STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GRJH, INC.	:	DETERMINATION DTA NO. 827617
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 March 1, 2010 through May 31, 2014.	:	

Petitioner, GRJH, Inc., 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 March 1, 2010 through May 31, 2014.

A hearing was held before Barbara J. Russo, Administrative Law Judge, in Albany, New York, on November 30, 2018, at 10:30 a.m., with all briefs to be submitted by June 27, 2019, which date commenced the six-month period for the issuance of this determination. Petitioners appeared by Hodgson Russ, LLP (Ariele R. Doolittle, Esq., and Christopher L. Doyle, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Brian Evans, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly determined that additional sales tax was due on petitioner's sales of gasoline.

II. Whether petitioner is entitled to deduct expenses incurred from participating in the Price Chopper Fuel Advantage Program from the amount of taxable receipts.

III. Whether petitioner has established reasonable cause for the abatement of penalties.

FINDINGS OF FACT

1. At all relevant times to this matter, petitioner, GRJH, Inc., was engaged in the business of wholesale and retail sales of motor fuel and diesel fuel (collectively, fuel), and was a distributer of Sunoco-branded fuel. Petitioner operates various gasoline stations in New York State making retail sales of gasoline and fuel products, and operating convenience stores at some of its station locations.

2. Petitioner was the subject of a sales and use tax audit by the Division of Taxation (Division) for the period March 1, 2010 through May 31, 2014 (the audit period).

3. Petitioner filed sales tax returns for the audit period and remitted the sales tax reported on its returns.

4. The sales at issue in this proceeding involved Sunoco franchise gasoline stations owned and operated by petitioner that participated in the Price Chopper Fuel Advantage Program (Fuel Advantage Program) during the audit period.

5. Sunoco, Inc. (R&M) (Sunoco) entered into an agreement with the Golub Corporation, doing business as Price Chopper (Price Chopper), under which Sunoco and electing Sunoco stations would participate in the Fuel Advantage Program that was in place during the audit period.

6. Certain of petitioner's Sunoco franchise gas stations in New York elected to participate in the Fuel Advantage Program.

7. Under the Fuel Advantage Program, Price Chopper customers earned and accrued points by purchasing items at Price Chopper grocery stores. Price Chopper customers then redeemed the accrued points for discounts on fuel at participating Sunoco stations using a Fuel Advantage

Program card or fab. The customers access and apply their Fuel Advantage Program card at the gasoline retailer and the pump price for the gasoline is automatically adjusted to the discounted price per gallon reflecting the applied number of accrued points.

8. When a customer uses the Fuel Advantage Program card at the pump, the information is sent electronically to Price Chopper, whose software calculates the discount and reduces the price at the pump based on the customer's accumulated rewards. The information is encrypted and protected by firewalls. Petitioner cannot see the Price Chopper loyalty activity and only sees the discounted price at the site, as reported on petitioner's computers at the end of the day.

9. When a customer uses the Fuel Advantage Program card for a fuel purchase, the customer pays petitioner the discounted sales amount, including sales tax, as shown at the pump, which is automatically calculated through the remote connection with Price Chopper.

10. Petitioner is later reimbursed by its Sunoco distributor for the discounts on the selling price resulting from the Fuel Advantage Program. The reimbursements by Sunoco are made one to two days later, and are reflected as a credit against petitioner's purchase cost of gasoline from Sunoco.

11. The agreement entered into between Sunoco and Price Chopper provides that Price Chopper, Sunoco, and the participating locations are obligated to acquire, install, operate and maintain equipment and software used for the operation of the Fuel Advantage Program and that each party shall bear its own expenses in connection with such acquisition, installation, operation and maintenance. The agreement further provides that Price Chopper shall maintain and operate central system components consisting of servers, switches and software licenses (Central System) to accomplish the processing for Fuel Advantage Program claims and credits.

12. The agreement further provides that Price Chopper make payments to Sunoco for credits redeemed by participating Sunoco locations according to information sent to Sunoco from the Central System.

13. The agreement further provides that Sunoco pay a rebate to Price Chopper for every gallon of gasoline sold during the term of the agreement at participating Sunoco locations for which credits were redeemed under the Fuel Advantage Program. From the beginning of the audit period through August 31, 2011, the rebate equaled $0.005 (½ cent) for every gallon sold at a participating Sunoco location under the Fuel Advantage Program. From September 1, 2011 through the end of the audit period, the rebate equaled $0.02 for every gallon sold at a participating Sunoco location under the Fuel Advantage Program. Price Chopper was responsible for reducing its payments for credits redeemed by participating Sunoco locations by the corresponding rebate amount.

14. During this proceeding, petitioner served a subpoena duces tecum on Sunoco seeking a summary of the monthly gallons of fuel sold by petitioner through the Fuel Advantage Program during the audit period. In response to the subpoena, Sunoco provided a report that listed the total number of "gallons discounted" for each of petitioner's stations per month during the audit period. According to that report, petitioner sold 25,247,751.46 gallons of discounted fuel under the Fuel Advantage Program during the audit period, and in doing so, provided discounts to customers totaling $14,545,824.03. Of the amount of discounted fuel, petitioner sold 10,790,787.45 gallons of discounted fuel during the period March 1, 2010 through August 31, 2011 (when the rebate was $0.005 per gallon) and 14,456,964.01 gallons of discounted fuel during the period September 1, 2011 through May 31, 2014 (when the rebate was $0.02 per gallon). As noted above, petitioner was reimbursed by Sunoco for the discounts on the selling

price resulting from the Fuel Advantage Program by way of a credit towards future fuel purchases, reduced by the fees petitioner paid to participate in the program. The fees equaled the "rebate" paid by Sunoco to Price Chopper for every gallon of gasoline sold by petitioner for which credits were redeemed under the Fuel Advantage Program (***see*** finding of fact 13) in the following amounts:

Period	Discounted Gallons	Rebate Per Gallon	Rebate
3/1/10 - 8/31/11	10,790,787.45	$0.005	$ 53,953.94
9/1/11 - 5/31/14	14,456,964.01	$ 0.02	$289,139.28
Total	25,247,751.46		$343,093.22

15. The credits petitioner received from Sunoco were intended to reimburse petitioner for the discounts on the selling price of the fuel resulting from the Fuel Advantage Program.

16. The credits petitioner received from Sunoco were only redeemable against petitioner's future purchases of fuel from Sunoco.

17. The credits petitioner received from Sunoco could not be redeemed for cash nor could petitioner request that the credits be paid in cash.

18. During the audit period, petitioner was required to make certain expenditures related to its participation in the Fuel Advantage Program. This included a fee of $300.00 a month for participating in the program per site, plus approximately $16,000.00 - $18,000.00 per site related to installation of special hardware and equipment necessary to participate in the Fuel Advantage Program.

19. On June 29, 2012, the Division sent a letter to petitioner scheduling a field audit pertaining to petitioner's sales and use tax liability for the period March 1, 2010 through May 31, 2012. A subsequent letter dated July 10, 2014 advised that the audit period was expanded

through and including the sales tax period ended May 31, 2014.[1] The audit was to commence with a July 16, 2012 field visit to petitioner's representative's offices by the Division's auditor.

20. The Division's June 29, 2012 audit appointment letter states that all of petitioner's sales and use tax books and records must be available on the appointment date. Referenced in and accompanying this audit appointment letter was an information document request (IDR) listing the records required for audit, including, in part, general ledger, general journal, sales invoices, exemption documents, fixed asset purchase/sales invoices, expense purchase invoices, merchandise purchase invoices, bank statements, cash receipts journal and sales journal, cash disbursements journal and purchase journal, cash register tapes, service station reports, inventory records, bulk receipts and invoices from suppliers, fuel disbursements, capital asset list and invoices, and pump meter readings, among other items. The subsequent letters updating the period of the audit again set forth the requirement that all records pertaining to petitioner's sales and use tax liability were to be made available for review, and included the noted list of required records.

21. After numerous delays and requests to reschedule the audit appointment by petitioner's former representative, the field audit was rescheduled to July 28, 2014. The Division's auditor met with petitioner's president, Alicia Metz, for the initial field audit appointment on July 28, 2014. At that meeting, petitioner and the Division agreed to a test period audit for sales and recurring expenses and executed a test period audit method election form.

22. Ms. Metz provided the auditor with Excel summary files used to calculate petitioner's returns, daily "z tapes" and a capital asset list.[2] The z tapes and Excel files showed total sales

---

[1] Consents extending the period of limitations on assessment were obtained from petitioner.

[2] "Z tapes" are daily summaries of the store's activities and do not list specific sale transactions.

broken down by category (i.e., newspapers, drinks, gasoline by grade) and total number of transactions, but did not provide individual transaction data. Petitioner agreed that the auditor would review its paper records and tie them to the electronic records, and then proceed with a review of the electronic records.

23. The auditor reviewed the records provided and determined that petitioner did not provide all of the books and records required to perform a detailed audit. Specifically, petitioner did not provide daily individual transaction level data showing each individual purchase made, which would be necessary to verify that the summary information provided was correct. Petitioner did not provide sufficient records to determine the amount of receipts where fuel was sold under the Fuel Advantage Program. No transactional level data was provided that would allow the auditor to look at each individual sale to determine what the actual selling price was rather than the stated pump price. Indeed, petitioner's witness admitted that its point of sale system does not collect data regarding loyalty discounts on a transactional basis and the end-of-day report generated by its system is a summary of sales after the loyalty discount that is not broken-down by each sales transaction. The records provided to the auditor by petitioner did not allow the auditor to properly determine the amount of sales tax due on the full sales price of the fuel sold. As explained by Ms. Metz, "[t]he loyalty credits are generated and produced to reconcile through Price Chopper and Sunoco, that's not our information. Our information is the net discounted sales that occurred on our property."

24. In order to determine petitioner's taxable gasoline sales for the audit period, the auditor first determined the amount of fuel sold by verifying petitioner's documented purchases of gasoline with the gallons reported as sold on its returns.

25. Since petitioner did not maintain a record of its daily pump prices for gasoline and the records were insufficient to determine the undiscounted selling price of the gasoline, the auditor used an external index. In order to determine petitioner's undiscounted selling prices for gasoline, so as to determine its receipts subject to sales tax, the auditor utilized Oil Price Information Service (OPIS) data. OPIS is a service that provides daily pricing information for gasoline stations, including petitioner's stations, that accept the Wright's Express fueling card. The OPIS transactional information is specific as to each station address and operator, and captures the selling price for the last Wright's Express credit card transaction for regular grade (87 octane) gasoline on each day.

26. Since the OPIS information provided selling price information for regular grade gasoline only, the auditor relied on Ms. Metz's advice that the selling price of mid-grade gasoline was approximately 10 cents per gallon higher than the regular grade selling price, that the super grade selling price was likewise approximately 10 cents per gallon higher than the mid-grade selling price, and that the ultra grade selling price was approximately 5 cents per gallon higher than the super grade selling price.[3] Using the OPIS selling price information for each of petitioner's stations, in conjunction with petitioner's records of the number of gallons of each grade of gasoline sold per day at each station and the noted price differences between such grades, the auditor determined: a) the prices per grade of gasoline per day during the audit period; b) the undiscounted amount of sales receipts per day for each grade of gasoline sold at each station; and c) the total audited sales receipts, at such audit-calculated pump prices, for the

[3] In instances where there was no OPIS information for particular stations for certain days (presumably because there were no Wright's Express purchases at certain stations on certain days), the auditor utilized the lowest price per OPIS information for the nearest surrounding two dates.

audit period. Based on the calculations, the auditor determined additional taxable receipts of gasoline sold under the Fuel Advantage Program resulting in additional tax due of $469,175.85.

27. With respect to the Division's determination of additional tax due for fuel sales under the Fuel Advantage Program, the Division determined that petitioner should have collected and remitted tax due on the full undiscounted pump-price of the fuel sold under the program. This conclusion was premised on the Division's view that the Fuel Advantage Program provided discount was akin to a manufacturer's coupon and was therefore fully taxable.

28. During the audit, Ms. Metz indicated that petitioner offered a discount for cash sales of gasoline, but petitioner provided no documentary support for any cash versus credit card price per gallon discount amounts.

29. The auditor also reviewed petitioner's capital assets during the audit period. As noted above (***see*** finding of fact 20) the Division requested petitioner's books and records with regard to capital assets for the audit period. However, during the audit, petitioner did not provide the auditor with any documentation regarding capital assets. As a result, the auditor determined that all of petitioner's capital assets were taxable for the audit period. The auditor determined that petitioner owed additional tax due of $22,477.21 for capital asset purchases.

30. At the conclusion of the audit, the Division issued a notice of determination to petitioner, notice number L-044463174 (notice), dated February 24, 2016, asserting additional tax due for purchases of capital assets and transactions involving discounted fuel sales under the Fuel Advantage Program. The notice asserted tax due in the amount of $491,653.06, plus penalty of $147,494.03 and interest of $388,027.74.

31. Subsequent to the audit, petitioner provided the Division with documentation for a portion of its capital asset purchases. As a result, at the hearing the Division stipulated to reduce

the tax due on capital assets to $7,439.76. Petitioner did not present any evidence or argument disputing this amount.

32. As a result of the reduction of tax due for capital asset purchases, the amount asserted due for the audit period is $476,615.61.

33. Prior to the audit at issue herein, the Division conducted a sales tax audit of petitioner for the period September 1, 2005 through February 28, 2010 (the prior audit).

34. The prior audit was conducted by the same auditor that conducted the audit in this matter and the same audit methodology was used in both audits.

35. Petitioner was issued a notice of determination at the conclusion of the prior audit asserting additional sales tax due. Petitioner protested that notice of determination by filing a petition with the Division of Tax Appeals on August 16, 2012 (***GRJH I***).[4] The Division of Tax Appeals issued a determination on January 15, 2015 with regard to the prior audit, sustaining the assessment (***see GRJH I***). Petitioner filed an exception seeking reversal of the Administrative Law Judge's determination, which was dismissed by the Tax Appeals Tribunal on timeliness grounds on October 8, 2015 (***see Matter of GRJH, Inc.***, Tax Appeals Tribunal, October 8, 2015).

36. All of the quarters in the audit period at issue in this matter ended prior to the Administrative Law Judge's determination regarding the prior audit (***see GRJH I***).

37. After the notice was issued in this matter, the Division commenced an audit of petitioner for a subsequent period (the third audit).

---

[4] Official notice of the record of proceedings in ***Matter of GRJH, Inc.*** (Division of Tax Appeals, January 15, 2015) is taken pursuant to State Administrative Procedure Act (SAPA) § 306 (4). Pursuant to SAPA § 306 (4) official notice can be taken of all facts of which judicial notice could be taken. Since a court may take judicial notice of its own records (***Matter of Ordway***, 196 NY 95 [1909]), the Division of Tax Appeals may take official notice of its record of proceedings (***see Bracken v Axelrod***, 93 AD2d 913 [3d Dept 1983]). As such, official notice of the filing date of the petition in ***GRJH I*** is hereby taken.

38. The third audit was conducted by Richard Tvorak and George Mastriani. Mr. Tvorak was the supervisor of the auditor that conducted the first two audits.

39. The Division did not use the same audit methodology in the third audit as it had used in the first two audits.

40. The audit methodology used in the third audit was based on an end-of-day report that computed the loyalty dollars attributed to each site for that day (Sunoco report). From this Sunoco report, the Division's auditors determined the daily sales attributed to the Fuel Advantage Program for each of petitioner's stores during the third audit period.[5]

41. Petitioner submitted 37 proposed findings of fact.[6] In accordance with State Administrative Procedure Act (SAPA) § 307 (1), proposed findings of fact 1 through 7, 10, 15, 16, 19 through 24, 26, and 28 through 34 are supported by the record and have been substantially incorporated in the foregoing findings of fact.[7] Proposed findings of fact 8, 9, 11 through 14, 18, and 35 have been modified to more accurately reflect the record. Proposed finding of fact 17 has been rejected as repetitive. Proposed findings of fact 25, 27, and 37 have been rejected as legal argument and conclusions of law. Proposed finding of fact 36 is rejected as not supported by the record.

---

[5] Ms. Metz's testimony is unclear whether the report came from Sunoco or some other "raw data" and the record does not indicate that such information was provided during the audit at issue herein. Ms. Metz testified that Sunoco "now" gives petitioner an accounting of the credits and did not indicate that such accounting was available during the audit at issue.

[6] In support of its proposed findings of fact, petitioner cites "Transcript of Oral Argument on November 33 [sic], 2018." It is noted that there was no oral argument in this matter, and there was no date of November 33, 2018 on our calendar. Presumably petitioner meant to cite the hearing transcript in this matter dated November 30, 2018.

[7] The proposed facts as presented by petitioner have been condensed and renumbered as incorporated in the findings of fact set forth above.

SUMMARY OF THE PARTIES' POSITIONS

42. Petitioner does not dispute that the credit reimbursements from Sunoco, based on the Fuel Advantage Program, were not included for sales tax purposes as part of the taxable receipt for petitioner's gasoline sales. Rather, petitioner argues that the credits it receives from Sunoco as reimbursements against the pump price discounts resulting from the Fuel Advantage Program are not properly includable as part of its receipts for its sales of gasoline. Petitioner maintains that the Fuel Advantage Program is not akin, as the Division asserts, to a manufacturer's coupon. Petitioner also asserts that, assuming the discounted portion of the transaction is part of the receipt, the taxable amount should be offset by costs incurred by petitioner to participate in the Fuel Advantage Program. Petitioner further asserts that the Division's audit methodology was improper and that, assuming the discounted sales are includable as receipts, that the Division should have used the same methodology that was used in the third audit. Finally, petitioner argues that there is reasonable cause to abate penalties.

43. The Division asserts that a "receipt" for sales tax purposes is the sale price for the item sold, and includes therein both payments in money plus any other payments received for the item sold, including credits or reimbursements received by the seller. The Division maintains that petitioner's receipts thus consist of the amounts paid by the customers (i.e., the pump prices), plus the amounts of the Sunoco credits received in reimbursement for the discounts allowed via reduction of the pump prices under the Fuel Advantage Program. The Division maintains that the Fuel Advantage Program provided discount was akin to a manufacturer's coupon and was therefore fully taxable. The Division also argues that petitioner was unable to provide documents to verify its sales under the Fuel Advantage Program, including the discounted pump prices at which the gasoline was sold, or any means to tie the Sunoco credits to such sales on an ongoing

basis, thereby allowing the Division to resort to external indices (the OPIS data) in conducting its audit. The Division argues that its audit methodology was reasonable and that it was not required to use a different methodology. The Division further argues that expenses incurred by petitioner are not deductible from the amount of taxable receipts. Finally, the Division asserts that petitioner has not shown reasonable cause to abate penalties.

CONCLUSIONS OF LAW

A. Tax Law § 1105 (a) imposes sales tax on the receipts from every "retail sale" of tangible personal property except as otherwise provided in article 28 of the Tax Law. Tax Law § 1101 (b) (3) defines "receipt" as:

> "The amount of the sale price of any property . . ., valued in money, whether received in money or otherwise, including any amount for which credit is allowed by the vendor to the purchaser, without any deduction for expenses or early payment discounts . . . ."

B. 20 NYCRR 526.5 discusses the items included in taxable receipts, including at paragraph (C) thereof the tax treatment of "coupons":

> "(1) Where a manufacturer issues a coupon entitling a purchaser to a credit on the item purchased, the tax is due on the full amount of the receipt. The receipt is composed of the amount paid and the amount of the coupon credit. The coupon credit reflects a payment or reimbursement by another party to the vendor.
>
> (2) Where a store issues a coupon, entitling a purchaser to a credit on the item purchased, for which it is reimbursed by the manufacturer or distributor, the tax is due on the full amount of the receipt. The receipt is composed of the amount paid and the amount of the coupon credit. The coupon must indicate, by "mfr" or some other code, that reimbursement is made. The reimbursement from the manufacturer or distributor to the store may be made in any form, such as cash or a credit against purchases or in additional merchandise.
>
> (3) Where a store issues a coupon entitling a purchaser to a discounted price on the item purchased, and receives no reimbursement, the tax is due from the purchaser on only the discounted price, which is the actual receipt.

> (4) Where a store issues a coupon involving a manufacturer's reimbursement, but does not disclose that fact to the purchaser on the coupon or in the advertisement, the vendor will collect from the purchaser only the tax due on the reduced price, but will be required to pay the tax on the entire receipt - the amount of the price and the reimbursement received from the manufacturer or distributor."

C. The term "receipt" is clearly defined to include the amount of the sale price whether received in money *or otherwise,* and includes any amount for which credit is allowed (Tax Law § 1101 [b] [3]). Here a discount on the price of gasoline is afforded at the pump to a purchasing customer, and that discount is later reimbursed in the form of credits provided to petitioner by Sunoco. There is no dispute that such credits are provided in reimbursement to petitioner for the per gallon pump price discount allowed to the customer at the pump, pursuant to the Fuel Advantage Program. Hence, under Tax Law § 1101 (b) (3), petitioner's receipts for the gasoline it sells under the Fuel Advantage Program include the payments made by the customers at the pumps, as discounted, plus the Sunoco credits based on such discounts and received thereafter by petitioner.

D. The Division correctly analogizes the Fuel Advantage Program sales to sales involving a manufacturer's coupon or loyalty card. Petitioner challenges this analogy, arguing that the subject circumstances do not involve a coupon because there is no "coupon" issued and no "manufacturer," and further because the customer is not receiving the discount for free, but instead receives a discount by way of its purchase of groceries from Price Chopper. Petitioner further attempts to distinguish the transactions at issue from other loyalty card programs, contending that the store offering the loyalty card incentive (Price Chopper) does not reimburse petitioner, but instead petitioner received payment by way of credit from a fourth party, Sunoco.

This argument is rejected as elevating form over substance and missing the appropriateness of the manufacturer's coupon and loyalty program analogy. In fact, the Fuel Advantage Program

operates on an ongoing basis by the purchasing customer's use of an "Advantage" card, on which points entitling the cardholder to a gasoline discount are captured and accrued and, at the time of gasoline purchase, accessed and applied. This method of affording a discount, via what is commonly referred to as a "loyalty card," is effectively an ongoing or reusable coupon. Its use, coupled with the subsequent reimbursement to the vendor (petitioner) for the discount so afforded via the allowance of credits fits squarely within the statutory language defining what is included in and comprises a vendor's receipt. It is irrelevant that petitioner is reimbursed for the discounts by Sunoco rather than directly by Price Chopper. As the agreement between Price Chopper and Sunoco shows, Price Chopper makes payments to Sunoco for the Fuel Advantage Program credits redeemed by participating Sunoco locations (***see*** finding of fact 12) and Sunoco then passes those payments on to its participating franchise stations, i.e. petitioner.

In sum, both the pump price received from the customer and the credit received from Sunoco are items of value received by petitioner for the gasoline it sells, and both are clearly encompassed within the statutory language defining "receipt" as consisting of the sale price "valued in money, whether received in money *or otherwise*."

E. Petitioner further argues that the reimbursements do not make it whole because there are various unreimbursed expenses associated with participating in the Fuel Advantage Program, including a "rebate" (calculated as a certain number of cents per gallon of gasoline sold), and costs related to installation of special hardware and equipment necessary to participate in the Fuel Advantage Program. Petitioner contends that if the discounted portion of the transactions constitute part of the taxable fuel sale receipts, the taxable amount should be offset by the costs petitioner incurred to participate in the Fuel Advantage Program. However, the definition of

"receipt" specifically precludes "any deduction for expenses or early payment discounts" (Tax Law § 1101 [b] [3]). Further, 20 NYCRR 526.5 (e) provides:

> "Expenses. All expenses, including telephone and telegraph and other service charges, incurred by a vendor in making a sale, regardless of their taxable status and regardless of whether they are billed to a customer, are not deductible from the receipts."

Thus, the expenses incurred to participate in the Fuel Advantage Program may not serve as offsets or reductions to petitioner's receipts.

F. Petitioner also argues that the Division's audit methodology was improper. Petitioner contends that, assuming the credits petitioner received from Sunoco are part of the fuel sale receipts, the Division should have used the same methodology that was used in the third audit.

Tax Law § 1138 (a) (1) provides, in relevant part, that if a sales tax return "is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined [by the Division] from such information as may be available. If necessary, the tax may be estimated on the basis of external indices . . . . " The long-standing statutory and regulatory authority of Tax Law § 1135 (a) and 20 NYCRR 533.2 (b), together with well-established case law, clearly mandate that complete and accurate records that are adequate to determine the proper amount of tax due concerning a taxpayer's transactions are to be maintained. These records must be maintained in such form as the Commissioner of Taxation and Finance may by regulation require, and must be made available to the Division for review upon request (***see*** Tax Law § 1135 [g]; 20 NYCRR 533.2 [a] [2]). The regulations provide that among the records required to be maintained are a "sales slip, invoice, receipt, contract, statement or other memorandum of sale; . . . guest check, . . . cash register tape and any other original sales document" (20 NYCRR 533.2 [b] [1]). When faced with inadequate, incomplete or inaccurate records, and acting pursuant to Tax Law § 1138 (a) (1), the Division is required to select a method of audit

reasonably calculated to reflect the tax due. The burden then rests upon the taxpayer to demonstrate that the method of audit or the amount of the assessment was erroneous (***see Matter of Your Own Choice, Inc.***, Tax Appeals Tribunal, February 20, 2003).

Petitioner asserts that the Division's use of the OPIS Retail Fuel Database was inappropriate and improper, claiming that petitioner provided the Division with records that reflected the actual sales attributed to the Fuel Advantage Program for each of petitioner's stations during the audit period. Petitioner argues that the Division used this Sunoco report for the third audit, utilizing a different audit method than the method used for this audit period.

Petitioner's arguments are without merit. First, there is no evidence in the record that establishes such Sunoco report was provided to the auditor during the audit at issue. Rather, Ms. Metz testified that Sunoco "now" gives petitioner an accounting of the sales attributed to the Fuel Advantage Program, thus inferring such report was not previously available. Ms. Metz further repeatedly testified that information regarding the loyalty sales was not available for the audit period, that petitioner only sees the discounted end-of-day amount at the site, and that petitioner's reports are summaries not broken down by transaction. When specifically asked whether petitioner had accurate books and records, Ms. Metz admitted that "the loyalty credits are generated and produced to reconcile through Price Chopper and Sunoco, that's not our information. Our information is the net discounted sales that occurred on our property."

Second, the Division is not obligated to use one audit methodology over another. Having established the inadequacies of a taxpayer's records, the Division is under no obligation to utilize one indirect method of audit as opposed to another, but rather must only select a method of audit reasonably calculated to determine the amount of tax due (***see Matter of Grant Co. v Joseph***, 2 NY2d 196 [1957]). Petitioners presented no evidence to show that the use of the OPIS Retail Fuel Database by the Division was unreasonable, given the insufficiency of the records provided.

The record clearly shows that the Division requested petitioner's books and records and thoroughly examined the same. In fact, the auditor relied in large part upon petitioner's books and records, accepting petitioner's reporting of the number of gallons of gasoline sold, including the number of gallons of each grade of gasoline sold. However, petitioner's record keeping did not include individual tracking of the pump prices for gasoline so as to allow the Division to determine sales made pursuant to the Fuel Advantage Program, or to verify that petitioner was reporting and paying tax on the receipts from such sales at the appropriate price (i.e., here the discounted pump price plus credit reimbursements), rather than on the discounted pump price only (as was the case). In fact, petitioner's witness admitted that records of daily pump prices and of individual sales (including discounted sales made under the Fuel Advantage Program) were not maintained, and that petitioner did not reconcile any Sunoco reports with petitioner's records in terms of tracking the Sunoco credits to the discounted sales made at the pumps. Under such circumstances, the Division's resort to indirect auditing and the use of external indices in order to determine the correct amount of petitioner's receipts subject to sales tax was proper.

G. The Division's method of indirect audit, and specifically its use of the OPIS information together with petitioner's own information as to the price differentials between the various grades of gasoline sold, to determine the pump prices for gasoline, was reasonable. The use of OPIS information has been sustained in prior cases (***see Matter of Khan***, Tax Appeals Tribunal, September 4, 2008). Moreover, the OPIS information employed in this case reflected the sale price of regular gasoline at petitioner's own stations at the end of each day and, as noted, the grade price differentials were provided by petitioner and were accepted by the auditor.

H. Finally, petitioner seeks the abatement of penalty. Petitioner contends as a basis for reasonable cause that it had a petition pending with the Division of Tax Appeals for the prior audit regarding the same issue.

The regulations provide examples of grounds for reasonable cause, including, in part, the following:

> "Pending petitions, actions or proceedings. A pending petition to the Commissioner of Taxation and Finance for an advisory opinion or a declaratory ruling, a pending conciliation conference proceeding in the Bureau of Conciliation and Mediation Services of the Division of Taxation, a pending petition to the Division of Tax Appeals or a pending action or proceeding for judicial determination may constitute reasonable cause, until the time at which the taxpayer has exhausted its administrative or judicial remedies, as applicable, for one or more taxable periods . . . , *the return or returns for which are due subsequent to* the filing of the petition with the Commissioner of Taxation and Finance, the commencement of the conciliation conference proceeding, *the filing of the petition with the Division of Tax Appeals* or the commencement of the judicial action or proceeding. The ground for reasonable cause described in this paragraph is subject to the following conditions:
>
> (i) the petition, action or proceeding must involve a question or issue affecting whether or not the person or entity or conveyance is subject to tax and/or required to file a return or, for purposes of article 28 of the Tax Law, whether such person or entity is required to file a return and collect and remit sales tax or file a return and pay use tax;
>
> (ii) the petition, action or proceeding must not be based on a position which is frivolous nor may it be intended to delay or impede the administration of the applicable article of the Tax Law; and
>
> (iii) the facts and circumstances for such taxable period(s) or conveyance(s) must be identical or virtually identical to those covered by the petition, action or proceeding" (20 NYCRR 2392.1 [d] [4], emphasis added).

Petitioner argues that reasonable cause exists based on its contention that a petition involving identical issues for a prior period was pending throughout the audit periods at issue. Petitioner's argument ignores the regulation's requirement that the periods for which penalty abatement is sought must be taxable periods for which the returns are due *subsequent to the filing of the petition with the Division of Tax Appeals*. The critical question, then, is when was the petition filed in ***GRJH I***. Petitioner presented no evidence as to the date of the filing of the petition in that matter. Nevertheless, judicial notice of the petition filing date of August 16, 2012 has been taken from the record in that prior matter (***see*** finding of fact 35). The returns for the

periods ended May 31, 2010 through May 31, 2012 were due *prior*, not subsequent, to the filing of the petition with Division of Tax Appeals in ***GRJH I*** (***see*** Tax Law § 1136 [b]) and thus those periods are clearly outside of the scope of 20 NYCRR 2392.1 (d) (4).

For the periods ended August 31, 2012 through May 31, 2014, the returns were due subsequent to the filing of the petition in ***GRJH I***. However, petitioner has failed to satisfy the requirement of 20 NYCRR 2392.1 (d) (4) (i) for those periods. Specifically, the regulation requires that for purposes of article 28, the petition must involve a question or issue of whether such person or entity is required to file a return and collect and remit sales tax (20 NYCRR 2392.1 [d] [4] [i]). In both the current and prior proceedings, the central issue is whether petitioner collected and remitted the appropriate amount of sales tax. There is no question as to whether petitioner is required to file a return and collect and remit sales tax. Indeed, included in petitioner's proposed findings of fact is the statement that petitioner filed sales tax returns and remitted payment in accordance with those returns. As such, petitioner has failed to satisfy the elements of 20 NYCRR 2392.1 (d) (4) and has not met its burden of establishing reasonable cause for the abatement of penalties.

I. The petition of GRJH, Inc., is denied and the notice of determination dated February 24, 2016, as modified by findings of fact 31 and 32, is sustained.

DATED: Albany, New York
December 19, 2019

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE