

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
SUNGARD CAPITAL CORP. AND SUBSIDIARIES	:	
SUNGARD DATA SYSTEMS, INC. AND SUBSIDIARIES	:	DETERMINATION
SUNGARD HIGHER EDUCATION MANAGED SERVICES, INC.	:	DTA NOS. 823631, 823632, 823680, 824167 AND 824256.
SUNGARD INSTITUTIONAL BROKERAGE, INC.	:	
SUNGARD DATA SYSTEMS, INC.	:	
for Redetermination of Deficiencies or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Years 2004, 2005 and 2006.	:	

Petitioners, Sungard Capital Corp. and Subsidiaries, Sungard Data Systems, Inc., and Subsidiaries, Sungard Higher Education Managed Services, Inc., Sungard Institutional Brokerage, Inc., and Sungard Data Systems, Inc., filed petitions for redetermination of deficiencies or for refunds of corporation franchise tax under article 9-A of the Tax Law for the years 2004, 2005 and 2006.

On January 15, 2013, petitioners, appearing by Alston & Bird, LLC (Richard C. Kariss, Esq., of counsel), and the Division of Taxation, appearing by Amanda Hiller, Esq. (Jennifer L. Baldwin, Esq., of counsel) waived a hearing and submitted these matters for determination based on documents and briefs to be submitted by July 15, 2013, which date commenced the six-month

period for issuance of this determination. By a letter dated January 9, 2014, this six-month period was extended for an additional three months (Tax Law § 2010[3]). After review of the evidence and arguments submitted, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

Whether SunGard Capital Corp. and Subsidiaries and SunGard Data Systems, Inc., and Subsidiaries (collectively referred to as petitioners) are entitled to refunds of corporation franchise tax based on their retroactive filings of their franchise tax reports on a combined basis for the period August 13, 2005 through December 31, 2005 and for the calendar year 2006 (referred to as the “audit years”).

FINDINGS OF FACT¹

1. Petitioner SunGard Data Systems, Inc. (SDS) is incorporated in Delaware with its headquarters located in Pennsylvania.
2. Petitioner SunGard Capital Corp. (SCC) is incorporated in Delaware with its headquarters located in Pennsylvania.
3. Petitioner SunGard Higher Education Managed Services, Inc. (SHEMS [f/k/a SunGard Collegis, Inc.]) is incorporated in Delaware with its headquarters located in Florida.
4. Petitioner SunGard Institutional Brokerage, Inc. (SIBI) is incorporated in New York.

¹ The parties executed and submitted a Stipulation of Facts setting forth 63 numbered stipulated facts and including 66 agreed-upon exhibits. To the extent such stipulated facts set forth procedural matters not in dispute, and include references to specific exhibits in support of such undisputed matters, the same have been renumbered and condensed (including elimination of the references to the supporting exhibits). As so renumbered and condensed, the stipulated facts are set forth within the Findings of Fact numbered 1 through 40.

5. For the calendar year 2005, SDS was the corporate parent of a group of affiliated companies for federal corporation income tax purposes (the SunGard Group or the Group) and was ultimately responsible for filing the consolidated federal income tax returns for the Group.

6. For the calendar year 2006, SCC became the corporate parent of the SunGard Group for federal corporation income tax purposes and was ultimately responsible for filing the consolidated federal income tax returns for the Group.

7. The New York State Department of Taxation and Finance (Department or Division) is an agency of the State of New York that is charged with the administration of the corporation franchise tax (the Tax).

8. For tax years beginning before 2005, SDS filed separate company corporation franchise tax returns in New York.

9. For tax years beginning before 2005, the subsidiary corporations of SDS that conducted business in New York filed corporation franchise tax returns in New York.

10. On August 11, 2005, a consortium of private equity investment funds (Sponsors or Investors) acquired the Sungard Group in a leveraged buyout transaction (LBO).

11. As part of the LBO, 25 of the subsidiary corporations of SDS, all of whom were C corporations prior to the LBO, were converted from C corporations to single-member limited liability companies (SMLLCs) or disregarded entities (DREs) for federal and state corporation income (and franchise) tax purposes.

12. The subsidiary corporations of SDS that were not converted to DREs, and that conducted business in New York, filed corporation franchise tax returns in New York for the 2005 calendar year. The subsidiary corporations that were not converted to DREs were engaged in three of the SunGard Group's four business segments.

13. The subsidiary corporations of SDS that were converted to DREs, and that conducted business in New York, filed corporation franchise returns in New York for the short period January 1, 2005 through August 12, 2005.

14. SDS filed a separate company franchise tax return in New York for the 2005 calendar year that included its DREs for the period August 13, 2005 through December 31, 2005.

15. For the calendar year 2006, SDS filed a separate company franchise tax return in New York that included its DREs.

16. The subsidiary corporations of SDS that were not converted to DREs, and that conducted business in New York, filed corporation franchise tax returns in New York for the 2006 calendar year.

17. SDS and Subsidiaries timely filed an amended corporation franchise tax return that included an application for refund of corporation franchise tax and MTA Surcharge in the amount of \$343,779.00 on the basis that those entities should have filed a combined corporation franchise tax return for the tax period August 13, 2005 through December 31, 2005 (2005 refund claim).

18. SCC and Subsidiaries timely filed an amended corporation franchise tax return that included an application for refund of corporation franchise tax and MTA Surcharge in the amount of \$2,183,747.00 on the basis that those entities should have filed a combined corporation franchise tax return for the 2006 calendar year (2006 refund claim).

19. The Division conducted a limited scope audit of the 2005 and 2006 refund claims. The audit was conducted concurrently with separate audits of SDS, SHEMS and SIBI.

20. On February 11, 2009, the Division received a letter from petitioners' counsel, Richard C. Kariss, Esq., providing information and a summary of petitioners' position with respect to the 2005 and 2006 refund claims.

21. The Division issued an audit appointment letter on March 2, 2009.

22. On June 2 - 4, 2009, the Division conducted interviews of certain employees of SDS:

- a) Mike Ruane—Chief Financial Officer.
- b) Michelle Burno—Senior Director of Benefits.
- c) Sandy Garcia—Senior Manager of Corporate HR.
- d) Pete Polasek—Executive Vice President of Business Development.
- e) Patty O'Shea—Vice President Corporate Tax.
- f) Leslie Brush—Vice President Legal
- g) Brian Robins—Chief Marketing Officer.
- h) Ed Rosario—Vice President Corporate Procurement.
- i) Eric Erikson—Vice President Corporate Treasury.
- j) Karen Mullane—Vice President Corporate Finance and Controller.
- k) Jorge Green—Vice President Corporate Audit.

Interview notes to reflect the statements made by the foregoing interviewees were prepared by the two Division auditors (Larry Snider and Kristine Sprung) who were present at the interviews. The interview notes prepared by Kristine Sprung include "added comments [by the interviewees] that clarify or correct the notes recorded during the interviews. Some of the comments are provided as modifications to the notes and others are statements made by email clarifying or confirming the accuracy of the notes recorded during the interviews."

23. The Division issued Information Document Request (IDR) Number 1 on June 8, 2009, and issued IDR Number 2 on June 26, 2009.

24. The Division received a response to IDR Numbers 1 and 2 on July 3, 2009.

25. The Division issued IDR Number 3 on August 19, 2009 and issued IDR Number 4 on August 27, 2009. The Division did not receive a response to IDR Number 3 or IDR Number 4.

26. On August 31, 2009 and February 17, 2010, respectively, the Division received letters from Richard C. Kariss, Esq., providing further information and setting forth petitioners' position with regard to the 2005 and 2006 refund claims.

27. On April 16, 2010, the Division issued correspondence through which it denied the application for refund by SDS and Subsidiaries in the amount of \$343,779.00 (the 2005 refund claim) and denied the application for refund by SCC and Subsidiaries in the amount of \$2,183,747.00 (the 2006 refund claim).

28. On May 11, 2010, SDS and Subsidiaries and SCC and Subsidiaries, respectively, timely appealed the denials of their applications for refunds by filing petitions for review of the denials with the Division of Tax Appeals (DTA).

29. On July 28, 2010, the Division of Taxation timely filed its answers to the petitions of SDS and Subsidiaries and SCC and Subsidiaries.

30. On August 17, 2010, SDS and Subsidiaries and SCC and Subsidiaries each timely filed a reply to the Division's answers to the petitions.

31. In an effort to gather more information regarding the 2005 and 2006 refund claims, the Division of Taxation issued IDR Number F-1 on June 14, 2010. The Division received a partial response to IDR Number F-1 on August 2, 2010.

32. Based on a separate company audit of SHEMS for the 2005 and 2006 calendar years, the Division issued a Notice of Deficiency dated March 15, 2010, which included the assessment of additional corporation franchise tax and interest in the amount of \$7,872.40.

33. On June 8, 2010, SHEMS timely appealed the Notice of Deficiency by filing a petition with the DTA. The Division of Taxation timely filed its answer to the SHEMS petition on

August 18, 2010, and SHEMS timely filed a reply to the Division's answer on September 7, 2010.

34. Based on a separate company audit of SIBI for the 2004, 2005 and 2006 calendar years, the Division issued a Notice of Deficiency dated November 15, 2010, which included the assessment of additional corporation franchise tax, interest and penalties in the amount of \$992,737.86.

35. On February 14, 2011, SIBI timely appealed the Notice of Deficiency by filing a petition with the DTA. The Division of Taxation timely filed its answer to SIBI's petition on May 18, 2011, and SIBI timely filed a reply to the Division's answer on June 7, 2011.

36. Based on a separate company audit of SDS for the 2004, 2005 and 2006 calendar years, the Division issued a Notice of Deficiency dated December 16, 2010, which included the assessment of additional tax, interest and penalties in the amount of \$1,158,872.67.

37. On March 16, 2011, SDS timely appealed the Notice of Deficiency by filing a petition with the DTA. The Division of Taxation timely filed its answer to SDS's petition on May 18, 2011, and SDS timely filed a reply to the Division's answer on June 7, 2011.

38. Stipulated facts numbered 51 through 57 note specifically that the following documents are included among the parties' 66 agreed-upon exhibits in these matters:

- a) a copy of SDS's 2006 Annual Report, SEC Form 10-K (Ex. 58).
- b) a copy of SunGard Global Business Conduct & Compliance Program guidelines adopted August 15, 2002 and most recently revised in August 2005 (Ex. 60).
- c) a partial copy of the Guarantee Agreement between SunGard Holdco, LLC, SDS, Solar Capital Corp., certain subsidiaries of SDS and JPMorgan Chase Bank, N.A., with a partial copy of the Credit Agreement between Solar Capital Corp. and certain overseas borrowers, SunGard Holdco LLC, SDS and its lenders, both dated August 11, 2005 (Ex. 61).

- d) a copy of the Management Agreement between SDS, SCC, SunGard Capital Corp. II, SunGard Holding Corp., SunGard Holdco LLC and the Sponsors, dated August 11, 2005 (Ex 62).
- e) copies of SIBI's Annual Audited Report, Form X-17A-5, filed with the U.S. Securities and Exchange Commission for the 2004, 2005 and 2006 calendar years (Exs 63, 64 and 65).
- f) a copy of SCC and Subsidiaries' 2006 Form 1120 spreadsheet (Ex. 66).

39. The parties have stipulated to the following:

- a) For the 2005 calendar year, SHEMS (on a separate basis) is not liable for additional corporation franchise tax and is not entitled to a refund of corporation franchise tax.
- b) For the 2004, 2005 and 2006 calendar year, SDS (on a separate basis) is not liable for additional corporation franchise tax and is not entitled to a refund of corporation franchise tax.
- c) For the 2004 and 2006 calendar years, SIBI (on a separate basis) is not liable for additional corporation franchise tax and is not entitled to a refund of corporation franchise tax.

40. The parties have further stipulated to the following:

- a) If it is finally determined that SDS should be permitted to file its corporation franchise tax return on a combined basis with all of its Subsidiaries for the tax period August 13, 2005 through December 31, 2005, then SDS and Subsidiaries is entitled to a refund of corporation franchise tax in the amount of \$376,577.00, plus interest.
- b) If it is finally determined that SCC should be permitted to file its corporation franchise tax return on a combined basis with all of its Subsidiaries for the 2006 calendar year, then SCC and Subsidiaries is entitled to a refund of corporation franchise tax in the amount of \$2,214,729.00, plus interest.
- c) If it is finally determined that SDS should not be permitted to file its corporation franchise tax return on a combined basis with all of its Subsidiaries for the tax period August 13, 2005 through December 31, 2005, then SIBI (on a separate basis) is liable for additional corporation franchise tax in the amount of \$150,000.00, plus interest for the 2005 calendar year.

41. All of the matters appealed above were consolidated by the Division of Tax Appeals. In turn, the parties have reached agreement and resolved all of the issues presented save for the determinative issue of whether the SunGard Group should file its corporation franchise tax returns on a combined basis rather than on a separate company basis for the 2005 (short period) and 2006 tax years.

42. The SunGard Group included dozens of legal entities involved in similar and related lines of business. In 2005, SDS owned at least 80 percent of the capital stock of all of the entities within the Group. In 2006, SCC owned at least 80 percent of the capital stock of all of the entities within the Group. In 2005, there were 82 members in the SDS group, including SDS and 8 additional holding companies, 2 inactive corporations (SunGard Availability Services, Ltd. and MBM, Inc.), a sales corporation (Plaid Brothers Software, Inc.), a securities broker (SunGard Institutional Brokerage, Inc. [SIBI]), a cash management company (Portfolio Ventures, Inc.) and one company (Online Processing, Inc. [OSP]), whose principal business activity is listed as computer services, but which had no receipts or sales of its own and listed revenues consisting only of the receipt of partnership income.² In 2006, the SDS group consisted of 58 members, including SCC and 12 additional holding companies, and the same 2 inactive companies, sales corporation, securities broker, cash management corporation and corporation whose revenues consisted only of the receipt of partnership income.³

² The holding companies listed in 2005 are SunGard investment Ventures, Inc., SIS Europe Holdings, Inc., SRS Development, Inc., SunGard Development Corporation, SunGard Canada Holdings, Inc., SunGard SAS Holdings, Inc., SunGard International Holding, Inc. and SunGard SAS Canada Holding, Inc.

³ The holding companies listed for 2006 are SunGard Capital Corp. II, SunGard Holding Corp., SDS, SIS Europe Holdings, Inc., SRS Development, Inc., SunGard Development Corporation, SunGard Canada Holdings, Inc., SunGard SSR Canada Holdings, Inc., SunGard SAS Holdings Co., ASI Australia Holdings Co., SunGard SAS Canada Holdings, Inc., SunGard International Holdings, Inc. and SunGard i Works Holdings, Inc.

43. The SunGard Group's primary line of business is providing information technology sales and services, including data processing, information availability, software solutions and software licensing, through four main business segments, as follows:

- a) The Financial Systems (FS) business segment that provides data processing services for customers in the financial services industry, such as investment banks, broker-dealers and insurance companies.
- b) The Public Sector (PS) business segment that provides data processing services for public sector entities, including government agencies, nonprofit agencies, nonprofit entities and municipal organizations.
- c) The Higher Education (HE) business segment that provides data processing services for colleges and universities.
- d) The Availability Services (AS) business segment that provides systems management, business continuity, data protection and disaster recovery services for customers in all sectors of the economy and for entities and other business segments within the SunGard Group.⁴

Per their annual SEC Forms 10-K, petitioners are described as offering “a huge number of products in complicated businesses,” and as providing “software and processing solutions to institutions throughout the financial services industry, higher education and the public sector, and help[ing] enterprises of all types to maintain the continuity of their business through information availability services.”

44. The FS segment is described as providing software and processing solutions for trading securities and for investment portfolio asset management. The FS segment, comprised of more than 50 business units and offering more than 50 brands, serves financial services companies, corporate and government treasury departments and energy companies. The FS segment included “three registered brokers that facilitate enhanced straight-through processing by

⁴ In contrast, petitioners' SEC filings describe only three business segments by presenting the HE and PS business segments as one (HEPS).

providing the following services using [its] financial systems solutions: (1) a clearing broker that provides order routing, execution and clearing for professional traders; (2) a full-service equities trading desk for institutional investors; and (3) a New York Stock exchange member that executes trades for institutional investors.” SIBI is an SEC registered and regulated broker-dealer that provides trading activities on behalf of its customers (introducing securities transactions, offering an electronic routing network for placing securities trades and providing an interactive trading link through the National Securities Clearing Corporation).⁵ The FS segment had revenue of \$1.906 billion in 2005 and \$2.1 billion in 2006.

45. The HEPS segment, comprised of 8 business units and offering 30 to 40 products, provides “specialized enterprise resource planning and administrative solutions” for institutions of higher education, school districts, state and local governments and not-for-profit organizations. The HEPS segment had revenue of \$788 million in 2005 and \$870 million in 2006.

46. The AS business segment provides a “[portfolio] of ‘always ready’ standby services, as well as advanced recovery and ‘always on’ production services that help businesses maintain uninterrupted access to their critical information and computer systems.” AS provides its services to companies of all sizes throughout nearly all industries and has more than three million square feet of secure facilities and a more than 25,000 mile global network. The AS segment had revenue of \$1.308 billion in 2005 and \$1.36 billion in 2006.

47. In addition to the services that it provides to unrelated third-party customers, AS provides its resources and “significant” services to “the whole SunGard company,” though the extent of such services provided was not specified or quantified in terms of dollar value. AS

⁵ SIBI merged with SunGard Investment Products, Inc., and Precient Markets, Inc., on October 31, 2006.

provides systems management services for the SunGard Group, manages the Group's infrastructure and network, and provides tracking and allocating data processing resources among the entities and business segments in the Group to ensure the most efficient use of the Group's nation-wide data processing centers. AS provides the Group with disaster recovery and facilities management services, and maintains and supports hardware used by the Group. AS manages the utilities and resources of the headquarters facility in Wayne, Pennsylvania.

48. SDS incurred \$65,188,980.00 for 2005 and \$66,339,049.00 for 2006 in costs for providing centralized corporate-level functions and services on behalf of all entities and business segments within the SunGard Group. None of these costs were allocated or charged back to the individual entities or business segments in the Group (with the exception of certain legal services that are performed for and charged to specific entities).

49. SDS managed the SunGard Group's budgetary matters. SDS directed the SunGard Group's centralized cash flow management system to enable the allocation of funds from profitable business operations to underfunded business operations within the SunGard Group on an as-needed basis. SDS managed the SunGard Group's debt, which is secured by the assets of substantially all members of the Group.

50. SDS managed all of the SunGard Group's insurance matters concerning property, workers compensation, general liability, criminal matters, professional liability and officers and directors insurance coverage. SDS acted as the SunGard Group's single contact regarding banks and bondholders.

51. SDS performed financial, accounting and information security audit functions for the SunGard Group, set controls, and ensured that the members of the SunGard Group followed company guidelines.

52. On behalf of the entire SunGard Group, SDS prepared SEC and other public documents, prepared accounting books and records and other accounting and finance services and set accounting and financial reporting policies and standards to ensure that all members of the SunGard Group provided consistent accounting and financial information.

53. SDS prepared domestic and international tax reports for the SunGard Group and ensured that the Group complied with tax laws.

54. SDS provided the SunGard Group with legal services, including the preparation of consistent Group-wide legal documents, and the management of all legal matters for the SunGard Group, including commercial, regulatory, litigation, securities, employment and other legal matters.

55. SDS provided the SunGard Group with employee management services by directing the Group's employee activities in a variety of areas, including records retention, the protection of confidential information, the use of electronic communications resources, the adherence to securities, antitrust and other areas of corporate law, the avoidance of conflicts of interest, political activities, avoidance of discrimination and/or harassment and the use of the SunGard Group's property.

56. Efficiencies within the SunGard Group were further enhanced when a consortium of private equity investment funds (Sponsors or Investors) acquired the SunGard Group in the LBO on August 11, 2005 (*see* Finding of Fact 10). In this regard, pursuant to the restructuring that followed the LBO, many of the operating subsidiary corporations within the SunGard Group were converted to DREs and other subsidiary corporations were merged into other entities. As a result of the conversion to DREs, the income and attributes of those entities were combined and they were treated as one New York taxpayer with their parent corporation.

57. One of the reasons for the restructuring was that the Investors wanted to further integrate the management of the SunGard Group and exploit intra-Group synergies leading to increased intercompany services and transactions among the SunGard Group members.

58. SDS financed the LBO and its working capital requirements in part by credit agreements including a \$3.69 billion term loan and a \$1 billion revolving credit agreement. In addition, the LBO was partially financed by senior notes, with a \$3 billion dollar aggregate principal amount, that are due from 2009 through 2015. Further, the LBO was partially financed with receivables securitization arrangements through which entities from all business segments of the SunGard Group sell their uncollected accounts receivables to a third-party conduit entity, thus accessing approximately \$450 million in funding and increasing the SunGard Group's liquidity. By pooling together accounts receivables into the receivables securitization arrangements, the SunGard Group is able to decrease its overall interest rate on third-party financing. Subsequent to (and notwithstanding) the sales of receivables as part of the receivables securitization arrangements, the SunGard Group continues to service and collect the accounts receivables on behalf of the third-party conduit entity.

59. The terms of the LBO's various financing agreements restrict the SunGard Group's ability to incur additional indebtedness or issue certain preferred shares. The terms of the agreements also include restrictions on the SunGard Group's ability to pay dividends on, repurchase or make distributions in respect of capital stock or make other restricted payments. The agreements further restrict the SunGard Group's ability to make certain investments, sell certain assets and create liens. The agreements restrict the SunGard Group's ability to consolidate, merge, sell or otherwise dispose of all or substantially all of the SunGard Group's assets, and restrict the Group's ability to enter into certain transactions with affiliates.

60. The various restrictions (Covenants) within the terms of the LBO's various financing agreements apply to the entire SunGard Group. The terms of the financing agreements specifically require SDS to prevent other SunGard Group members from failing to comply with the Covenants, and a failure by any company within the Group to comply with the Covenants has the potential to lead to termination of the financing agreements and any attendant benefits afforded the Group therefrom.

61. Under the terms of the LBO's various financing agreements, The SunGard Group is required to satisfy and maintain specified financial ratios and other financial condition tests. The financial ratios and financial condition tests examine the SunGard Group as a single entity.

62. Domestic companies acquired or formed by the SunGard Group subsequent to the LBO are generally required to become immediately subject to the terms of the LBO's various financing agreements.

63. SDS is charged with managing all of the requirements of the LBO's financing agreements on behalf of the entire SunGard Group. SDS paid approximately \$600 million of interest expense resulting from the LBO's various financing agreements. The LBO's financing agreements are unconditionally guaranteed, jointly and severally, by SDS and substantially all of the wholly-owned domestic subsidiary corporations.

64. Following the LBO, the SunGard Group's purchasing services, including the negotiation of vendor agreements and consolidation of common purchases for the entire SunGard Group were further consolidated within SDS, resulting in significant discounts and reduced costs. The SunGard Group's human resources and benefits services, including the management of the Group-wide common benefit plans such as retirement benefits, HMO, medical, dental and vision insurance plans, were further consolidated within SDS.

65. Following the LBO, the SunGard Group's marketing services, including the establishment and implementation of marketing policies and guidelines for the SunGard Group, branding the "SunGard" name, the maintenance of a consistent marketing message and the generation and approval of all external communications and press releases for the Group were further consolidated within SDS.

66. Following the LBO, the SunGard Group's technology services, including the maintenance and support of SunGard Group-wide document, email, teleconferencing and web-conferencing systems for all business segments and entities in the SunGard Group, were further consolidated within SDS. In addition, following the LBO, other shared services of the SunGard Group, including the formation of shared service centers to streamline various administrative functions, were further consolidated within SDS.

67. Pursuant to an agreement made at the time of the LBO, SDS pays a quarterly management fee to the Investors on behalf of the entire SunGard Group based on the combined earnings of the SunGard Group. Certain SunGard Group members are jointly and severally liable for the quarterly management fee. SDS pays the quarterly management fee and does not charge SunGard Group members for any portion of that fee.

68. In exchange for the quarterly management fee, the Investors provide certain financial, managerial and operational advice and services with respect to the development and implementation of strategies for improving the operating, marketing and financial performance of the SunGard Group.

69. The SunGard Group has implemented the Value Creation Plan (VCP), a documented plan developed at the highest levels within the SunGard Group to increase corporate efficiencies through the consolidation and allocation of resources and to increase cross-segment business

development. The VCP covers nine disciplines, and progress is monitored on a periodic basis with regard to compliance, cost savings, cross-selling success and other measurable criteria.

70. The SunGard Group customer list includes dozens of large customers that purchase numerous SunGard services from different SunGard business segments. The SunGard Group created the Global Account Management (GAM) group at the corporate level to efficiently manage the SunGard Group's large customer accounts and to act as a single point of contact for these large customers. The GAM group aims to increase the diversity of the SunGard Group services purchased by its large customers.

71. The SunGard Group created the Business Development Group (BDG), a corporate-level group whose purpose is to promote cross-selling within the SunGard Group to develop new business. The goal of the BDG is to leverage existing customer relationships of entities in the SunGard Group to develop new business for other entities in the Group.⁶

72. Salesforce.com, a third-party service provider, and its Cross Product Referral Program are used to assist with tracking and monitoring sales and opportunities to facilitate the BDG. The BDG has instituted an initiative whereby SunGard Group salespersons are expected to refer sales opportunities to other Group members. The BDG also promotes sales of SunGard Group products and services to other unrelated companies in the Investors' portfolios. Sales resulting from this (and other) cross-selling initiatives are booked by the particular entity making the sale.

73. The SunGard Group is managed as a single business enterprise from a strategic corporate planning perspective. Many corporate officers have responsibilities for multiple

⁶ The record does not specify the dates on which the VCP, GAM and BDG plans were implemented. It appears that the same were initiated, planned and created at or about the same time of and in connection with (or resulting from) the LBO, but were not implemented until 2007 or later (i.e., after the audit years at issue herein).

entities within the Group, and a number of them are also executive officers of SDS that are responsible for the high-level management, direction and control of the entire SunGard Group.

74. Petitioner submitted 121 proposed findings of fact, divided into “procedural facts,” numbered 2 through 47, and “substantive facts,” numbered 48 through 122, plus proposed conclusions of law numbered 1 through 5. In accordance with State Administrative Procedure Act (SAPA) § 307(1), all of such proposed findings of fact, except for proposed findings of fact numbered 20, 21 and 22, are supported by the record and have been incorporated in the foregoing Findings of Fact. Proposed findings of fact 20, 21 and 22, taken together, are not supported as presented by the record, in that the record does not specify whether only one set of interview notes were prepared by the Division’s two auditors or rather whether two separate sets of notes were prepared, with only the interview notes taken by the second auditor subsequently confirmed, clarified or corrected by comments provided by the interviewees. Finding of Fact 22, above, taken from the parties’ stipulated facts and from review of the exhibits in the record (specifically Exhibit 28) most accurately reflects the record. SAPA does not require rulings with respect to proposed conclusions of law and none have been made herein with respect to petitioners’ five proposed conclusions of law.

CONCLUSIONS OF LAW

A. New York State imposes an annual franchise tax on corporations for the privilege of exercising a corporate franchise, doing business, employing capital, owning or leasing property or maintaining an office in the State (Tax Law § 209[1]). Tax Law § 211(1) requires, generally, the filing of an annual tax return by each such corporation (20 NYCRR 6-1.1). Corporations that conduct business in New York generally file on a separate company basis (20 NYCRR 6-2.1[a]). However, in order to properly reflect a taxpayer’s franchise tax liability, Tax Law former §

211(4) during the period in issue gave the Division the discretion to require or permit corporations subject to New York State franchise tax to file combined reports with certain other corporations in instances where there existed unity of ownership (20 NYCRR 6-2.1[a][1]; 6-2.2[a]) and a unitary business relationship among the corporations (20 NYCRR former 6-2.1[a][2]; 6-2.2[b]), such that reporting on a separate basis would distort the activities, business, income or capital of the corporations that conducted business in New York (20 NYCRR former 6-2.1[a][3]; 6-2.3).

B. The members of the SunGard Group are commonly owned and controlled, and the parties do not dispute that the unity of ownership requirement for combined filing is met. However, the parties disagree over whether petitioners are engaged in a unitary business and whether separate filing results in distortion. As the proponent seeking to change from separate filings to combined filing for the years in questions, petitioners bear the burden of establishing that they are engaged in a unitary business and that separate filings result in distortion that will be cured by permission to file on a combined basis.

C. Petitioners claim that the SunGard Group, consisting of its four business segments and the plethora of entities included therein, are highly integrated, interdependent and unitary. Interestingly, the starting point for petitioner's claim coincides precisely with the mid-August 2005 date of the LBO and the tax return periods commencing therewith and continuing thereafter. Petitioners note that SDS initially filed returns that included its separate company income plus the income and attributes of the approximately 25 DREs. Petitioners point out that SDS conducted the entirety of the AS business segment, a portion of another SDS business segment, and in addition conducted the overall management and oversight activities and the corporate-level services and functions (finance, treasury, internal audit, accounting, tax, legal, purchasing,

marketing and employee management) for the entire SunGard Group. Petitioners state that the balance of the approximately 26 SDS and SCC subsidiary corporations that are engaged in two of the business segments and a portion of the third such segment, and that conduct business in New York, filed separate returns without offsetting their income by SDS's various costs related to management, oversight, corporate-level services, the AS business segment, and the like.

Petitioners maintain this overall situation improperly reflects the New York income and business activity of the members of the allegedly highly integrated, interdependent and unitary Group, results in disjointed and distorted reporting and that combined filing should be permitted in order to remedy such distortion and reflect proper and accurate reporting.

D. The unitary business and the distortion requirements for combined filing are considered interrelated factors (*Matter of Autotote Limited*, Tax Appeals Tribunal, April 12, 1990). In determining whether a corporation is part of a unitary business, consideration must be given to (1) whether the activities in which the corporation engages are related to the activities of the other corporations in the group, such as (i) manufacturing or acquiring goods or property or performing services for other corporations in the group; or (ii) selling goods acquired from other corporations in the group; or (iii) financing sales of other corporations in the group.

Consideration must also be given to (2) whether the corporation is engaged in the same or related lines of business as the other corporations in the group, such as (i) manufacturing or selling similar products; or (ii) performing similar services; or (iii) performing services for the same customers (20 NYCRR 6-2.2[b]). Such considerations are, necessarily, highly factual in nature.

E. The unitary business concept developed under federal constitutional law in response to the issue of states' authority to devise formulae to accurately assess a corporation's intrastate value or income and to limit the states' authority to tax a corporation's value or income not

attributable to the taxing state (*Allied-Signal, Inc. v. Director, Div. Of Taxation*, 504 US 768 [1992]). The support for finding a unitary business under federal constitutional law is a flow of value from one corporation to another (*see Container Corp. of Am. v. Franchise Tax Bd.*, 463 US 159 [1983]).

F. A unitary business exhibits a flow of value among the group of companies as the result of centralized management, functional integration and economies of scale among the members of the group (*see Matter of British Land [Md.] Inc, v. Tax Appeals Tribunal*, 85 NY2d 139 [1995]). These aspects can be shown by intercompany transactions not undertaken at arm's length, a management role by the parent that is grounded in its own operational expertise and operational strategy so as to control the strategic business decisions and oversee the performance of subsidiaries or affiliates, and the fact that the corporations are engaged in the same line of business and made more efficient use of capital through operational integration and sharing of resources (*id.*). In contrast, a nonunitary enterprise is shown by corporations that engage in discrete business operations and that function autonomously and independently from each other (*Woolworth Co. v. Taxation Department* 458 US 354 [1982]). In *Matter of Panavision, Inc.* (Tax Appeals Tribunal, June 6, 2002), the Tribunal held that the corporations there were not engaged in a unitary business because (1) there was no functional integration as the taxpayer received little or no benefit from cash sweeps to its parent corporation; (2) the parent's role was strictly oversight and did not involve any operational expertise that would rise to the level of centralized management, and (3) no economies of scale had been established.

G. Applying the foregoing standards to the instant matter results in a conclusion that petitioners were not engaged in a unitary business during the period in issue. Notwithstanding

the common thread that the Group members were involved in businesses providing information technology solutions, sales and services, that there was general oversight, policy and initiative direction provided by the Sponsors and by petitioners' senior management executives, and that there was a centralization of certain purchasing and administrative functions,⁷ the record does not compel a conclusion that any of such shared points of connection resulted in a unitary operation, or in a material distortion of the income of the various largely functionally independent entities within the individual business segments.

H. As a starting point, the general statement that petitioners and their subsidiaries are engaged in providing information technology services, while true, oversimplifies the scope, breadth and complexity of the Groups' activities. In this regard, three of petitioners' four business segments (FS, HE and PS) are described, generically, as "providing data processing services" for customers within those business segments (*see* Finding of Fact 43), yet the record shows that SunGard companies provide significantly more than data processing. Petitioners provide a "huge number of products in complicated businesses." The FS segment included over 50 primary brands, and provided not only software and processing solutions but also various brokerage services (*see* Finding of Fact 44). The HE and PS segments offer resource planning and administrative solutions via numerous specific products (*see* Finding of Fact 45). The AS segment, generally, maintains the computer systems of its customers, and includes some of the petitioner group companies among its customers. The record does not detail whether the costs of such services provided by the AS segment to other petitioner group companies in the other business segments were or were not properly charged back.

⁷ For example, certain efficiencies and cost reductions are achieved in areas such as group-wide vendor supply purchase agreements, common benefit plans and human resources functions.

I. Given the size of the group of entities involved, it would only be sensible to centralize certain functions, including legal, accounting, human resources policies (statements of company values, policies concerning ethical behavior, discrimination, sexual harassment, insider trading), use of company resources, and the like. However, this does not evidence operational expertise in the subsidiaries' businesses, constitute functional integration or translate into flows of value in those areas. Similarly, conversion of some 25 C corporations into single-member limited liability companies (SMLLCs) or disregarded entities (DREs) in connection with the LBO simplified the legal structure of the Group. However, structural simplification does not necessarily establish functional integration nor, on this record, a discernable flow of value resulting therefrom. The same is likewise true with regard to the distinction between "management oversight" versus "centralized management based on operational expertise." While petitioners provided "corporate oversight" and "strategic guidance" to their subsidiaries, the record does not establish that petitioners (or the Sponsors) provided functional or operational expertise to the subsidiaries' businesses. In the same manner, the Sponsors under the LBO are required to provide planning, strategic oversight and support to management (SDS and its parent companies [e.g., SCC]) in return for the payment from SDS and its parent companies (SCC, SunGard Capital Corp. II, SunGard Holding Corp., and SunGard Holdco LLC) of a fee of one percent of Quarterly Adjusted EBITDA (*see* Finding of Fact 67).⁸ This fee is paid for advice regarding the development and implementation of strategies for improving the operating, marketing and financial performance of the SunGard Group (*see* Finding of Fact 68). There is no evidence that the Sponsors provided

⁸ EBITDA is an acronym for "earnings before interest, taxes, depreciation and amortization."

any direct services, including any particular operational expertise, to any of the SunGard subsidiaries during the years in issue.⁹

J. As to the structure of the Group, there are a number of holding companies (8 in 2005 and 13 in 2006). While a holding company may be unitary with the corporation it owns, that is not necessarily always the case (*see* 20 NYCRR 6-6.3[e][3]). The record here does not spell out any flow of value between the holding companies and the other members of the combined group so as to support the conclusion that these entities constituted a unitary business. Similarly, the record provides no obvious basis to support a conclusion that the inactive corporations in the proposed combined group were engaged in a unitary business with the other corporations. Further, and as the Division notes, a number of the subsidiaries had little or no income and expenses, and there is no obvious basis from which to conclude that these corporations were functionally integrated or that there were flows of value to support a conclusion that they were engaged in a unitary business with petitioners. In addition, the entities engaged in providing brokerage activities (e.g., introducing securities transactions, providing an electronic routing network for placing trades, and providing an interactive trading link) are, as the Division notes, subject to regulations that other group members do not face and also expose other group members to risks that they would not otherwise face in their own businesses. Even acknowledging that the brokerage activities may utilize products or services provided by the FS (and likely the AS) business segments does not make the brokerage businesses any more unitary with petitioners than it makes any other customer of the FS segment (or AS segment) unitary with petitioners. The

⁹ The Sponsors own, collectively, a “portfolio” of over 600 different companies. The referral, cross-selling and other initiatives undertaken within SunGard, post-LBO (*see* Findings of Fact 69 - 72), no doubt reflect in part a desire to sell petitioners’ products and services to the Sponsor’s other portfolio companies that are unrelated to petitioners. This is fully consistent with the same desire that petitioners would purchase goods or services provided by such Sponsor portfolio companies. (*see* Exhibit 28, p 7).

record includes no evidence as to the operations of the partnership or what role, if any, OSP plays in the partnership other than the passive receipt of partnership income (*see* Finding of Fact 42). Various businesses were acquired by petitioners in 2005 (in all four business segments) and 2006 (in the FS segment). While it would appear that these businesses would be subject to the overall Group corporate standards and culture, there is no evidence that the same were functionally integrated, centrally managed or benefitted from economies of scale so as to be considered engaged in a unitary business with petitioners.

K. In sum, the FS segment provides software and processing solutions for trading securities and managing portfolios of investment assets to financial services companies, corporate and government treasury departments and energy companies, via over 50 brands through more than 50 business units, and includes registered brokers and provides securities trading services. The HE and PS segments offer resource planning and administrative solutions for higher education institutions, school districts, state and local governments and not-for-profit organizations via 30 to 40 products and 8 business units. The AS segment enables customers of all sizes across nearly all industries, including some of petitioners' subsidiaries, to maintain their information and systems. While there is the general provision of information technology services and products through all three (or four) business segments, the record does not establish that these segments, and the business units within each, are unitary with petitioners and each other. Notwithstanding the existence of "corporate oversight" and "strategic management," post LBO, there is little evidence of functional integration or of interdependence among and between the various business segments and the specific business units therein, or of economies of scale within and throughout the proposed group. In this latter regard, some economies of scale doubtless result from serving multiple customers via shared platforms, yet there is little cross-selling or

intercompany transactions with and among affiliates, especially across the business segments.

The Group's revenues are diversified by customer and product and no single customer accounted for more than three percent of total revenues. In fact, the various initiatives aimed at enhancing cross-selling, while conceived and structured before or during the audit years, were not initiated until after the audit years in question (*see* Finding of Fact 71, footnote 6).

L. Turning to the claim of distortion, petitioners maintain that the members of the SunGard Group are "so thoroughly integrated and interdependent with respect to business functions, management functions, [and] administrative and corporate functions that separate reporting by its members will result in a distorted measurement of income and business activity."¹⁰ As noted, the concepts of unitary business and distortion of income are considered interrelated (*see* Conclusion of Law D). Indeed, the existence of the factors that support the existence of a unitary business, taken together, often give rise to or cause distortion of income. Petitioners claim that distortion exists as the result of a lack of arm's-length reimbursements from the subsidiaries for the interest expense paid by SDS on the debt undertaken to finance the LBO, the corporate oversight services provided by SDS, the management fee (one percent of EBITDA) paid by SDS to the Sponsors, and the cash management system and cross-selling of products and services. Review of these

¹⁰ In combined filing cases, either party may attempt to prove distortion *per se* by establishing the existence of *substantial* intercorporate transactions between entities. *Substantial*, in this context, means at least 50 percent of a corporation's receipts or expenses are from one or more qualified activities, i.e., transactions that are "directly connected with the business conducted by the taxpayer" (20 NYCRR 6-2.3[a]-[c]). For purposes of establishing a presumption of distortion in this manner, administrative and managerial intercompany transactions (e.g., accounting, legal, personnel services and other like transactions) are not considered (20 NYCRR 6-2.3[c]). To clarify, petitioner has not claimed the existence of *substantial* intercorporate transactions and does not seek a conclusion of distortion *per se* under the noted regulations. Rather, petitioner points out that distortion can exist notwithstanding the absence of *substantial* intercorporate transactions as defined so as to establish the presumption of distortion (20 NYCRR 6-2.3[d]). Petitioner asserts herein that there exist *significant* intercompany transactions among the members of the group, including intercompany service, administrative and managerial transactions, and that the same may properly be considered as indicators of economies of scale and centralization of management in a unitary business enterprise in determining whether combined filing is appropriate (*citing Matter of British Land [Md.], Inc. v. Tax Appeals Tribunal*).

areas fails to establish the existence of distortion at a level sufficient to require (here permit) combined filing in order to cure the same.

M. With respect to the LBO debt interest expense, the Division correctly points out that the same is SDS debt, incurred to finance the LBO, recorded and paid by SDS and taken as an expense by SDS on its federal income tax returns. The record reflects no quantifiable benefit accruing to the subsidiaries from the debt. Further, the limiting covenants set forth in the debt instruments and applicable to many of the subsidiaries as collateral holders have not been shown to cause distortion. Petitioners also claim that the lack of arm's-length reimbursement for the corporate services SDS provided to its subsidiaries, including treasury, finance, accounting, tax, internal audit, purchasing, marketing, legal and employee management, distorts the income and expenses of petitioner and its subsidiaries. While the amount of such expenses totaled approximately \$66 million per year (*see* Finding of Fact 48), this figure represents less than five percent of SDS's total expenses, and when further shared between the 60 to 80 members of petitioners' combined groups, does not rise to the level of significantly impacting the incomes of any of the members including the New York State taxpayer members. It is also noteworthy that, except for certain legal costs, SDS chose not to allocate (or "push down") these expenses to the group members, stating that the same would entail "a lot of work" and "the company takes the position that the administrative effort to push [them] down is not worth it." This position does not indicate that the amount of such costs, in context, are substantial or that the choice or failure to effect reimbursement for such expenses is distortive at any level. As to the management fees paid to the Sponsors, the record does not specify any direct support afforded to the subsidiaries, nor, notwithstanding that the fees are based on the combined earnings of the group, support a conclusion that the fees are not properly payable by SDS in return for advice the Sponsors

provide to management. Again, sharing the fees among the 60 to 80 group members would not appear likely to cause a significant impact on petitioners' incomes rising to the level of distortion. The record does not specify the extent of the cash sweep and resulting cash reapportionment by SDS within the group of subsidiaries, or the extent of any benefit to the "swept" entities, the amount of loans or interest or other expense involved including the extent, if any, to which the swept cash was used to service the LBO debt. Further, and specifically with respect to the cross-selling initiatives, the same were not, as noted, implemented until 2007 (i.e., post LBO and post the audit years), and there was admittedly little or no cross-selling during earlier years. Finally, and in any event, a referred sale is booked by the selling entity and is thus presumably properly reflected in its own income.

N. Beyond corporate level oversight and strategic advice, with attendant consistencies in certain areas (human resources, and the like), there is little evidence that petitioners and the subsidiaries are interdependent, functionally integrated or benefit from economies of scale in the operations of their specific business segments, or that combined reporting is necessary to alleviate distortion of true income or business activity.

O. The petitions of SunGard Capital Corp. and Subsidiaries, SunGard Data Systems, Inc. and Subsidiaries, SunGard Higher Education Managed Services, Inc., SunGard Institutional Brokerage, Inc. and SunGard Data Systems, Inc. are hereby denied in such manner as is consistent with the parties' stipulation set forth at Findings of Fact 39 and 40, the denials of

petitioners' refund claims are sustained, and the Notice of Determination dated November 15, 2010 and issued to SIBI is sustained such that (per stipulation) SIBI (on a separate basis) is liable for additional corporation franchise tax in the amount of \$150,000.00 plus interest for the 2005 calendar year.

DATED: Albany, New York
April 3, 2014

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE