

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions :
of :
HOJA, INC. : DETERMINATION
for Revision of Determinations or for Refund of Sales : DTA NOS. 820291
and Use Taxes under Articles 28 and 29 of the Tax Law : AND 820531
for the Period June 1, 2003 through November 30, 2003. :

Petitioner, Hoja, Inc., 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 period June 1, 2003 through November 30, 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 9, 2006 at 11:15 A.M., with all briefs to be submitted by October 10, 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).

ISSUE

Whether petitioner has established facts or circumstances warranting the abatement of penalties imposed pursuant to a Notice of Determination dated January 26, 2004 and a Notice and Demand dated May 28, 2004.

FINDINGS OF FACT

1. Petitioner, Hoja, Inc. (“Hoja”), owned and operated seven gas stations located on Long Island, New York.
2. Kemal Akkaya was, at all times relevant herein, Hoja’s president and sole shareholder.
3. On January 26, 2004, the Division of Taxation (“Division”) issued to Hoja a Notice of Determination (Estimated) which asserted \$6,914.14 in additional sales tax due, plus penalty and interest, for the period June 1, 2003 through August 31, 2003.
4. The January 26, 2004 notice was issued to Hoja as a result of its failure to file a sales tax return or to pay tax for the quarter ended August 31, 2003. The amount of tax asserted due was estimated based on the tax reported due by Hoja on its sales tax return for the period March 1, 2003 through May 31, 2003, the period immediately preceding the sales tax quarter at issue.
5. On or about May 3, 2004, Hoja filed its quarterly sales tax return for the period September 1, 2003 through November 30, 2003. The due date for the return was December 20, 2003. The return was signed by Kemal Akkaya and reported \$3,046.71 in sales tax due. It was filed without payment.
6. On May 28, 2004, the Division issued a Notice and Demand to Hoja asserting \$3,046.71 in tax due for the September 1, 2003 through November 30, 2003 period, plus penalty and interest.
7. Petitioner concedes sales tax asserted due for the two sales tax quarters at issue, but contests the penalty asserted in the subject notices. Sales tax for both quarters remains unpaid.
8. During the period at issue Kemal Akkaya was also the president and sole shareholder of two other corporations, White Stone Enterprises, Inc. (“White Stone”) and Getgo Gas Station Corp. (“Getgo”), which also operated gas stations in New York.

9. Petitioner, White Stone and Getgo, acting through Kemal Akkaya, hired Saranto Calamas, a certified public accountant, to prepare and file their quarterly sales tax returns. Mr. Calamas had been serving in this capacity for several years as of the time the returns for the periods at issue in this matter were due to be filed.

10. Prior to the sales tax quarter ended August 31, 2001, Mr. Calamas calculated Getgo's taxable sales using an incorrect formula. More specifically, Mr. Calamas had improperly deducted prepaid sales tax, Federal excise tax and New York excise tax in calculating taxable sales of fuel. Mr. Calamas should properly have deducted only New York excise tax in calculating taxable sales. As of the quarter ended August 31, 2001, Getgo began using the correct formula to calculate its taxable sales.

11. The Division conducted a sales tax audit of White Stone beginning in August 2001. During that audit, the Division's auditor expressed concerns to Mr. Calamas regarding the manner in which White Stone's sales tax returns were prepared and White Stone's recordkeeping practices. The auditor did not assert penalties with respect to that audit because it was White Stone's first audit. Approximately nine months later the same auditor began an audit of Hoja and discovered similar tax preparation and recordkeeping problems.

12. Kemal Akkaya was aware of Hoja's obligation to file quarterly sales tax returns and to remit payment with such returns. Mr. Akkaya regularly signed such returns and regularly signed checks in payment of sales tax.

13. 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.

14. Kemal Akkaya speaks and understands English with some difficulty.

15. 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.

16. The record does not establish when Kemal Akkaya left for or returned from Turkey following medical treatment and does not establish if he was in Turkey at the time the returns for the quarters ended August 31, 2003 or November 30, 2003 were due.

