

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**GETGO GAS STATION CORP.** :  
for Revision of a Determination or for Refund of :  
Sales and Use Taxes under Articles 28 and 29 of the :  
Tax Law for the Period September 1, 2003 through :  
November 30, 2003.

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In the Matter of the Petition : DETERMINATION  
of : DTA NOS. 820530  
AND 820541  
**KEMAL AKKAYA** :  
for Revision of a Determination or for Refund of :  
Sales and Use Taxes under Articles 28 and 29 of the :  
Tax Law for the Period September 1, 2003 through :  
November 30, 2003.

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Petitioner, Getgo Gas Station Corp., 980 Montauk Highway, Shirley, New York 11967,  
filed a petition for revision of a determination or for refund of sales and use taxes under Articles  
28 and 29 of the Tax Law for the period September 1, 2003 through November 30, 2003.

Petitioner, Kemal Akkaya, 980 Montauk Highway, Shirley, New York 11967, filed a  
petition for revision of a determination or for refund of sales and use taxes under Articles 28 and  
29 of the Tax Law for the period September 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 8, 2006  
at 1:45 P.M., with all briefs to be submitted by August 18, 2006, which date commenced the six-

month period for the issuance of this determination. Petitioners 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 petitioners have established facts or circumstances warranting the abatement of penalties imposed pursuant to a Notice and Demand dated May 28, 2004 and a Notice of Determination dated February 22, 2005.

### ***FINDINGS OF FACT***

1. Petitioner Getgo Gas Station Corp. (“Getgo”) owned and operated a gas station located on the east end of Long Island at 2051 Manor Road, Wading River, New York.
2. Kemal Akkaya was, at all times relevant herein, Getgo’s president and sole shareholder. Mr. Akkaya concedes that he was a responsible officer of Getgo during the relevant period.
3. On or about May 3, 2004, Getgo filed its quarterly sales tax return for the period September 1, 2003 through November 30, 2003. The due date for the return was December 22, 2003. The return was signed by petitioner Kemal Akkaya and reported \$2,066.48 in sales tax due. It was filed without payment.
4. On May 28, 2004, the Division of Taxation (“Division”) issued to Getgo a Notice and Demand asserting \$2,066.53 in tax due for the September 1, 2003 through November 30, 2003 period, plus penalty and interest.
5. On February 22, 2005 the Division issued to petitioner Kemal Akkaya a Notice of Determination which asserted \$2,066.53 in tax due, plus penalty and interest, for the period September 1, 2003 through November 30, 2003. The notice 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.

6. Petitioners have conceded the tax and interest as asserted in the subject notices, but protest the penalty asserted therein.

7. Getgo, acting through petitioner Kemal Akkaya, hired Saranto Calamas, a certified public accountant, to prepare and file its quarterly sales tax returns. Mr. Calamas had been serving in such capacity for about four years as of the time the return for the period at issue in this matter was due to be filed.

8. 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, petitioner began using the correct formula to calculate its taxable sales.

9. Petitioner Kemal Akkaya was aware of Getgo'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.

10. Petitioner 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.

11. Petitioner Kemal Akkaya speaks and understands English with some difficulty.

12. 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 his son, Baki Akkaya, was charged with running Getgo.

13. The record does not establish when Kemal Akkaya returned from Turkey following medical treatment and does not establish if he was in Turkey at the time the return for the period at issue was due.

14. 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.

15. At the request of the parties, official notice is taken of the record and findings of fact in *Matter of Getgo Gas Station Corp.* (Administrative Law Judge determination, February 8, 2007).<sup>1</sup> The taking of official notice applies to Findings of Fact “7” through “14.”

#### ***SUMMARY OF PETITIONERS' POSITION***

16. Petitioners contend that they demonstrated reasonable cause and that therefore penalties imposed herein should be abated in full. Petitioners point to three factors which support a finding of reasonable cause. First, petitioners contend that the certified public accountant upon whom petitioners relied to prepare and file Getgo's sales tax returns, Saranto Calamas, committed wrongful or negligent acts. Petitioners contend that Getgo 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

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<sup>1</sup> 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).

language, petitioners further assert that such language difficulties prevented him from understanding Getgo's tax obligations. Petitioners contend that it was thus reasonable for Mr. Akkaya to rely on the accountant to prepare and file Getgo's sales tax returns. Finally, petitioners contend that Mr. Akkaya was unable to carry out Getgo's obligations because he was ill and absent from the business at the time the sales tax return at issue became due. Taken together, petitioners assert 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. Petitioners have failed to establish reasonable cause or an absence of willful neglect in the instant matter as none of the factors cited in support of their position is actually consistent with a finding of reasonable cause and an absence of willful neglect.

Petitioners assert, first, that they reasonably relied on the erroneous advice of a tax professional as a reason for their failure herein. While reliance on professional advice may constitute reasonable cause under certain circumstances (*see, 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 whatsoever. 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. Hence, the present situation 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 of a return and the failure to pay the amount shown due on the return. The tax as reported on the return has not been contested by the Division. Moreover, there is no question that petitioners were aware of their 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)<sup>2</sup>:

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<sup>2</sup> 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.”

[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 241, 251, 252.)

It is noted that the failures by Getgo's accountant in the computation of Getgo's sales tax liability involve earlier periods. Such errors are not relevant to Getgo's failure to timely file a return and pay tax for the period at issue, especially considering that the computation of tax as reported on the return is not at issue.

Petitioners also assert Mr. Akkaya's difficulty in speaking and understanding English as a factor supportive of a finding of reasonable cause. This contention is rejected. While he may not have been versed in the vagaries of the Tax Law, Mr. Akkaya was well aware of the corporation's obligation to file returns and to pay tax. Indeed, prior to the period at issue he regularly signed sales tax returns and checks in payment of sales taxes.

Petitioner's illness and medical treatment in Turkey in the fall of 2003 also does 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" 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, petitioners have not shown that the filing of the return 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 returned from Turkey in the fall of 2003. Additionally, petitioners have not shown that Mr. Akkaya’s illness precluded Getgo’s timely compliance as required under the regulations considering that Mr. Akkaya left his son in charge during his absence.

Given the failure of any of the factors cited by petitioners to support a finding of reasonable cause, it is clear that, taken together, such factors do not constitute a cause for the subject delinquency “which would appear to a person of ordinary prudence and intelligence” as reasonable cause (*see*, 20 NYCRR 2392.1[d][5]).

C. The petitions of Getgo Gas Station Corp. and Kemal Akkaya are denied and the Notice and Demand dated May 28, 2004 and the Notice of Determination dated February 22, 2005 are sustained.

DATED: Troy, New York  
February 15, 2007

/s/ Timothy J. Alston  
ADMINISTRATIVE LAW JUDGE