

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GREGORY A. SOJKA	:	DETERMINATION
D/B/A GREG'S TREE SERVICE	:	DTA NO. 850239
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 June 1, 2016 through	:	
February 28, 2019.	:	

Petitioner, Gregory A. Sojka, d/b/a Greg's Tree Service, 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 June 1, 2016 through February 28, 2019.

A formal hearing was held before Barbara J. Russo, Administrative Law Judge, in Rochester, New York, on March 28, 2024, at 10:30 a.m., with the final brief to be submitted by October 10, 2024, which date began the six-month period for the issuance of this determination. Petitioner appeared by Lippes Mathias, LLP (Justin J. Andreozzi, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Brandon Batch, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly resorted to an estimated audit methodology to determine petitioner's sales and use tax liability for the period in issue on the basis that petitioner's books and records were inadequate.

II. Whether the audit methodology utilized by the Division of Taxation had a rational basis and was reasonably calculated to reflect the tax due.

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

FINDINGS OF FACT

1. Petitioner, Gregory A. Sojka, operates a sole proprietorship doing business as Greg's Tree Service that provides tree trimming, tree cutting, and tree removal services around the Western New York area. Petitioner timely filed sales and use tax returns for the period June 1, 2016 through February 28, 2019 (the audit period or period at issue), reporting gross sales of \$775,460.00 and taxable sales of \$723,170.00. Petitioner timely reported and remitted sales and use tax of \$63,277.39 for the audit period.

2. Petitioner operated his business out of an office in his parents' home in Lancaster, New York (parents' house), since 1987. His business records were stored in this office. Most of petitioner's business records were kept in accordion-style folders in file cabinets in an attached storage room. He maintained the business's invoices for exempt sales in a separate folder with the exemption certificates. The business's vehicles were also stored at petitioner's parents' home address.

3. Petitioner's mother helped him with office tasks such as answering the business telephone, simple bookkeeping, and filing business receipts until 2015. Petitioner's father passed away from cardiomyopathy on March 28, 2015. The next day, petitioner's mother suffered a heart attack. She was diagnosed with Alzheimer's disease shortly thereafter and was no longer able to answer the telephone or perform other tasks for the business. She could not be left alone, so petitioner and his sister, Gail, took turns staying with her. Petitioner continued running his business from his parent's house while caring for his mother during the audit period.

4. Petitioner's mother passed away on May 16, 2019. She fell and broke her hip approximately three weeks prior to her passing and was on hospice care in her home, just as the audit at issue started. Petitioner and his sisters, Gail and Renee, stayed at their parents' house to

care for her between the time of her fall and her death.

5. On April 17, 2019, the Division of Taxation (Division) sent a letter to petitioner stating that the business's sales and use tax records had been scheduled for an audit for the audit period and scheduled an initial audit appointment for May 9, 2019. The letter further explained that petitioner must provide all documents that support his sales and use tax returns for the audit period on the appointment date. Among the records specifically requested, in an attached information document request (IDR), were the following: sales tax returns, worksheets and canceled checks showing taxes paid; federal income tax returns; New York State corporation tax returns; general ledger; general journal and closing entries; sales invoices; exemption documents supporting non-taxable sales; chart of accounts; fixed asset purchase/sales invoices; expense purchase invoices; merchandise purchase invoices; bank statements, canceled checks and deposit slips for all accounts; cash receipts journal and sales journal; cash disbursement journal and purchase journal; the corporate book, including minutes, board of directors and articles of incorporation; depreciation schedules; lease/rental agreements; and job cost sheets for contracts for the entire audit period.

6. The initial audit appointment was postponed to May 21, 2019. On that date, petitioner's then-representative, Allen Travers, CPA, met with the Division's auditor, Tina Jarczewski, and her supervisor, Joseph Logalbo. Petitioner was not present at the appointment due to the recent passing of his mother. Petitioner's then-representative provided the Division with the business's records, including bank statements for the entire audit period, a sales ledger in which petitioner recorded the business's sales, copies of customers' check payments and copies of deposit slips and deposit detail information.

7. Petitioner's sales ledger contained dates, customer names, street names and numbers,

sales amount, and amount of sales tax collected. The customer checks that petitioner provided to the Division show the complete address of the customers and corresponded to the entries in the sales ledger.

8. The Division's tax field audit record indicated that, on May 21, 2019, Mr. Logalbo transcribed petitioner's sales ledger and Ms. Jarczewski transcribed the bank statements and transfer/loan deposit details for the entire audit period. The tax field audit record entry for this date also stated that Ms. Jarczewski transcribed canceled check details for June 2016 to May 2017 and customer checks and deposit details for June through December 2016. These records transcriptions were not included in the audit file introduced by the Division during the hearing.

9. On May 28, 2019, Ms. Jarczewski had a follow-up appointment with petitioner and his then-representative. According to an entry in the Division's tax field audit record, Ms. Jarczewski continued transcribing deposit slips and deposited checks on that date. These records transcriptions were not included in the audit file introduced by the Division during the hearing.

10. During the audit appointment on May 28, 2019, petitioner's then-representative provided exemption certificates and tax-exempt invoices for the audit period. The exemption certificates corresponded with the entries in petitioner's sales tax ledger that indicated exempt sales and where no sales tax was collected.

11. The Division sent correspondence, dated June 4, 2019, to petitioner's then-representative, requesting that petitioner provide all sales invoices, asset invoices and expense receipts for the entire audit period.

12. Other than invoices for tax-exempt sales, petitioner did not provide sales invoices to the Division for the audit period.

13. From the time between petitioner's mother's fall in April 2019 and her death in May 2019, petitioner's sister, Renee, stayed at their parents' house with him to help care for their mother. Renee began clearing out the house while petitioner was working, cleaning out cupboards and cabinets as a form of stress release for coping with their ailing mother. While discarding boxes and other items, she inadvertently disposed of some of petitioner's business records, including sales invoices for the business's taxable sales for the period at issue.

14. The Division's tax field audit record indicated that, on July 29, 2019, and September 24 through 25, 2019, Ms. Jarczewski transcribed petitioner's fuel purchase information. The Division's transcription of fuel purchases and the fuel purchase records were not included in the audit file introduced by the Division during the hearing.

15. On August 14, 2019, petitioner executed a consent to extension of time, agreeing to extend the Division's amount of time to determine additional sales and use taxes due for the period June 1, 2016 through February 28, 2017 to March 20, 2020.

16. On August 29, 2019, the Division sent correspondence to petitioner's other representative at that time, Frank Minisci, CPA, stating that petitioner's records were deemed inadequate because detailed sales invoices were not provided. The correspondence further stated that the Division would use an alternative audit methodology to determine any liability on sales.

17. On September 10, 2019, the Division's auditor met with petitioner's then-representatives who provided invoices for dates after the audit period.

18. The Division sent correspondence, dated September 30, 2019, to Mr. Minisci, informing him that, as stated in its prior letter, petitioner's records were deemed inadequate because few invoices were provided for the audit period, and the invoices provided were not

sequentially numbered and did not provide internal control procedures to assure the accuracy and completeness of the transactions recorded in the sales journal. The correspondence further stated that the sales records provided were only for sales paid by check and no cash sales records were found within the audit period. The correspondence stated that an analysis was done comparing sales per customer checks to fuel purchases and that an attached schedule B illustrated the calculation of unreported sales tax based on a mark-up of petitioner's fuel purchases throughout the audit period. However, schedule B was not attached to the correspondence in the audit file introduced by the Division during the hearing.

19. The Division's field audit report described the auditor's determination that petitioner's records were inadequate and her use of an alternative audit methodology as follows:

"Sales records were reviewed for the entire audit period and were deemed inadequate because the taxpayer failed to maintain or make available individual sales invoices. The taxpayer only provided copies of check payments and a sales journal. Sequentially numbered invoices would have provided adequate internal control procedures that assure the accuracy and completeness of the transactions recorded in the sales journal. Without invoices, the sales reported could not be verified as complete and accurate. Only exempt invoices were provided. Very little, if any, cash sales were observed from the records provided. Furthermore, a 'squeal' was received by the Tax Department about this taxpayer regarding cash sales. Due to the inadequacy of records, an indirect audit method was used to calculate any additional sales tax liability.

Fuel is used to drive to each job and to operate tree removal equipment, etc. Therefore, it is practical to believe fuel purchases should correlate to sales. An analysis was done comparing sales per customer checks to fuel purchases during the audit period. The ratio of fuel purchases to sales was extremely inconsistent throughout the audit period and clearly indicated an underreporting of sales when viewed on a monthly basis. . . . Considering the ratio being calculated is a correlation ratio and not a markup ratio, the lowest monthly ratio from the analysis was used to calculate audited sales for the audit. Using any other ratio would result in zero cash sales for one or more months during the audit period. If a taxpayer is underreporting cash sales in one period, it is reasonable to assume they are underreporting in all periods. Our calculation resulted in additional sales tax due of \$82,048.04."

20. The Division calculated a ratio of fuel purchases to sales, using petitioner's credit

card statements that reflected fuel purchases for the audit period. Ms. Jarczewski testified that she recorded petitioner's fuel purchases by month and compared them with petitioner's reported sales amounts. She then calculated a ratio for each month by dividing fuel purchases by sales. The ratio for each month varied throughout the audit period, ranging from .0201 to .1225.¹ Ms. Jarczewski used a ratio of .0201, based on the ratio calculated from August 2017 of petitioner's fuel purchases per credit card statements (\$1,066.25) to sales per customer checks excluding tax (\$53,028.66), and applied this ratio to every month of the audit period to determine audited taxable sales. The ratio from August 2017 was the lowest ratio out of every month within the audit period. Ms. Jarczewski testified that she selected the ratio that would yield the highest amount of gross receipts for the audit period. Applying the lowest ratio created the highest amount of sales tax due.

21. Applying the ratio of .0201 to each month of the audit period resulted in audited taxable sales of \$1,637,760.73, and additional sales tax due of \$82,048.04, as indicated in the Division's field audit report and an audit workpaper titled schedule C, sales - additional tax due calculation, contained in the audit file introduced by the Division into the record. The Division's calculation of audited sales tax due did not make any adjustments for exempt sales.

22. The Division requested and reviewed capital asset purchase records for the audit period. The Division determined that petitioner's capital asset purchase records were inadequate because records were not provided for several of the vehicles registered with the New York State's Department of Motor Vehicles (DMV). The Division determined additional tax due on capital asset purchases in the amount of \$3,317.22.

23. The Division issued to petitioner a statement of proposed audit change for sales and

¹ A copy of the pertinent information regarding the Division's ratio calculations from the Division's schedule C, sales - additional tax due calculation, contained in exhibit F, is attached hereto as appendix A.

use tax, dated October 16, 2019, asserting additional tax due of \$87,330.43, plus interest and penalty.²

24. The Division issued to petitioner a notice of determination, bearing assessment number L-051291701, dated March 2, 2020, asserting additional tax due of \$85,365.26, plus interest and penalty for the audit period.

25. The Division issued to petitioner a notice of determination, bearing assessment number L-051292994, dated March 3, 2020, asserting additional penalties in the amount of \$51,000.00 for failure to maintain or provide records for the audit period.

26. The Division's tax field audit record indicated that on March 4, 2020, Ms. Jarczewski discussed with Mr. Logalbo calculations of tax due using averages proposed by petitioner's then-representative. The entry stated, in part:

“[a]lthough we wanted to use the taxpayer records to determine tax due, we decided we need to adjust our alternative audit method because of the perceived unreasonableness of the ratio used. We will resort to using industry ratios and the taxpayer's filed federal income tax returns. We will follow up with POA with this approach and adjust assessment(s) as necessary.”

However, the Division subsequently decided not to change the audit methodology used. An entry in the Division's tax filed audit record, dated May 7, 2020, stated:

“[r]ec'd email from team leader stating 'I was thinking on this one that we shouldn't change our audit methodology, but instead just use your other calculations to support what we did. I think it would look bad if we suddenly changed our approach after the audit was complete.'”

27. Petitioner timely filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services in protest of the notices of determination. By

² The record is unclear why the amount of tax due in the statement of proposed audit change is greater than the amount reflected in the Division's calculations as shown in the field audit report and schedule C, sales - additional tax due calculation (*see* finding of fact 21) (compare \$82,048.04 [sales tax] + \$3,317.22 [capital asset purchases] = \$85,365.26 with \$87,330.34 in the statement of proposed audit change). A subsequent statement of proposed audit change for sales and use tax, dated February 6, 2020, shows additional tax due of \$85,365.26, plus interest and penalty.

conciliation order (CMS No. 000320448), dated May 20, 2022, the conciliation conferee sustained the statutory notices. Petitioner thereafter filed a timely petition with the Division of Tax Appeals.

28. During the hearing, the Division introduced a redacted version of its audit file into the record as exhibit F. When identifying exhibit F, Ms. Jarczewski testified that it was the entire audit file except for attachments to an email dated December 10, 2020, that were left out. The email referenced the removed attachments as “gregs [sic] tree squeals.pdf.” Later, during cross-examination, Ms. Jarczewski admitted that exhibit F was also missing a summary she prepared comparing petitioner’s sales ledger to customer checks and possibly other charts and summaries that she prepared.

29. Petitioner made a Freedom of Information Law (FOIL) request to the Division prior to the hearing that requested, among other items, the complete audit file. Petitioner introduced the Division’s response to the FOIL request into the record as exhibit 26.³ A comparison of petitioner’s exhibit 26 with the Division’s exhibit F reveals that several workpapers and summaries were omitted from exhibit F.

30. Ms. Jarczewski testified that she reviewed petitioner’s records, including the sales journal, bank statements, customer checks and deposit slips and determined the records were not adequate because she could not determine the date a transaction occurred or what was done for a job because there was not a detailed description of each transaction. However, she later testified that she could not recall if she looked at the checks provided to confirm whether the dates on the checks matched with the dates on the sales ledger and could not recall how many names on the checks matched with the customer names in the sales ledger. She admitted that, although in the

³ The record was held open for petitioner to submit the FOIL response, among other items, after the hearing. Petitioner submitted the FOIL response and the other specified documents within the time allowed.

normal course of business there would be an audit record that would help her recall if the customer names on the checks and in the sales ledger matched, such audit record was not included in exhibit F. Ms. Jarczewski subsequently conceded that the sales ledger substantiated \$778,590.00 in sales and \$63,263.27 in sales tax and that the checks and bank statements provided by petitioner corroborated the sales amounts listed in the sales ledger except for the amount of \$3,395.95.

31. Ms. Jarczewski testified that she also determined petitioner's records were inadequate because detailed sales invoices were not provided, other than for exempt sales, because she believed there were unreported cash sales, and because of inconsistencies between the amount of fuel purchased and the amount of sales reported.

32. Ms. Jarczewski testified that she believed there were unreported cash sales that were not included in petitioner's sales ledger based on her experience. She also testified that a pre-audit analysis mentioned "squeal information" alleging that petitioner had unreported cash sales, but she did not base her conclusion that there were unreported cash sales on the squeal information.⁴

33. Ms. Jarczewski also testified there were unreported cash sales based on internet reviews and a news article that she read. She testified that internet reviews for Greg's Tree Service reflected sales that were not recorded in petitioner's sales ledger. Several of the reviews

⁴ The pre-audit analysis states, in part, "Taxpayer leads sales pitches by saying 'if you pay cash, I won't charge you sales tax.' Taxpayer reports no employees, but appears to have 6-8 family members on payroll. Taxpayer refuses to give out written estimates instead using the back of business cards to give a price." There is no evidence in the record supporting the alleged sales pitch or indicating where the Division obtained this information. The back of petitioner's business cards includes lines for estimates for various services, including remove, trim, chip brush, remove wood, and grind stump, and has a pre-printed line at the bottom that states "Plus Sales Tax." Contrary to the Division's statement that petitioner reports no employees, petitioner's exhibit 26 includes a summary created by the Division of petitioner's form NYS-45-ATT, quarterly combined withholding, wage reporting and unemployment insurance return attachment, showing that petitioner reported four employees over the course of the audit period. This summary was not included in the Division's exhibit F.

were undated, some contained only a first name and initial of last name, and some contained a pseudonym. When questioned on cross-examination regarding a review of a customer, Scott Whitmire, that she had flagged as not appearing in the sales ledger, Ms. Jarczewski stated that she could not reconcile the review with petitioner's records because the review did not have a specific date, and she "went back a year ago" and did not see the name. However, petitioner's sales ledger reported a sales transaction with "Whitmire" in March 2019, and the ledger reflected the amount charged for the sale and sales tax. When questioned why she believed the sales ledger did not reconcile with the review from Mr. Whitmire, Ms. Jarczewski testified that "it could have been another Whitmire." She later testified that she could not state specifically what she looked at to confirm that a review did not match a sale recorded in the sales ledger and conceded that the reviews, alone, did not show that there were unreported sales.

34. According to Ms. Jarczewski, the news article that she relied on, as part of the basis for determining that petitioner had unreported cash sales, indicated that he had voluminous sales following a storm in February 2019, and she did not see these sales reflected in his records. The news article, dated February 26, 2019, contained in exhibit F, stated that petitioner had "10 jobs on the docket." Ms. Jarczewski testified that she knew the sales were not reflected in the records because there were not as many sales recorded in the sales ledger as stated in the article during that period of time. However, she conceded that the article did not specifically state how many sales petitioner had, and she did not have any work product to show that she confirmed the unreported sales. She further testified that she did not see any bank checks for that period, but then conceded that there were some checks, but she could not recall how many. She further admitted that she did not know when the transactions occurred and conceded that it was possible that petitioner was paid the following month, March 2019, after the audit period ended. She

admitted that petitioner's sales ledger for March 2019 contained several entries.

Another news article, apparently dated February 25, 2019, relied on by Ms. Jarczewski for her determination that petitioner had unreported cash sales quoted a homeowner, Mrs. Shih, regarding a damaged tree. A review of petitioner's sales ledger for February 2019 showed that petitioner reported a sales transaction with Mrs. Shih and reflected that sales tax was charged for the job.

35. Petitioner's sales ledger reflected 11 sales transactions for February 2019 and 20 sales transactions for March 2019. The sales ledger entries for February and March 2019 indicated the customer's name, street address, sales amount and amount of tax charged.

36. Ms. Jarczewski testified that because detailed sales invoices were not received, she used an alternative audit method to determine any sales tax due. She reviewed petitioner's credit card statements that contained charges for fuel purchases and compared the monthly fuel purchases to monthly reported sales. She calculated a ratio of fuel purchases to sales for each month by dividing fuel purchases by sales. The ratios varied for each month during the audit period. Ms. Jarczewski testified that she applied the lowest monthly ratio calculated, .0201, to every other month to come up with the highest amount of gross receipts and increase the sales tax liability because she believed there were unreported cash sales. She testified that she used the lowest ratio because she believed there were unreported cash sales based on her "experience" and that using any other ratio would not make sense because there would be some months where petitioner did not owe additional tax. She further testified that "if we believe he is underreporting sales, it's reasonable to believe he is underreporting it for every period of time." Ms. Jarczewski testified that this method was based on audit experience.

37. Ms. Jarczewski further testified that she used the alternative audit method of

applying a ratio of fuel purchases to sales because “if there is more fuel used, it’s practical to deduce that there is [sic] more sales. And if there is less fuel used, there would be less sales.” When questioned on cross-examination whether it was possible that with the nature of petitioner’s business, some periods have more gas usage and less receipts while other periods have more receipts and less gas usage, Ms. Jarczewski responded, “I don’t believe so, but I’m not in the business.” Ms. Jarczewski was further questioned regarding the relation of fuel usage to sales as follows:

“Q [Mr. Andreozzi]: But what if the job didn’t require fuel but it did require him to climb up and do a 30-foot tree and take on that responsibility as opposed to running a truck or a grinder or something else? No fuel, but he charged a lot because it was a dangerous job. Is it true that if he had jobs like that, he would have higher pay and lower fuel in a month?

A [Ms. Jarczewski]: Possibly. I don’t know.”

38. During direct examination, Ms. Jarczewski testified that the audit method of using a ratio of fuel purchases to sales amounts is a standard audit methodology that has been used for decades. During cross-examination, she admitted that she has not applied this method in other cases but stated that it has been used in other cases. However, she later testified that she did not know how this method has been used in other cases, she was not aware if other auditors pick a ratio from one month and apply that ratio to every month, as was done here, and she did not know if the method has been used for decades. She further testified that she was directed to use this method by her supervisor, Mr. Logalbo. Mr. Logalbo was not presented as a witness by the Division.

39. Ms. Jarczewski’s testimony included several contradictions as discussed in the findings of fact above, including her admission that she did not know if the audit methodology used here had been used for decades, despite her earlier testimony that it had been (*see* finding of

fact 38), her misidentification of exhibit F as the entire audit file (except for an email attachment), and subsequent admission that summaries and workpapers were omitted (*see* finding of fact 28); her initial testimony that she reviewed petitioner's records and could not confirm transaction dates, and subsequent testimony that she could not recall if she looked at the checks provided to confirm whether the dates and names on the checks matched with the dates and names on the sales ledger (*see* finding of fact 30); her initial testimony that she believed there were unreported cash sales based on internet reviews, compared with her subsequent admission that she could not state specifically what she looked at to confirm that a review did not match a sale recorded in the sales ledger and concession that the reviews, alone, did not show that there were unreported sales (*see* finding of fact 33); and the contradictions in her testimony regarding the news articles she relied on to determine there were unreported sales (*see* findings of fact 34 and 35). Ms. Jarczewski's testimony was contradictory, evasive, and forgetful of relevant and material aspects of the audit, and as such, was not credible.

40. Petitioner credibly testified that, in some months, he incurred more fuel costs than he earned in sales and that there was a wide range of fuel expenses incurred compared to how much money he earned in sales from month to month. The distance he traveled for a job varied and did not correlate to how much he earned in revenue. Petitioner provided an example of varying fuel costs in a situation where he cut down a tree for a customer and the next-door neighbor wanted the wood chips. In this instance, petitioner did not have to drive around to find an open dump site, as opposed to occasions where he cut and removed a tree and then was required to drive a longer distance to find a dump site, incurring additional fuel expenses. Petitioner testified regarding another occasion where the income earned was high, but fuel cost was low because he had to take down 200 dead trees but did not have to remove them. In this

example, the fuel use was only 6-8 gallons for chainsaws, compared to \$10,000.00 in sales for completion of the job.

41. In some months, petitioner had to travel farther away for jobs to earn the same fee than other months where jobs were closer. The customer checks petitioner provided during the audit show the full address of the customers' locations and correspond with petitioner's sales ledger. The Division's audit methodology did not factor in the customers' locations.

42. During the audit period, dump locations that accepted tree debris were at times filled to capacity because of the presence of emerald ash borer disease that affected trees in the area. When petitioner transported tree debris from job locations to a dump that was already full, he would either drive to another dump that was still accepting debris or the debris was stored at his business location and then reloaded at a later time for transport to a facility that was able to accept the debris. The additional distance traveled to find a dump site was not reflected in the sales price charged to the customer. The removal of tree debris from a customer's location and the subsequent storage and later dumping of the debris could span months.

43. Similarly, when weather prevented petitioner from dumping debris upon completion of jobs, he stored the debris in his yard and stockpiled it until he was able to dump it later, during a slow month. While paid in one month for cutting down and removing trees, he then incurred additional fuel costs during another month when the dumping spots were accessible and he reloaded the debris and drove it to the dump site.

44. In slow months, petitioner drove to various locations to provide estimates, loaded up wood chips and stockpiled debris for disposal. During that time, he still incurred fuel expenses without generating revenue.

45. Petitioner incurred fuel expenses traveling to locations to provide estimates.

Estimates did not always result in sales and the fuel used when driving to the locations to give estimates was not related to petitioner's gross sales for the month. Occasionally petitioner drove to a location where he concluded that a tree did not need to be taken down.

46. Some jobs were not completed in one day and required multiple trips to the same location.

47. Petitioner has had epilepsy since 1999. Due to this condition, he is unable to obtain a commercial driver's license (CDL). As a result of this, he cannot drive large trucks and his trucks must be under the CDL weight of 26,000 pounds. Petitioner is also restricted from driving a pickup truck with a trailer that weighs over 10,000 pounds. Petitioner cannot drive and operate the same equipment as used by his competitors due to his restricted driver's license. Because petitioner cannot operate equipment over certain weight limits, he must make multiple trips for jobs that require the disposal of logs, wood chips, or tree debris that exceed the capacity limits.

48. Petitioner used different trucks for different types of jobs. For some jobs, he begins with one truck, then returns to his business location for a different truck and returns to the job site with that truck, creating extra trips that a competitor with a CDL does not make.

49. A large part of petitioner's work involves climbing trees to cut them. Petitioner specializes in climbing trees to access areas where larger equipment, such as a bucket truck, crane or spider lift, cannot access. This work cannot be performed during inclement weather.

50. Petitioner incurs higher insurance costs than his competitors because he is physically climbing into trees, instead of using large spider lifts.

51. Pursuant to State Administrative Procedure Act (SAPA) § 306 (4), official notice is taken of New York State Energy Research and Development Authority (NYSERDA) Monthly

Average Gasoline Prices (<https://www.nyserda.ny.gov/Energy-Prices/Motor-Gasoline/Monthly-Average-Motor-Gasoline-Prices>).⁵ The monthly average gas prices (cents per gallon) in upstate New York during the period at issue were as follows:

	2019	2018	2017	2016
Jan	246.6	261.8	243.1	
Feb	241.6	267.1	235.1	
March		262.3	230.8	
April		276.1	242.1	
May		294.2	242.0	
June		298.3	236.5	234.8
July		292.0	231.9	228.4
Aug		291.5	238.6	221.9
Sept		292.2	271.8	222.5
Oct		291.8	258.8	228.2
Nov		283.4	258.9	230.0
Dec		264.1	254.4	234.4

52. Petitioner’s business was subject to a follow-up sales tax audit for the period March 1, 2019 through August 31, 2021. The Division determined that petitioner did not owe any additional sales and use taxes for the period and issued a no-change letter on December 2, 2022.

53. Petitioner introduced evidence of his filing history for periods before, during, and after the audit period, showing that he timely filed sales tax returns and reported and remitted sales tax therewith. For the periods December 1, 2015 through November 30, 2016, petitioner reported \$236,255.00 in taxable sales. For the periods December 1, 2016 through November 30,

⁵ SAPA provides that official notice may be taken of all facts of which judicial notice could be taken (SAPA § 306 [4]). A court may only take judicial notice of particular facts if the items are of common knowledge or are determinable by referring to a source of indisputable accuracy (*Matter of Crater Club v Adirondack Park Agency*, 86 AD2d 714, 715 [3d Dept 1982], *aff’d* 57 NY2d 990 [1982]). It is permissible to take official notice of NYSERDA’s Monthly Average Gasoline Prices because they are “determinable from a source of indisputable accuracy” and are a matter of public record (*see Matter of Sunoco, Inc. [R&M] Combined Affiliates*, Tax Appeals Tribunal, November 18, 2024; *Matter of Piscopo*, Tax Appeals Tribunal, April 29, 2019; *see also Matter of Cento Props Co. v Assessor*, 71 AD3d 1015, 1017 [2d Dept 2010]; *Kingsbrook Jewish Med. Ctr. v Allstate Ins. Co.*, 61 AD3d 13, 20 [2d Dept 2009] [material derived from official government websites may be the subject of judicial notice]; *Pargett v Wal-Mart Stores*, 2020 WL 5028317, at *3 (C.D. Cal. Apr. 10, 2020) [taking judicial notice of documents published on the Department of Energy’s website]).

2017, petitioner reported \$286,760.00 in taxable sales. For the periods December 1, 2017 through November 30, 2018, petitioner reported \$244,605.00 in taxable sales. For the periods December 1, 2018 through November 30, 2019, petitioner reported \$232,770.00 in taxable sales. For the periods December 1, 2019 through November 30, 2020, petitioner reported \$252,971.00 in taxable sales. For the periods December 1, 2020 through November 30, 2021, petitioner reported \$269,550.00 in taxable sales.

54. Petitioner submitted unnumbered proposed findings of fact in narrative format. Given the manner in which such proposed findings of fact were presented, it is not possible to make a ruling on such (*see* SAPA § 307 [1]). However, the relevant and appropriately supported portions of petitioner's proposed findings of fact have been incorporated herein.

CONCLUSIONS OF LAW

A. Tax Law § 1135 (a) (1) provides that “[e]very person required to collect tax shall keep records of every sale . . . and of all amounts paid, charged or due thereon and of the tax payable thereon, in such form as the commissioner of taxation and finance may by regulation require.” Such records include a “copy of each sales slip, invoice, receipt, statement or memorandum upon which subdivision (a) of section eleven hundred thirty-two requires that the tax be stated separately” (*id.*). Further, the Division's sales tax regulations provide as follows:

“(b) Sales records.

(1) Every person required to collect tax, including every person purchasing or selling tangible personal property for resale must keep records of every sale . . . and all amounts paid, charged or due thereon, and of the tax payable thereon. The records must contain a true copy of each:

(i) sales slip, invoice, receipt, contract, statement or other memorandum of sale;

(ii) guest check, hotel guest check, receipt from admissions such as ticket stubs, receipt from dues; and

(iii) cash register tape and any other original sales document.

Where no written document is given to the customer, the seller shall keep a daily record of all cash and credit sales in a day book or similar book” (20 NYCRR 533.2 [b]).

If the records of a taxpayer are determined to be incorrect or insufficient, the return filed on the basis of information obtained from such records may be deemed to be incorrect or insufficient (*see* 20 NYCRR 533.2 [g]). 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 [.]” (Tax Law § 1138 [a] [1]). When acting pursuant to Tax Law § 1138 (a) (1), the Division is required to select an audit methodology reasonably calculated to reflect the tax due. The burden then rests upon the taxpayer to demonstrate that the audit methodology or the amount of the assessment was erroneous (*see Matter of Your Own Choice*, Tax Appeals Tribunal, February 20, 2003).

B. The standard for reviewing a sales tax audit where external indices were employed is as follows:

“The Division must first request and thoroughly examine the taxpayer’s books and records for the entire period of the proposed assessment. The purpose of the examination is to determine, through verification drawn independently from within these records, whether they are in fact so insufficient that it is virtually impossible for the Division to verify taxable sales receipts and conduct a complete audit from which the exact amount of tax due can be determined. Where the Division follows this procedure, and thereby demonstrates that the records are incomplete or inaccurate, the Division may resort to external indices to estimate tax. The estimate methodology utilized must be reasonably calculated to reflect taxes due, but exactness in the outcome of the audit method is not required. The taxpayer bears the burden of proving with clear and convincing evidence that the assessment is erroneous or that the audit methodology is unreasonable. In addition, considerable latitude is given an auditor’s method of estimating sales under such circumstances as exist in each case” (*Matter of Abbasi*, Tax Appeals Tribunal, June 12, 2008, citing *Matter of Your Own Choice*, Tax Appeals Tribunal, February 20, 2003; *Matter of AGDN, Inc.*, Tax Appeals Tribunal, February 6, 1997).

C. In this case, the record establishes the Division's clear and unequivocal written requests for books and records of petitioner's sales, including a request for sales invoices for the entire audit period. Petitioner provided a sales ledger, bank statements, copies of customers' check payments, copies of deposit slips, deposit detail information, and exemption certificates with corresponding exempt sales invoices for the entire audit period. However, other than invoices for exempt sales, petitioner did not provide sales invoices for the audit period. While petitioner credibly testified that such invoices were inadvertently discarded by his sister (*see* finding of fact 13), the reason for the unavailability of invoices is irrelevant when determining whether the Division properly resorted to an alternative audit methodology due to the lack of complete records.

Petitioner argues that the sales ledger, customer checks, and deposit information were sufficient for the Division to conduct an audit without resorting to external indices. However, without sales invoices, the Division was unable to verify reported sales by cross-checking with source documents and could not confirm if all cash sales were recorded in the sales ledger (*see Matter of Club Marakesh v Tax Commn. of State of N.Y.*, 151 AD2d 908, 909-910 [3d Dept 1989], *lv denied* 74 NY2d 616 [1989]; *Matter of Crescent Beach*, Tax Appeals Tribunal, September 22, 2011; *Matter of 33 Virginia Place*, Tax Appeals Tribunal, December 23, 2009). Without sequentially numbered sales invoices, the sales ledger and bank statements are insufficient to establish that all cash receipts were recorded and deposited. Absent such invoices, petitioner had no system of internal controls to ensure that each sale and the tax due on that sale were separately recorded and that the monies collected were deposited in petitioner's bank account. As such, the Division was entitled to resort to external indices to determine petitioner's sales and use tax liability.

D. Although considerable latitude is given to an auditor's method of estimating sales tax under such circumstances as may exist in a given case, it is necessary that the record contain sufficient evidence to allow the trier of fact to determine whether the audit has a rational basis (*see Matter of Khan*, Tax Appeals Tribunal, September 4, 2008; citing *Matter of Grecian Sq. v New York State Tax Commn.*, 119 AD2d 948, 950 [3d Dept 1986]). A determination of tax must have a rational basis in order to be sustained upon review (*id.*). The presumption of correctness raised by the issuance of the assessment, in itself, provides the rational basis, so long as no evidence is introduced challenging the assessment (*see Matter of Tavalacci v State Tax Commn.*, 77 AD2d 759, 760 [3d Dept 1980]; *Matter of Leogrande v Tax Appeals Trib.*, 187 AD2d 768, 769 [3d Dept 1992], *lv denied* 81 NY2d 704 [1993]). Evidence that both rebuts the presumption of correctness and indicates the irrationality of the audit may appear on the face of the audit as described by the Division through testimony or documentation (*see Matter of Snyder v State Tax Commn.*, 114 AD2d 567, 568 [3d Dept 1985]; *Matter of Khan*; *Matter of Fortunato*, Tax Appeals Tribunal, February 22, 1990); from factors underlying the audit which are developed by the petitioner at hearing (*see Matter of Ristorante Puglia, Ltd. v Chu*, 102 AD2d 348, 350-351 [3d Dept 1984]; *Matter of Fokos Lounge*, Tax Appeals Tribunal, March 7, 1991 [wherein the petitioner proved that its utility meter readings bore no relationship to its level of business activity]); or in the inability of the Division to identify the basis of the audit methodology in response to questions posed at the hearing (*see Matter of Basileo*, Tax Appeals Tribunal, May 9, 1991; *Matter of Fokos Lounge*; *Matter of Shop Rite Wines & Liqs.*, Tax Appeals Tribunal, February 22, 1991; *Matter of Fashana*, Tax Appeals Tribunal, September 21, 1989).

E. A review of the record shows that the audit method used by the Division in this matter lacked a rational basis. It is initially noted that the Division's method of calculating a ratio by dividing the cost of monthly fuel purchases per credit card statements by monthly sales in order to compare fuel usage to sales, and then applying the lowest monthly ratio calculated to every month, in the manner applied here, is irrational on its face. The Division's auditor contended that the method was reasonable because "if there is more fuel used, it's practical to deduce that there is [sic] more sales." However, the Division did not use the amount of fuel *usage* to calculate the ratio; instead, it merely used the fuel *costs* from credit card records. The Division's method is facially flawed because even if fuel *usage* correlated to sales, the audit method did not compare fuel *usage* to sales, but compared fuel *expenses* to sales, without factoring in the fluctuating cost of fuel. For example, if petitioner had the same fuel usage in two different months, and in the second month, the price of gas was \$.10 higher than in the first month, the fuel expense in the second month would necessarily be greater than in the first month, even though the same amount of fuel was consumed. Under the Division's audit method of using a ratio of fuel *expenses* (from petitioner's credit card statements) to the amount of sales, the Division presumed that petitioner's sales should be greater in the second month, because the fuel *expenses* were greater, even though fuel *usage* remained the same. This method disregarded the higher fuel cost and ignored the fact that the fuel usage was the same in both months.

This flaw is evidenced by comparing entries in the Division's schedule C (*see* appendix A) with the average monthly fuel costs (*see* finding of fact 51). A comparison of August 2017, the test month chosen by the Division to calculate the ratio that was applied to every other month, to November 2018 demonstrates the inherent flaw in the Division's method. In August

2017, fuel purchases totaled \$1,066.25 (*see* appendix A) and the average gas price was \$2.386 per gallon (*see* finding of fact 51). Based on these figures, petitioner used 446.8776 gallons of fuel in August 2017 ($1,066.25 \div 2.386 = 446.8776$). In November 2018, fuel purchases totaled \$1,241.84 (*see* appendix A) and the average gas price was \$2.834 per gallon (*see* finding of fact 51). Based on these figures, petitioner used 438.1934 gallons of fuel in November 2018 ($1,241.84 \div 2.834 = 438.1934$). Although petitioner used less fuel in November 2018 than he used in August 2017, the Division calculated higher audited sales for November 2018 (\$61,761.58) than for August 2017 (\$53,028.80) (*see* appendix A), despite its premise that the more fuel used, the greater the sales should be.⁶

While exactness in the Division's audit method is not required, the method must be reasonably calculated to reflect the taxes due (*see Matter of Abbasi*). The audit method used by the Division here was not reasonably calculated to reflect the taxes due and failed to calculate the taxes in the manner described by the Division. If the Division intended to compare fuel *usage* to monthly sales, as it purports to do in explaining its audit method, it could have done a simple mathematical calculation to determine estimated monthly fuel usage, by dividing the monthly fuel expenses by the average gasoline price each month. The Division did not perform such calculations and, instead, merely used the charges on petitioner's credit card statements as the numerator for the ratio. There is no question that fuel prices increased and decreased erratically within the audit period. Without factoring in the fluctuating price of fuel or a reasonable formula for estimating the amount of fuel usage, any calculation of taxable sales based merely on the cost of monthly fuel purchases was necessarily arbitrary and unreasonable (*see Matter of Savino*, Tax Appeals Tribunal, April 20, 1989).

⁶ It is further noted that out of the 33 months in the audit period, 21 months had a higher monthly average fuel price than the month chosen by the Division (*see* finding of fact 51).

F. The Division's audit methodology also lacked a rational basis due to the Division's inability to identify the basis of the audit methodology. The Division claims that the basis for the audit methodology was the experience of Ms. Jarczewski, but she could not explain her "audit experience" in response to questions posed at the hearing (*see Matter of Khan; Matter of Basileo*). It is well established that the record must contain information identifying the external index used by the Division to establish a rational basis for the audit methodology employed (*see Matter of Grecian Sq. v New York State Tax Commn.*, 119 AD2d at 950; *Matter of Fokos Lounge*). The Court in *Grecian Square* considered an audit that estimated a bar's sales based on an auditor's wide experience in auditing other bars. Because there was no testimony or evidence in the record that detailed the nature or applicability of this audit experience to the bar in question, the Court concluded that there was insufficient evidence to determine whether a rational basis existed for the auditor's computation (*Matter of Grecian Sq. v New York State Tax Commn.*, 119 AD2d at 950). Similarly, in *Matter of Khan*, the Tax Appeals Tribunal rejected the Division's estimate of automotive repair sales based on the Division's experience of rates charged. The Tax Appeals Tribunal found that the Division failed to show a rational basis for its audit methodology because the record did not disclose any specific information concerning the auditor's audit experience and stated:

"Without at least some indication in the audit report to show how the audit experience relied on ties into, and has relevance to, the facts of this taxpayers' business (e.g., was the other audit experience derived from audits of small gas stations, in similar neighborhoods, were they local businesses), we have no way of knowing whether the audit experience relied on is valid or not" (*Matter of Khan*).

The Division is required to offer evidence to show how the alleged prior audit experience related to the specific taxpayer (*id.*; *see also Matter of Abassi* [rejecting estimation where the Division's auditor, on cross examination, was unable to provide a detailed description of the two

purportedly comparable taxpayers]; *Matter of Savino* [audit method rejected because there was no testimony from the auditor as to what year or years his audit experience was derived from or the number of comparable facilities, their type or geographic location]). Such information is necessary to provide the taxpayer with an opportunity to meet their burden of proving such methodology unreasonable (*Matter of Basileo*).

In this matter, the Division asserts that its audit method of comparing fuel purchases to sales was based on experience and was used for other audits. However, during cross-examination, the Division's auditor admitted that she had never used this method before, did not know how this method had been used in other cases, and did not know if other auditors used a ratio from one month and applied that ratio to every month in an audit period, as was done here. Moreover, while she testified on direct examination that this method had been used "for decades," she later admitted that she did not know if the method had been used for decades. The Division failed to identify what "experience" the method was based on and failed to provide any support for its assertion that the fuel purchases correlate to sales for petitioner's business type. While the Division claimed the method was used for other businesses, it failed to identify the type of other businesses and whether any businesses were similar to petitioner's (for example, were they similar tree cutting businesses or were they taxi and livery services), the type of equipment used by the other businesses, geographic location, etc. The auditor could not state whether the same methodology of applying the lowest ratio, derived from one month, to the other months over the entire audit period was used for other audits, and there is no indication whether other factors, such as fluctuating gas prices, was factored in for other audits. The Division provided no meaningful response to questions regarding the relation of fuel purchases to sales for petitioner's business type or the application of the lowest monthly ratio to every

month during the audit period. The auditor's conclusory testimony that it is "practical to deduce" that the more fuel used, the more sales there should be, and further that she used the lowest ratio because she believed there were unreported cash sales based on her "experience" and belief that using any other ratio would not make sense because "if we believe he is underreporting sales, it's reasonable to believe he is underreporting it for every period of time" does not provide the required rational basis for estimating tax liability (*see Matter of Abbasi* [rejecting the Division's use of a rent-to-sales ratio where "the auditor began and ended his analysis with 'a benchmark kind of thing' of ten times rent, which was apparently drawn from flea market audits and 'regularly used' in his office. The habits of mind so described do not in our view provide the required rational basis for estimating tax liability"]).

G. Besides the undescribed audit "experience," the Division's other asserted grounds for using an audit method comparing fuel purchases to sales and applying the lowest calculated ratio from a single month to every month in the audit period likewise fail to provide a rational basis. The Division's auditor testified that she used the lowest ratio in order to calculate additional tax due for every month in the audit period because she believed there were unreported cash sales. According to the Division's auditor, using the lowest ratio created the highest amount of tax due to account for the suspected unreported cash sales. In addition to Ms. Jarczewski's claimed experience, she based her determination of unreported cash sales on internet reviews and news articles. The auditor's reliance on internet reviews is irrational, as there is no way to verify the authenticity of those reviews, most were undated and several of them did not have complete names or used pseudonyms. As such, it is impossible to determine whether they represented actual taxable sales during the audit period. Her reliance on news articles as support for her conclusion that there were unreported cash sales is likewise irrational. Beyond the inherent

unreliability of unauthenticated articles printed from the internet, one article she relied on simply indicated that petitioner had “10 jobs on the docket.” It did not state the dates those jobs would be performed or the amount of sales revenue. According to Ms. Jarczewski, she knew the sales were not reflected in petitioner’s records because there were not as many recordings of sales in the sales ledger as stated in the article during that period of time. However, the record shows that petitioner recorded 11 transactions in his sales ledger the month of the article. Moreover, the article was from the end of February 2019. The following month, petitioner recorded 20 transactions in his sales ledger. Ms. Jarczewski conceded that she did not look at the following month to see what transactions were recorded because it was after the audit period. As such, the Division’s other grounds for concluding there were unreported cash sales does not provide a rational basis for the audit method used.⁷ The Division’s audit method of applying the lowest monthly ratio to every month within the audit period was not reasonably calculated to reflect taxes due. Instead, the method was chosen to produce the greatest amount of tax due. The Division has not provided a rational basis for its assumption that petitioner had unreported cash sales. As such, the method is unreasonable and the assessment of additional tax due on sales is erroneous.

H. Furthermore, petitioner provided clear and convincing evidence at the hearing that both rebutted the presumption of correctness and indicated the irrationality of the audit method. Petitioner rebutted the Division’s claim that internet reviews evidenced unreported sales,

⁷ This Division asserts in its brief that the “squeal” information is additional support for the determination that petitioner had unreported sales. However, Ms. Jarczewski testified that she did not use the squeal information as a basis for her conclusion that there were unreported sales. The Division provided no substantiation for the squeal information alleged in the pre-audit analysis and the pre-audit analysis is mere hearsay. While an administrative agency may consider hearsay information, the agency has an obligation to insure that the information relied upon is reliable and accurate (*see Matter of Georgian Motel Corp. v New York State Liq. Auth.*, 184 AD2d 853, 855 [3d Dept 1992]). The record is devoid of information suggesting any indicia of reliability of the squeal information. As such, I accord the alleged squeal information no weight.

showing customer names that matched the reviews recorded in the sales ledger and customer checks deposited in the bank account. Petitioner rebutted the Division's claim that petitioner did not report the "10 jobs on the docket" referenced in a news article relied on by the Division's auditor, showing that in the month of the article, he recorded 11 transactions in the sales ledger, and the month immediately following the storm referenced in the article, he recorded 20 sales transactions. Petitioner refuted the Division's assertion that another news article, referencing a homeowner named Mrs. Shih, showed that petitioner had unreported sales. Contrary to the Division's contention, petitioner's sales ledger for February 2019 reports a sales transaction with Mrs. Shih and shows that sales tax was charged for the job.

Petitioner further established that audit method used was unreasonable. Petitioner provided credible and unrefuted testimony establishing that the business's fuel purchases do not correlate with sales. The distance he travels for a job varies and does not correlate to how much he earns in revenue. Petitioner provided documentary evidence, by way of the copies of customers' checks which corresponded to the sales entered in the sales ledger, which showed the customer's complete address, yet the Division did not factor in the differing mileage to each job when concluding that fuel use directly related to sales. Petitioner credibly testified that the business's fuel usage varies from month to month based on a number of factors, including weather, the type of job performed, and the number of trips he made to job locations and to debris dump sites. He further established that there is no linear relationship between sales receipts and fuel usage or expenses for his business, credibly testifying that his specialty, climbing tress for trimming or removal, required less fuel than a job using heavy equipment, but earned higher fees. He further credibly testified that the trucks regularly consumed fuel for trips where no income was generated, such as when he drove to various locations to provide

estimates. Estimates did not always result in sales, and when they did, the sales often were accounted for in a different month. Moreover, petitioner credibly testified that there were occasions during the audit period that he traveled to a location to give an estimate and then told the caller that the tree in question did not need to be taken down, thus not resulting in a sale. Thus, the fuel used when driving to locations to give estimates is simply not related to petitioner's gross sales for the month. Petitioner further credibly testified that, during the audit period, the region was dealing with the presence of emerald ash borer disease that affected trees in the area. As a result, dump locations that accepted tree debris were at times filled to capacity. When petitioner transported tree debris from job locations to a dump that was already full, he either drove to another dump that accepted debris or stored the debris at his business location and then later reloaded it for transport to a facility that was accepting the debris at a later date. The removal of tree debris from a customer's location and the subsequent storage and later dumping of the debris could span months and the additional distance traveled to find a dump site was not reflected in the sales price to the customer. Petitioner further established that his license is restricted because he has epilepsy. Due to his condition, he is unable to obtain a CDL. As a result of the restriction, he cannot drive large trucks and his trucks must be under the CDL weight of 26,000 pounds. This restriction also prevented petitioner from driving a pickup truck with a trailer that weighs over 10,000 pounds. Petitioner cannot drive and operate the same equipment as used by competitors because of his restricted license. Because petitioner is restricted from operating equipment over certain weight limits, he made multiple trips for jobs that required the disposal of logs, wood chips, or tree debris that exceeded the capacity limits, but did not generate more revenue for the additional trips. Thus, petitioner has established, by clear and convincing evidence, that the Division's audit method was unreasonable.

Finally, the record shows that, although petitioner provided the Division with exemption certificates and invoices substantiating exempt sales for the audit period, the Division did not adjust its calculation of audited sales tax due to account for the exempt sales. The Division's failure to account for exempt sales, which the Division conceded were substantiated, was erroneous.

Because the sales tax method used by the Division was unreasonable, petitioner need not prove the proper amount of the assessment (*see Matter of Majestic Deli Grocery*, Tax Appeals Tribunal, April 14, 2017; *Matter of Paladino*, Tax Appeals Tribunal, June 30, 1994). Based on the foregoing, the Division's assessment of additional tax due on sales in the amount of \$82,048.04 is canceled.

I. The Division also determined additional tax due on capital asset purchases in the amount of \$3,317.22. During the audit, the Division requested and reviewed capital asset purchase records. The Division determined that petitioner's capital asset purchase records were inadequate because records were not provided for several of the vehicles registered with DMV. The Division determined additional tax due on capital asset purchases in the amount of \$3,317.22. Petitioner presented no evidence or argument on this issue during the hearing. Therefore, this portion of the assessment is sustained.

J. The Division assessed penalties pursuant to Tax Law § 1145 (a) (1) and (i) in the amount of \$32,961.95 and \$51,000.00, respectively.

Tax Law § 1145 (a) (1) provides for penalties and interest on the underpayment of tax, based on a percentage of the amount of tax due. In as much as this penalty stems from the Division's assessment of additional tax due on sales in the amount of \$82,048.04, which has

been canceled by virtue of the conclusions of law above, such corresponding penalty is hereby canceled.

Tax Law § 1145 (i) provides for the assessment of penalties for the failure to maintain and provide adequate records. Pursuant to Tax Law § 1145 (i), a person required to maintain records under article 28, who fails to maintain or make available those records to the Division, is subject to a penalty not to exceed one thousand dollars for the first quarter, and up to five thousand dollars for each additional quarter during which such failure occurs. For purposes of the penalty imposed by Tax Law § 1145 (i), a person will be considered to have failed to make or maintain the required records when the records made or maintained by that person for a quarterly period make it virtually impossible to verify sales receipts or the taxability of those receipts and to conduct a complete audit.

Both Tax Law § 1145 (a) and (i) provide for the abatement of penalties if the failure was due to reasonable cause and not due to willful neglect. Specifically, Tax Law § 1145 (a) (1) (iii) states:

“If the commissioner of taxation and finance determines that such failure or delay was due to reasonable cause and not due to willful neglect, he shall remit all of such penalty and that portion of such interest that exceeds the interest that would be payable if such interest were computed at the underpayment rate set by the commissioner of taxation and finance pursuant to section eleven hundred forty-two. The commissioner shall promulgate rules and regulations as to what constitutes reasonable cause.”

Similarly, Tax Law § 1145 (i) provides, in part, that “[i]f the commissioner determines that a failure to make or maintain or make available records in any quarter was entirely due to reasonable cause and not to willful neglect, the commissioner must remit the penalty imposed for that quarter.”

“Reasonable cause” is not defined in Tax Law § 1145, but the Division's regulations set forth grounds constituting reasonable cause (*see* 20 NYCRR 2392.1 [d]).⁸ These grounds include death, illness or absence of the taxpayer; destruction of the place of business or business records; inability to timely assemble information; pending petitions, actions or proceedings; and any other ground for delinquency, which would appear to a person of ordinary prudence and intelligence as reasonable cause and an absence of willful neglect (*id.*). Petitioner has met his burden of proving, by clear and convincing evidence, that penalties should be abated due to reasonable cause and the lack of willful neglect.

First, to the extent that the Division deemed petitioner's records inadequate for purposes of imposing penalties pursuant to Tax Law § 1145 (i), based on their belief that there were unreported cash sales, the record establishes that the grounds presented for this assertion are unfounded. As discussed above, the alleged squeal information is afforded no weight (*see* footnote 7) and the Division's reliance on internet reviews and news articles as a basis for its determination of inadequate records was irrational (*see* conclusion of law G). The only legitimate grounds for finding petitioner's records inadequate was the lack of complete invoices for the audit period. Nevertheless, petitioner has provided clear and convincing evidence that explained why complete invoices were not available. Petitioner's credible testimony, that described how some invoices were inadvertently discarded by his sister during a family tragedy, established facts that demonstrated reasonable cause and an absence of willful neglect for petitioner's inability to provide the complete invoices for the audit period (*see* 20 NYCRR

⁸ Although 20 NYCRR 2392.1 (a) (1) lists Tax Law § 1145 (a) (1) (i) and (ii), (c), and (e), and does not specifically list Tax Law § 1145 (i) in its reference to various sections of the Tax Law, I find that 20 NYCRR 2392.1 (d) is applicable to penalties imposed under Tax Law § 1145 (i), which provides that all the provisions of article 28 are deemed to apply to the penalties in this subdivision. As such, I find that Tax Law § 1145 (i) must be read in *pari materia* with Tax Law § 1145 (a) (1) (i) and the definition of reasonable cause in 20 NYCRR 2392.1 (d) applies. The Division does not dispute the applicability of 20 NYCRR 2392.1 (d) to the penalties imposed by Tax Law § 1145 (i), and only argues that petitioner has not shown reasonable cause under those provisions.

2392.1 [d] [5]). Based on the foregoing, petitioner has established reasonable cause and the lack of willful neglect and, accordingly, the penalties are canceled.

K. The petition of Gregory A. Sojka, d/b/a Greg's Tree Service, is granted to the extent indicated in conclusions of law E, F, G, H and J, but is otherwise denied, the Division of Taxation is directed to modify the notice of determination, dated March 2, 2020, in accordance therewith, and the notice of determination, dated March 3, 2020, is canceled.

DATED: Albany, New York
April 10, 2025

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE

From Division's Schedule C: Sales – Additional Tax Due Calculation

<u>Sales per customer checks</u>									
Month	Fuel Amt Purchased	Amount (excl tax)	Ratio of Fuel to Sales	Ratio Used to Project	Audited Sales	Audited Sales per Quarter	Calculated Sales Tax	Sales Tax Paid	Additional Tax Due
06/30/16	1,185.70	43,514.42	0.0272	0.0201	58,969.51				
07/31/16	1,046.67	24,743.63	0.0423	0.0201	52,055.01				
08/31/16	1,165.90	27,111.61	0.0430	0.0201	57,984.78	169,009.30	14,788.31	6,990.75	7,797.56
09/30/16	1,103.59	23,127.86	0.0477	0.0201	54,885.86				
10/31/16	927.59	36,332.65	0.0255	0.0201	46,132.69				
11/30/16	605.06	18,145.29	0.0333	0.0201	30,092.01	131,110.56	11,472.17	6,452.19	5,019.98
12/31/16	700.59	10,735.17	0.0653	0.0201	34,843.09				
01/31/17	891.90	20,183.33 **	0.0442	0.0201	44,357.69				
02/28/17	566.70	26,400.02 **	0.0215	0.0201	28,184.21	107,384.99	9,396.19	4,074.38	5,321.81
03/31/17	987.22	16,771.62	0.0589	0.0201	49,098.32				
04/30/17	988.56	23,510.91	0.0420	0.0201	49,164.97				
05/31/17	1,099.55	20,391.44	0.0539	0.0201	54,684.94	152,948.23	13,382.97	4,096.25	9,286.72
06/30/17	1,556.48	35,306.55	0.0441	0.0201	77,409.86				
07/31/17	1,237.73	24,099.31	0.0514	0.0201	61,557.17				
08/31/17	1,066.25	53,028.66	0.0201	0.0201	53,028.80	191,995.82	16,799.63	9,173.44	7,626.19
09/30/17	1,310.91	27,406.35	0.0478	0.0201	65,196.70				
10/31/17	1,302.10	25,211.95	0.0516	0.0201	64,758.54				
11/30/17	814.35	30,477.20	0.0267	0.0201	40,500.87	170,456.11	14,914.91	6,947.44	7,967.47
12/31/17	682.56	7,802.30	0.0875	0.0201	33,946.39				
01/31/18	422.58	3,450.00	0.1225	0.0201	21,016.56				
02/28/18	448.64	9,923.68	0.0452	0.0201	22,312.63	77,275.58	6,761.61	1,413.12	5,348.49
03/31/18	744.20	7,401.15	0.1006	0.0201	37,012.18				
04/30/18	1,085.07	17,911.10	0.0606	0.0201	53,964.79				
05/31/18	1,511.74	32,639.99	0.0463	0.0201	75,184.76	166,161.73	14,539.15	4,078.75	10,460.40
06/30/18	1,502.17	38,396.56	0.0391	0.0201	74,708.81				
07/31/18	1,347.15	25,928.01	0.0520	0.0201	66,999.06				
08/31/18	1,433.34	34,276.84	0.0418	0.0201	71,285.62	212,993.48	18,636.93	7,881.06	10,755.87
09/30/18	1,361.59	34,669.77	0.0393	0.0201	67,717.21				
10/31/18	1,090.59	28,330.23	0.0385	0.0201	54,239.32				
11/30/18	1,241.84	29,315.51	0.0424	0.0201	61,761.58	183,718.11	16,075.33	7,355.63	8,719.70
12/31/18	674.61	7,400.69	0.0912	0.0201	33,551.00				
01/31/19	319.85	2,799.77	0.1142	0.0201	15,907.40				
02/28/19	507.67 *	8,193.33	0.0620	0.0201	25,248.42	74,706.82	6,536.85	2,793.00	3,743.85
	32,930.46	774,936.92			1,637,760.73	1,637,760.73	143,304.05	61,256.01	82,048.04

*Fuel purchases not provided for February 2019. Averaged February 2017 & February 2018.

**Amount excludes check(s) received from attorney

APPENDIX A