17. At the request of the parties, official notice is taken of the record and findings of fact in the following Administrative Law Judge determinations: *Matter of Getgo Gas Station Corp.* (DTA No. 820290) and *Matter of Kemal Akkaya* (DTA No. 820293).¹ The taking of official notice applies to Findings of Fact “8” through “16.”

SUMMARY OF PETITIONER’S POSITION

18. Petitioner contends that it demonstrated reasonable cause, and therefore, penalties imposed should be abated in full. Petitioner points to three factors which support a finding of reasonable cause. First, petitioner contends that Saranto Calamas, the certified public accountant upon whom petitioner relied to prepare and file its tax returns and the tax returns of the related corporations, White Stone and Getgo, committed wrongful or negligent acts. Petitioner contends that it reasonably relied on the accountant’s erroneous advice and that such reliance supports a finding of reasonable cause. Noting Kemal Akkaya’s limited grasp of the written and spoken English language, petitioner further asserts that such language difficulties prevented him from understanding Hoja’s tax obligations. Petitioner contends that it was thus reasonable for Mr. Akkaya to rely on the accountant to prepare and file Hoja’s sales tax returns. Finally, petitioner

¹ State Administrative Procedure Act § 306(4) provides that “official notice may be taken of all facts of which judicial notice could be taken and of other facts within the specialized knowledge of the agency.” Courts of the State of New York may take judicial notice of their own record of the proceeding of the case before them, the records of cases involving one or more of the same parties or the records of cases involving totally different parties (*Berger v. Dynamic Imports, Inc.*, 51 Misc 2d 988, 274 NYS2d 537; *Matter of Kolovinas*, Tax Appeals Tribunal, December 28, 1990; 57 NY Jur 2d, Evidence and Witnesses, § 47).

contends that Mr. Akkaya was unable to carry out Hoja's obligations because he was ill and absent from the business at the time the sales tax returns for the quarters ended August 31, 2003 and November 31, 2003 became due. Taken together, petitioner asserts that the forgoing factors constitute "ground[s] for delinquency which would appear to a person of ordinary prudence and intelligence as reasonable cause for delay and which clearly indicate an absence of willful neglect" (*see*, 20 NYCRR 2392.1[d][5]).

CONCLUSIONS OF LAW

A. Tax Law § 1145(a)(1)(i) states that any person failing to file or pay over any sales or use tax to the Commissioner of Taxation and Finance ("the Commissioner") "shall" be subject to a penalty. This penalty may be canceled if the Commissioner determines that the failure was "due to reasonable cause and not due to willful neglect" (Tax Law § 1145[a][1][iii]). Consistent with this statute, the Commissioner's regulations provide that penalty imposed under Tax Law § 1145(a)(1)(i) "must be imposed unless it is shown that such failure was due to reasonable cause and not due to willful neglect" (20 NYCRR 2392.1[a][1]). "By first requiring the imposition of penalties (rather than merely allowing them at the Commissioner's discretion), the Legislature evidenced its intent that filing returns and paying tax according to a particular timetable be treated as a largely unavoidable obligation [*Matter of F&W Oldsmobile v. Tax Commn. of the State of New York*, 106 AD2d 792, 484 NYS2d 188]" (*Matter of MCI Telecommunications, Corp.*, Tax Appeals Tribunal, January 16, 1992). The taxpayer faces the "onerous task" of establishing reasonable cause as well as the absence of willful neglect (*Matter of Philip Morris, Inc.*, Tax Appeals Tribunal, April 29, 1993).

B. Petitioner has failed to establish reasonable cause or an absence of willful neglect in the instant matter as none of the factors cited in support of its position is consistent with a finding of reasonable cause and an absence of willful neglect.

Petitioner asserts, first, that it reasonably relied on the erroneous advice of a tax professional as a reason for its failure herein. While reliance on professional advice may constitute reasonable cause under certain circumstances (*see, Matter of LT & B Realty Corp. v. New York State Tax Commn.*, 141 AD2d 185, 535 NYS2d 121; 20 NYCRR 2392.1[g][2][iv]), the instant matter does not involve the reliance on any professional advice. This is not a case where a tax professional advises a client as to the proper treatment of certain income or a specific transaction under the Tax Law. The present situation thus does not involve “reliance on professional advice” as contemplated by the Division’s regulations which refer to “professional advice as to the treatment of the taxpayer under the Tax Law” (*see, 20 NYCRR 2392.1[g][2][iv][a][1]*). Rather, the penalties at issue result simply from the late filing or nonfiling of returns and the failure to pay the amount shown due on returns. Petitioner has conceded the tax asserted due for the quarter ended August 31, 2003, and the Division has not contested the tax as reported on the return for the quarter ended November 30, 2003. Moreover, there is no question that petitioner was aware of its obligation to file quarterly tax returns and to pay tax. Under such circumstances, the timely filing of returns and the payment of taxes are solely the duties of the taxpayer and are nondelegable (*see, United States v. Boyle*, 469 US 241; *see also, Matter of McGaughey*, Tax Appeals Tribunal, March 19, 1998, *confirmed* 268 AD2d 802, 702 NYS2d 415). As the Supreme Court of the United States stated in determining that

reliance on a tax professional to file a return did not constitute reasonable cause under Internal Revenue Code § 6651(a)²:

[O]ne does not have to be a tax expert to know that tax returns have fixed filing dates and that taxes must be paid when they are due. In short, tax returns imply deadlines. Reliance by a lay person on a lawyer is of course common; but that reliance cannot function as a substitute for compliance with an unambiguous statute It requires no special training or effort to ascertain a deadline and make sure that it is met. The failure to make a timely filing of a tax return is not excused by the taxpayer's reliance on an agent, and such reliance is not 'reasonable cause' for a late filing under [IRC] §6651(a)(1). (*United States v. Boyle, supra*, 469 US at 251, 252.)

Since the penalties asserted herein are for failure to timely file returns and pay tax and the correct computation of tax is not at issue, any failures by petitioner's accountant in the computation of sales tax or in proper recordkeeping do not support a finding of reasonable cause in the present matter.

Petitioner also asserts Mr. Akkaya's difficulty in speaking and understanding English as a factor supportive of a finding of reasonable cause. This contention is rejected. Any such language difficulties notwithstanding, the record shows that Mr. Akkaya was well aware of the corporation's obligation to file returns and to pay tax, as he regularly signed sales tax returns and checks in payment of sales taxes.

Mr. Akkaya's illness and medical treatment in Turkey in the fall of 2003 also do not constitute grounds for abatement of penalty herein. The Division's regulations provide that the "serious illness of a taxpayer or the taxpayer's unavoidable absence from its usual place of business, which precluded timely compliance, may constitute reasonable cause," provided however, in the case of a failure to pay, the "amount is paid within a justifiable period of time"

² Internal Revenue Code § 6651(a) provides for the imposition of late filing and late payment penalties and contains language similar to that of Tax Law 1145(a)(1)(i) in that it further provides for the abatement of such penalties where the taxpayer's failure "is due to reasonable cause and not due to willful neglect."

after the illness (*see*, 20 NYCRR 2392.1[d][1][i]). Here, the tax for the period at issue has not been paid. Thus, Mr. Akkaya's illness may not constitute reasonable cause. The regulations further require that, in the case of a failure to file the return, in order for the illness to constitute reasonable cause, the return must be filed within a "justifiable period of time" after the illness, defined as a "period which is substantiated by the taxpayer" as reasonable based on the facts and circumstances of the case (*id.*). Here, petitioner has not shown that the filing of the return for the quarter ended November 30, 2003 on or about May 3, 2004 was within a justifiable period of time after Mr. Akkaya's illness. Indeed, the record does not show when Mr. Akkaya departed for or returned from Turkey in the fall of 2003. Furthermore, petitioner has not shown that it ever filed its sales tax return for the quarter ended August 31, 2003. Additionally, petitioner has not shown how Mr. Akkaya's illness precluded Hoja's timely compliance as required under the regulations.

Inasmuch as none of the factors cited by petitioner support a finding of reasonable cause, penalties imposed herein are properly sustained.

C. The petitions of Hoja, Inc. are denied and the Notice of Determination (Estimated) dated January 6, 2004 and the Notice and Demand dated May 28, 2004 are sustained.

DATED: Troy, New York
April 5, 2007

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE