, scheduling an appointment for May 20, 2002 on which to commence a sales and use tax field audit of petitioner for the period September 1, 1999 through February 28, 2002. The Division’s letter requested that all of petitioner’s books and records pertaining to its sales tax liability for the audit period be available for review. Among the records specifically requested were petitioner’s daily pump readings and pump prices for the audit period; gasoline purchase invoices for the audit period; copies of petitioner’s forms FT-943 (Quarterly Inventory Report by Retail Service Stations and Fixed Base Operators) for the audit period; sales and use tax returns and schedules FR (Report of Sales and Use Tax on Motor Fuel and Diesel Motor Fuel [Form ST 100.10]) for the audit period. Also specifically requested were petitioner’s general ledger, cash receipts and disbursements journal, Federal income tax returns, daily books, cash register tapes, shift reports, and bank statements for the audit period.

3. The Division made similar requests for records at a meeting with petitioner’s representative on May 21, 2002 and by letter dated April 17, 2003.

4. In response to the Division’s requests petitioner produced its sales tax returns for all quarters of the audit period except for March 1, 2001 through May 31, 2001.² Petitioner also produced copies of its motor fuel purchase invoices for the entire audit period except for the March 1, 2001 through May 31, 2001 period.

5. Also in response to the Division’s request for records, petitioner produced workpapers created by its accountant in connection with the preparation of petitioner’s sales tax returns for

² Petitioner did not file a sales tax return for the March 1, 2001 through May 31, 2001 period.

eight of the ten sales tax quarters which comprise the audit period.³ Such workpapers include a detailed listing of purchase invoices, including gallons purchased and purchase prices. They also contain computations detailing petitioner's sales tax liability for the respective periods. The workpapers are consistent with the sales tax returns in the record and also with the Division's workpapers which contain petitioner's reported sales tax information. The workpapers also indicate petitioner's markup over cost (measured in cents per gallon) for regular and premium gasoline and diesel fuel sold by petitioner as follows:

Sales Tax Quarter	Regular	Premium	Diesel
9/1/99-11/30/99	\$.02	\$.18	\$.18
12/1/99-2/29/00	\$.20	\$.18	\$.18
3/1/00-5/31/00	\$.09	\$.09	\$.09
6/1/00-8/31/00	\$.07	\$.07	\$.07
9/1/00-11/30/00	\$.10	\$.15	\$.18
12/1/00-2/28/01	\$.09	\$.09	\$.09
9/1/01-11/30/01	\$.04	\$.04	\$.04
12/1/01-2/28/02	\$.02	\$.02	\$.02

6. Petitioner did not produce any records of sales or any source documentation of its selling prices of gasoline during the audit period.

7. Given this lack of any records of sales or any source documentation of selling prices, the Division determined that petitioner's books and records were insufficient for the purpose of verifying its taxable sales and therefore determined to estimate petitioner's sales tax liability

³ The eight quarters for which these workpapers were produced are the periods ended 11/30/99, 2/29/00, 5/31/00, 8/31/00, 11/30/00, 2/28/01, 11/30/01 and 2/28/02.

using the purchase invoices provided by petitioner on audit as the starting point in its audit methodology.

8. First, the Division determined audited gallons of fuel sold based upon gallons purchased as indicated by petitioner's fuel purchase invoices. Petitioner's representative advised the auditor during the audit that he relied on the purchase invoices in preparing petitioner's sales tax returns and that petitioner did not maintain any opening or closing inventory figures. Thus, purchases made during any given period were deemed sold in the same period.

9. Following its review of petitioner's fuel purchase invoices, the Division determined audited sales of 3,435,590 gallons of gasoline and 184,070 gallons of diesel fuel for the audit period. By its sales tax returns for the audit period, petitioner reported sales of 3,047,142 gallons of gasoline and 141,206 gallons of diesel fuel.

10. Next, the Division determined petitioner's purchase price for fuel using the purchase invoices. The Division calculated an average purchase price for gasoline for each quarter by dividing total gallons of gasoline purchased for the quarter by the total of the invoice prices for gasoline for the quarter. The Division determined petitioner's purchase price for diesel fuel in a similar manner. The Division did not calculate a separate average purchase price for regular and premium unleaded gas.⁴ The Division's audit workpapers indicate that, at least with respect to certain sales tax quarters at issue, the Division's calculation of average invoice price included purchases of fuel delivered to other gas stations owned by petitioner's president, Kemal Akkaya.

⁴ Most of the information in the record regarding petitioner's purchase invoices is contained in workpapers compiled by petitioner's accountant and the Division's auditor which summarize invoice information. Such workpapers do not state a price per gallon for regular and premium gas. However, based on a review of the 18 actual purchase invoices which are in the record, the purchase price for premium was 10 to 13 cents higher than the purchase price for regular during the audit period. It is further noted that a review of petitioner's sales as reported on its sales tax returns indicates that approximately 87 percent of petitioner's gasoline sales during the audit period were for regular gas.

11. For the period for which invoices were not provided (March 1, 2001 through May 31, 2001), the Division determined audited gallons purchased and average purchase prices using the audited gallons purchased and average purchase prices as determined for the prior quarter.

12. After determining petitioner's average invoice price for gasoline and diesel fuel for each quarter of the audit period, the Division marked up that amount by ten cents per gallon to reach audited selling price.

13. The Division's auditor used a markup of ten cents per gallon because, based on his audit experience, such markup was reasonable.⁵ At the time the audit herein began, the Division's auditor had performed about 15 or 20 sales tax audits in his career.

14. The Division then multiplied audited selling price by audited gallons sold to reach audited gross sales. From that amount the Division calculated petitioner's sales tax liability by subtracting New York State excise tax and giving credit for petitioner's prepaid sales tax to reach additional tax due. In this manner, the Division determined additional tax due of \$68,360.32 for the audit period.

15. On August 27, 2003, the Division issued a Statement of Proposed Audit Change to petitioner's former representative and accountant, Saranto Calamas. Mr. Calamas did not respond to the statement and the Division was subsequently in contact with Baki Akkaya, son of Kemal Akkaya, petitioner's president. Baki Akkaya and the Division's auditor had a meeting to discuss the audit and the Statement of Proposed Audit Change. Saranto Calamas was not present at this meeting. As Baki advised the auditor at their meeting, Kemal Akkaya became ill during the fall of 2003 and had returned to Turkey for treatment. Baki further advised the auditor that

⁵ The auditor also testified as a further rationale for his use of the ten cent markup that petitioner's accountant had used a ten cent markup in his preparation of petitioner's sales tax returns for the first half of the audit period. Considering that the accountant's workpapers indicate the use of a ten cent markup for only one of the sales tax periods at issue (*see*, Finding of Fact "5"), this explanation is not accepted as a basis for the ten cent markup.

his father had left him in charge of the business. On or about the date of their meeting, the Division provided Baki Akkaya with a Statement of Proposed Audit Change for Sales and Use Tax dated November 5, 2003 and issued to Getgo Gas Station Corp. which asserted \$68,360.32 in additional sales tax due, plus interest, for the period September 1, 1999 through February 28, 2003.

16. Baki Akkaya subsequently signed a consent to the proposed tax as set forth in the November 5, 2003 Statement of Proposed Audit Change. Baki Akkaya's signature on the consent is dated November 6, 2003. Next to his signature he identified himself as vice president of Getgo Gas Station Corp.

17. Baki Akkaya also signed and remitted an \$8,000.00 check dated November 6, 2003 in partial payment of the corporation's tax liability.

18. The November 6, 2003 consent signed by Baki Akkaya provides, in relevant part:

I consent to the assessment of the tax and penalties, if any, and accept the determination of any amount to be credited or refunded as shown above, plus any interest as provided by law. By signing this consent, I understand that: (1) I am waiving any right to have a Notice of Determination issued to me, and I am also waiving my right to have a hearing to contest the validity and amount of the tax, interest, and any applicable penalties determined and consented to. (2) If I later wish to contest the findings in this agreement, I must first pay the full amount shown due, and file an application, within the time provided by law, for a credit or refund. If the Tax Department denies my application in whole or in part, I may then contest the amount denied, within the time provided by law, in the Bureau of Conciliation and Mediation Services, or in the Division of Tax Appeals or both.

19. The Division subsequently issued a Notice and Demand for Payment of Tax Due to Getgo Gas Station Corp. dated December 30, 2003 (L-023392663-7) which demanded payment of the tax asserted due in the previously issued statements of audit change, i.e., \$68,360.32, plus interest, but which also gave credit for the \$8,000.00 payment made by Baki Akkaya in November 2003.

20. Petitioner filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services in respect of the December 30, 2003 Notice and Demand. Pursuant to a Conciliation Order dated September 17, 2004, such request was denied and the Notice and Demand was sustained. Petitioner then filed a petition with the Division of Tax Appeals.

21. On January 22, 2004, the Division issued to Kemal Akkaya a Notice of Determination which asserted tax due of \$68,360.32, plus interest, for the period September 1, 1999 through February 28, 2002. The notice gave credit for the \$8,000.00 payment made in November 2003. The notice also advised Mr. Akkaya that the Division had determined that he was a corporate officer or a person responsible for the collection and payment of sales and use taxes due from Getgo Gas Station Corp. and therefore personally liable for the sales and use taxes due from the corporation.

22. As noted previously, at all times relevant herein, Kemal Akkaya was the president and sole shareholder of Getgo Gas Station Corp., which began doing business in May 1999. Mr. Akkaya was responsible for all aspects of Getgo's operation, including the hiring and firing of employees, the purchase of supplies and the payment of suppliers, the payment of taxes, including sales taxes, and the signing of tax returns. He hired a certified public accountant to prepare the corporation's sales tax returns. He also set pump prices.

23. Kemal Akkaya was born and raised in Turkey where he was a high school teacher. He emigrated to the United States in 1985 and became employed in the retail gas business. In 1996, Mr. Akkaya brought his wife and five children to the United States.

24. As noted previously, in the fall of 2003 Kemal Akkaya became ill and returned to Turkey for treatment. He was in Turkey for about two and a half months. During that time he

expressly told his son, Baki Akkaya, then 26 years old, to run Getgo. Baki's authority included the authority to pay rent and to take care of the payroll. Kemal also entrusted Baki to take care of the tax matters related to the audit, which was then ongoing.

25. During the period at issue Kemal Akkaya was also the president and sole shareholder of two other corporations, Hoja, Inc. and White Stone Enterprises, Inc., which also operated gas stations in New York.

26. There is no dispute herein that Kemal Akkaya was a responsible officer of Getgo Gas Station Corp. during the relevant period.

27. On January 26, 2004, the Division issued to Baki Akkaya a Notice of Determination which asserted tax due of \$68,360.32, plus interest, for the period September 1, 1999 through February 28, 2002. The notice gave credit for the \$8,000.00 payment made in November 2003. The notice also advised Mr. Akkaya that the Division had determined that he was a corporate officer or a person responsible for the collection and payment of sales and use taxes due from Getgo Gas Station Corp. and therefore personally liable for the sales and use taxes due from the corporation.

28. Baki Akkaya did not appear at the hearing and did not testify.

29. Neither Kemal Akkaya nor Baki Akkaya filed a petition in response to the notices of determination issued to them.

30. During the audit, the auditor became aware that, during the first part of the audit period, petitioner's accountant had improperly deducted prepaid sales tax, Federal excise tax and New York excise tax in calculating taxable sales of fuel. Petitioner should properly have deducted only New York excise tax in calculating taxable sales. As of the period ended August 31, 2001, petitioner began using the correct formula to calculate its taxable sales.

31. Petitioner's gas station is "unbranded." That is, it does not sell gas under a well-known brand name such as Exxon or Mobil. As noted previously, petitioner sells gas under the name "Jetgo." Unbranded stations, such as petitioner, usually sell gas at a cheaper price than branded stations.

32. Several branded gas stations were located near petitioner's station. A Hess gas station was located on the next corner from petitioner's station. A Mobil station and an Exxon station were also in the vicinity.

33. Petitioner's station sold gas only through full-service pumps. There were no self-service pumps.

34. Petitioner's regular and premium graded gasoline were sold at different prices, with the premium sold at a higher price.

35. Getgo did not file a sales tax return or pay over any sales tax for the period June 1, 2003 through August 31, 2003. Consequently, on January 26, 2004 the Division issued to Getgo a Notice of Determination (Estimated) which asserted \$5,709.83, plus penalty and interest, for the period June 1, 2003 through August 31, 2003. The tax asserted in the notice was estimated based on the amount of tax reported by Getgo for the period September 1, 2002 through November 30, 2002, which was the return most recently received by the Division at the time of issuance of the January 26, 2004 notice. Petitioner subsequently filed a petition in protest of such notice. At hearing, petitioner conceded the tax and interest as asserted in the estimated notice, but protested the penalty asserted therein.

36. Near the end of the hearing in this matter the administrative law judge asked petitioner's representative whether petitioner had any additional evidence. Petitioner's representative responded "no." The administrative law judge later asked whether either

petitioner or the Division had “anything further they wish to add in this matter?” Petitioner’s representative responded “no.” The hearing was then concluded. At no time during the hearing did petitioner’s representative make any request for the record to be held open for the submission of additional evidence post-hearing.

37. Petitioner sought to submit additional evidence, identified as Appendix 1 and Appendix 2, with its post-hearing memorandum of law. Such documentation has not been reviewed by the administrative law judge and is not received in evidence in this matter.

SUMMARY OF THE PARTIES’ POSITIONS

38. Petitioner contended that the audit of Getgo was so fundamentally erroneous as to lack a rational basis and thus warrant the cancellation of the Notice and Demand in its entirety. In support of this contention, petitioner pointed to the asserted arbitrary markup of petitioner’s purchases, the failure to factor in petitioner’s status as an unbranded station in the audit calculations, the failure to use a weighted average method to calculate petitioner’s markups, and the asserted overall failure by the Division to perform the audit in a conscientious manner.

39. Petitioner contended that Baki Akkaya was not a responsible officer of Getgo Gas Station Corp. during the period at issue.

40. Additionally, petitioner contended that penalty imposed pursuant to the January 26, 2004 Notice of Determination should be abated because petitioner has established reasonable cause and an absence of willful neglect for its failure to timely file and pay tax for the relevant period because it relied on the erroneous advice of its certified public accountant whose accounting computations, record keeping, and overall attitude during the audit were erroneous and inappropriate.

41. With respect to the audit, the Division contended that the execution of the consent rendered the tax fixed and final and established the rational basis for the assessment. The Division further contended that the audit method was reasonable and that petitioner has not shown error in either the method or results.

42. The Division also asserted that Baki Akkaya was a responsible officer of Getgo Gas Station Corp. during the period at issue.

43. With respect to the January 26, 2004 Notice of Determination, the Division asserted that petitioner has not shown reasonable cause or a lack of willful neglect with respect to its failure to timely file and pay tax for the relevant period.

CONCLUSIONS OF LAW

A. Preliminarily, regarding the exhibits attached to petitioner's brief (*see*, Finding of Fact "37"), the Tax Appeals Tribunal has established a firm policy of not allowing the submission of evidence after the record is closed (*see, e.g., Matter of Equity Title and Closing Services*, Tax Appeals Tribunal, July 20, 2006). Petitioner did not request that the record be held open for the submission of evidence post-hearing (*see*, Finding of Fact "36"). Accordingly, pursuant to the Tribunal's policy, petitioner's attempt to offer the exhibits attached to its brief is properly rejected.

B. The instant matter presents two threshold issues of subject matter jurisdiction which must be addressed. The Division of Tax Appeals is an adjudicatory body of limited jurisdiction (*Matter of Scharff*, Tax Appeals Tribunal, October 4, 1990, *revd on other grounds sub nom New York State Dept. of Taxation & Fin. v. Tax Appeals Tribunal*, 151 Misc 2d 326, 573 NYS2d 140). Its powers are limited to those conferred by its authorizing statute (*id.*).

Tax Law § 2008 provides:

All proceedings in the division of tax appeals shall be commenced by the filing of a petition with the division of tax appeals protesting any written notice of the division of taxation which has advised the petitioner of a tax deficiency, a determination of tax due, a denial of a refund . . . or any other notice which gives a person the right to a hearing in the division of tax appeals under this chapter or other law.

As set forth above, the jurisdiction of the Division of Tax Appeals is premised on the filing of a petition protesting a notice which gives a person a right to a hearing; as a consequence, the scope of the jurisdiction is confined by the notice and the petition of that notice (*see, e.g., Matter of Dreisinger*, Tax Appeals Tribunal July 20, 1989). The parties to a proceeding cannot confer jurisdiction on the Division of Tax Appeals to decide matters outside the scope of its authority (*see, Strina v. Troiano*, 119 AD2d 566, 500 NYS2d 736 [subject matter jurisdiction cannot be conferred by consent or stipulation of the parties and a defect in subject matter jurisdiction cannot be waived]).

C. With respect to the issue of whether the Division of Tax Appeals has subject matter jurisdiction over the petition of Getgo Gas Station Corp. filed in protest of the Notice and Demand dated December 30, 2003, Tax Law § 2006(4) gives authority to the Tax Appeals Tribunal to “provide a hearing as a matter of right, to any petitioner upon such petitioner’s request . . . unless a right to such a hearing is specifically provided for, modified or denied by another provision of this chapter.”

D. In the instant matter, the right to a hearing is specifically denied to petitioner Getgo Gas Station Corp. under section 1138(c) of the Tax Law which provides as follows:

A person liable for collection or payment of tax . . . shall be entitled to have a tax due assessed prior to the ninety-day period [for the filing of a petition challenging such tax] by filing with the [division] a signed statement in writing . . . consenting thereto.

E. The November 5, 2003 Statement of Proposed Audit Changes is a consent to assessment of tax as described in Tax Law § 1138(c). Moreover, the execution of the consent by Baki Akkaya renders the tax liability fixed and final and eliminates the hearing right provided for in Tax Law § 1138(a)(1) (*see, Matter of House of Lloyd*, Tax Appeals Tribunal, November 13, 1998; *Matter of SICA Elec. & Maintenance Corp.*, Tax Appeals Tribunal, February 26, 1998). Consequently, the Division of Tax Appeals is without jurisdiction to hear the petition of Getgo Gas Station Corp. filed in protest of the Notice and Demand dated December 30, 2003 (*see, Matter of Brewsky's Goodtimes Corporation*, Tax Appeals Tribunal, February 22, 2001). Petitioner's only remedy after executing a consent is to pay the tax assessment and file for a refund of tax as provided for in Tax Law § 1139(c). Petitioner has not filed such a refund request.

F. Although petitioner did not expressly contend that Baki Akkaya was without authority to execute the consent on behalf of the corporation, petitioner did contend in its brief that:

During the short period Kemal Akkaya was in Turkey, there is no evidence in the record that Baki Akkaya had any authority to sign sales tax returns on behalf of petitioner, make tax payments, make financial decisions, hire or fire employees or borrow money on behalf of petitioner.

To the extent that this contention is relevant to the question of whether Baki Akkaya was authorized to sign the consent, it is rejected. The record herein establishes that Baki Akkaya had authority to sign the consent on behalf of the corporation. By his signature on the consent, he identified himself as vice president of the corporation. More significantly, Kemal Akkaya, president of Getgo and Baki's father, testified that Baki was authorized to "run" the corporation in his absence. On cross-examination, Kemal Akkaya testified that Baki's authority included the authority to pay rent and to take care of the payroll. He also testified that

Baki was entrusted to take care of the tax matters related to the audit, which was then ongoing. In light of such evidence and considering that petitioner did not expressly deny that Baki had authority to sign the consent and considering that Baki Akkaya did not testify at the hearing, it is concluded that Baki Akkaya acted within his authority in signing the consent.

G. A second jurisdictional issue presented is whether the Division of Tax Appeals has subject matter jurisdiction over the notices of determination issued to Kemal and Baki Akkaya. Neither Kemal Akkaya nor Baki Akkaya filed a petition in protest of the notice of determination issued to him. Petitioner asserts that jurisdiction over such notices is conferred upon the Division of Tax Appeals by operation of Tax Law § 1138(a)(3)(B), which provides that the liability of a responsible officer of a corporation shall be determined by the issuance of a Notice of Determination pursuant to Tax Law § 1138(a)(1) and (2); that such determination shall be an assessment with respect to such person absent the timely filing of a petition with the Division of Tax Appeals; and which further provides:

If such determination is identical to or arises out of a previously issued determination of tax of the corporation . . . for which such person is under a duty to act, an application filed with the division of tax appeals on behalf of the corporation . . . shall be deemed to include any and all subsequently issued personal determinations and a separate application to the division of tax appeals for a hearing shall not be required.

H. Petitioner's contention is rejected. As noted, Tax Law § 1138(a)(3)(B) provides that a corporate petition shall be deemed to include any and all subsequently issued responsible officer determinations. Such responsible officer or "personal" determinations, however, must arise "out of a previously issued *determination* of tax of the corporation (emphasis added)." As a review of the statutory language makes plain, "determination" as used in this sentence and throughout Tax Law § 1138(a)(3)(B) refers to a notice of determination issued pursuant to Tax Law § 1138(a)(1) and (2). Accordingly, in order for a corporate petition to be deemed to

include protests of officer determinations, the statute requires that such corporate petition itself be filed in response to a notice of determination issued pursuant to Tax Law § 1138(a)(1) and (2). Here, the corporate petition was filed in protest of a notice and demand, issued not pursuant to Tax Law § 1138(a)(1) and (2), but pursuant to Tax Law § 1138(c), following the execution of the consent.

I. Even absent the clear statutory bar to the inclusion of the officer determination with the corporate petition as discussed above, any such inclusion of officer determinations presupposes subject matter jurisdiction over the corporate petition. The Division of Tax Appeals must have subject matter jurisdiction over the corporate petition in order to deem such petition to include protests of officer determinations. Here, as discussed previously, the Division of Tax Appeals lacks jurisdiction over the corporate petition. Hence it is without authority to deem such petition to include the officer notices of determination.

J. Without subject matter jurisdiction, Division of Tax Appeals is without authority to consider the merits of the petition filed herein. Issues IV and V are thus moot.

K. Turning to the Notice of Determination dated January 26, 2004, petitioner conceded tax asserted due therein, but protested the penalty. Petitioner has failed, however, to establish any cause for its delinquency in the timely payment of taxes for the periods at issue which would appear to a person of ordinary prudence and intelligence as reasonable cause for the delay in filing a sales tax return and paying the tax imposed under Articles 28 and 29 of the Tax Law (*see*, 20 NYCRR 2392.1[d][5]). Although petitioner points to various failures on the part of its accountant which purportedly contributed to its failure to pay the proper tax, all such failures fall within the period of the field audit, i.e, September 1, 1999 through February 28, 2002. Even assuming that such failures would constitute reasonable cause, there is no evidence

in the record that any such failures occurred with respect to the period of the January 26, 2004 statutory notice, i.e., May 1, 2003 through August 31, 2003. More significantly, there is no evidence in the record to explain petitioner's failure to file a sales tax return or to pay any tax for the period ended August 31, 2003. Penalty is therefore properly sustained.

L. The petition of Getgo Gas Station Corp. filed in protest of the Notice and Demand dated December 30, 2003 is dismissed. The petition of Getgo Gas Station Corp. filed in protest of the Notice of Determination and Demand dated January 26, 2004 is denied and said statutory notice is sustained.

DATED: Troy, New York
February 8, 2007

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE