STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
KEMAL AKKAYA	:	DETERMINATION DTA NO. 820293
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Periods September 1, 1999 through May 31, 2002 and March 1, 2003 through May 31, 2003.	:	

Petitioner, Kemal Akkaya, 980 Montauk Highway, Shirley, New York 11967, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods September 1, 1999 through May 31, 2002 and March 1, 2003 through May 31, 2003.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on March 9, 2006 at 9:15 A.M., with all briefs to be submitted by August 28, 2006, which date commenced the six-month period for the issuance of this determination. Petitioner appeared by Carl S. Levine, Esq. and Diane J. Moffet, Esq. The Division of Taxation appeared by Mark F. Volk, Esq. (Robert A. Maslyn, Esq., of counsel).

ISSUES

I. Whether an exhibit attached to petitioner's post-hearing brief should be received in evidence.

II. Whether, as the result of an audit, the Division of Taxation properly determined additional sales tax due from Hoja, Inc., or whether petitioner has shown error in the audit method or results.

III. Whether petitioner has established facts or circumstances warranting the reduction or abatement of penalties imposed pursuant to two notices of determination dated September 25, 2003.

FINDINGS OF FACT

1. Petitioner, Kemal Akkaya, was the president and sole shareholder of Hoja, Inc. ("Hoja"), which owned and operated seven gas stations located in Suffolk County, New York. Petitioner sold regular and premium graded unleaded gasoline and diesel fuel under the name "Jetgo." The addresses of Hoja's gas stations were as follows:

1641 Montauk Highway, Mastic New York 11951;
255 East Main Street, East Patchogue, New York 11772;
320 Middle Country Road., Smithtown, New York 11787;
1105 Smithtown Avenue, Bohemia, New York 11716;
283 Montauk Highway, Patchogue, New York 11772;
698 Montauk Highway, Bayport, New York 11705;
49 Montauk Highway, Bluepoint, New York 11715.

2. On June 12, 2002, the Division of Taxation ("Division") conducted a field audit observation of Hoja's Jetgo station located at 1641 Montauk Highway, Mastic, New York. The Division's investigator observed selling prices of $1.41 per gallon for regular, $1.49 per gallon for mid-grade and $1.57 per gallon for premium at that location on that date. The investigator also observed that the station was a "full-serve" (as opposed to self-serve) station.

3. On July 16, 2002, the Division sent a letter to petitioner scheduling an appointment for August 5, 2002 on which to commence a sales and use tax field audit of Hoja for the period

September 1, 1999 through May 31, 2002.[1] The Division's letter requested that all of Hoja's books and records pertaining to its sales tax liability for the audit period be available for review.

4. On August 5, 2002, the Division's auditor met with Hoja's accountant, Mr. Saranto Calamas, CPA, who provided the Division with Hoja's fuel purchase invoices and workpapers used by Mr. Calamas to prepare Hoja's sales tax returns. Petitioner was not present at the meeting.

5. Upon review of Hoja's purchase invoices the Division became aware that Hoja operated multiple gas stations. Hoja filed its sales tax returns under a single sales tax identification number.

6. During the audit, the Division made verbal requests for additional records, most specifically records of sales. No such additional records were provided.

7. Given the absence of any records of sales, the Division concluded that Hoja's books and records were insufficient for the purpose of verifying its taxable sales and therefore decided to estimate Hoja's sales tax liability for the audit period. As a starting point the Division determined Hoja's audited gallons of fuel purchased during the audit period by totaling the purchase invoices provided by Hoja's representative. The purchase invoices reviewed in detail by the auditor indicated 6,532,393 total gallons of gasoline purchased during the audit period. Hoja's sales tax returns for the same period indicated 5,497,951 gallons of gasoline purchased.

8. Next, the Division determined Hoja's audited selling prices for gasoline during the audit period. Except for the first quarter of the audit period (i.e., September 1, 1999 through November 30, 1999), the Division determined audited selling prices by using an "OPIS" report.

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[1] The Division had previously sent a letter dated August 24, 2001 to Hoja scheduling an audit and requesting records. It appears, however, that there was no followup to that letter.

As described by the auditor, an OPIS report is retail gasoline pricing information provided by Wright Express Credit Card Company ("Wright") and is based on gasoline purchases made using Wright credit cards. OPIS reports group gas stations based on their zip codes and list daily prices for each listed station based on the last purchase of the day made by Wright credit card. The reports list only prices for regular gasoline.

9. According to the auditor, not all gas stations participate in the OPIS reports or make their prices available to Wright or OPIS. The Division did not identify which stations participate and which do not, or why a station would participate or not.

10. OPIS reports are commonly used by the Division.

11. The document described as the OPIS report used by the Division in the audit of Hoja was received in evidence at the hearing. This report consists of several pages of a computer printout. There is no title or heading on any page of this document identifying it as an "OPIS" report or that it was published by Wright. This is the form in which such reports are normally received by the Division's auditors.

12. The OPIS report upon which the Division relied on audit lists the daily price of regular gasoline in the 11951 zip code during the audit period. The 11951 zip code was selected because Hoja has a station in the same zip code at 1641 Montauk Highway in Mastic, New York. A review of this report shows that it lists the daily price of regular gas at a single Sunoco gas station in Mastic Beach, New York. The report does not list a price for every day, but does list prices for several days within each sales tax period.

13. Hoja's gas stations were "unbranded." That is, they did not sell gas under a well-known brand name such as Sunoco or Mobil. As noted previously, Hoja sells gas under the

name "Jetgo." Unbranded stations, such as Hoja, usually sell gas at a cheaper price than branded stations.

14. Using the daily prices listed on the OPIS report, the Division determined an audited quarterly selling price for regular gas by calculating the arithmetic mean of the daily prices within each quarter. To determine the audited selling price for mid-grade and premium the Division increased the audited selling price for regular by the percentage differences in selling prices for regular, mid-grade and premium as indicated by the investigator's observation of prices (***see***, Finding of Fact "2"). Hoja's purchase invoices indicated only regular and premium purchases. Hence, audited sales indicate only regular and premium sales.[2]

15. Next, the Division multiplied the audited quarterly selling price for regular and premium gas by audited quarterly gallons purchased of regular and premium, respectively, to reach quarterly audited gross sales. From that amount the Division calculated Hoja's quarterly sales tax liability by subtracting New York State excise tax and giving credit for petitioner's prepaid sales tax to reach additional tax due per quarter. In this manner, the Division determined additional tax due of $132,257.04 on Hoja's sales of gasoline for the period December 1, 1999 through May 31, 2002.

16. As noted, the Division did not have an OPIS report for the first quarter of the audit period, September 1, 1999 through November 30, 1999. Therefore, the Division determined audited selling prices for gas for that quarter by using what was described by the auditor as a New York City consumer price report. As described by the auditor, this report calculates average selling prices for gasoline in New York City based on a survey of the retail price of gasoline at stations located in New York City.

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[2] Although Hoja also sold diesel fuel, such sales were deemed too small to be included in the audit.

17. Such New York City consumer price reports are commonly used by the Division.

18. The document described as the New York City consumer price report used by the Division in the audit of Hoja was received in evidence at the hearing as Exhibit "L." One page of this document indicates at the top: "New York City Department of Consumers Affairs - Gasoline Price Surveys." The document consists of charts listing "Citywide Average Price" for regular and premium unleaded gas and also average prices for each borough. The two-page document introduced as Exhibit "L" indicates such prices for the months of June and September 1999 and for several months in 2000 and 2001.

19. A third page of the New York City consumer price report was attached, apparently erroneously, to the OPIS report which was received in evidence. Similar to the other two pages of the consumer price report, this page contains charts listing "Citywide Average Price" for regular and premium unleaded gas and average prices for each borough on a monthly basis from February 1999 through February 2000. This page also lists a Citywide average price for regular gas for the months of September, October and November 1999.

20. The Division determined petitioner's audited selling price for regular gasoline for the period ended November 30, 1999 by taking the average of the "Citywide Average Price" for regular gas for the months of September, October and November 1999 as indicated on the consumer price report. The Division then calculated the audited selling price for premium for the same period by marking up the regular price by the percentage difference in regular and premium as indicated by the investigator's report. The Division then multiplied such audited selling prices by Hoja's purchases of regular and premium gas for that quarter to reach audited gross sales and ultimately determined additional tax due of $25,414.06 on Hoja's sales of gasoline for the period September 1, 1999 through November 30, 1999.

21. Retail gas prices in New York City were described by the auditor as "a little higher" than prices in the area where Hoja's stations were located, but "not significantly higher."

22. In total, the Division determined $157,671.10 in additional tax due on Hoja's sales of gasoline during the audit period.

23. Hoja also sold cigarettes during the audit period. Hoja did not produce any records of purchases or sales of cigarettes either during the audit or at hearing.

24. Hoja claimed a total of $23,392.59 in credit for prepaid sales tax on cigarettes on its sales tax returns for the audit period. On audit, in the absence of any documentation of payment of such prepaid tax, e.g., purchase invoices, the Division disallowed all such claimed credit. The Division thus asserted $23,392.59 in additional sales tax due on petitioner's sales of cigarettes.

25. On September 2, 2003, the Division issued to Hoja a Notice of Determination which asserted $182,793.95 in additional tax due for the period September 1, 1999 through May 31, 2002, plus penalty and interest.

26. On September 25, 2003, the Division issued to petitioner a Notice of Determination which also asserted $182,793.95 in additional tax due for the period September 1, 1999 through May 31, 2002, plus penalty and interest. The notice also advised petitioner that the Division had determined that he was a corporate officer or a person responsible for the collection and payment of sales and use taxes due from Hoja and therefore personally liable for the sales and use taxes due from the corporation.

27. Also on September 25, 2003, the Division issued to petitioner, also as a responsible officer of Hoja, a Notice of Determination which asserted $4,914.15 in additional tax due for the period March 1, 2003 through May 31, 2003, plus penalty and interest. This additional tax due is the difference between tax reported on Hoja's sales tax return for this period and the amount

remitted. Petitioner does not contest the amount of tax due in this notice but does protest the assertion of penalty.

28. Petitioner concedes that he was a responsible officer of Hoja at all times relevant herein.

29. During the period at issue petitioner was also the president and sole shareholder of two other corporations, White Stone Enterprises, Inc. ("White Stone") and Getgo Gas Station Corp. ("Getgo"), which also operated gas stations in New York.

30. As noted previously, petitioner, hired Saranto Calamas, a certified public accountant, to prepare and file Hoja's quarterly sales tax returns. Petitioner also engaged Mr. Calamas to prepare and file sales tax returns for White Stone and Getgo. Mr. Calamas had been serving in this capacity for several years as of the time the returns for the periods at issue in this matter were due to be filed.

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

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

calculating taxable sales. As of the period ended August 31, 2001, Getgo began using the correct formula to calculate its taxable sales.

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

34. Kemal Akkaya was born and raised in Turkey where he was a high school teacher. He emigrated to the United States in 1985 and became employed in the retail gas business. In 1996, Mr. Akkaya brought his wife and five children to the United States.

35. Near the end of the hearing in this matter the administrative law judge asked petitioner's representative whether petitioner had any additional evidence. Petitioner's representative responded "no." At no time during the hearing did petitioner's representative make any request for the record to be held open for the submission of additional evidence post-hearing.

36. Petitioner sought to submit additional evidence, identified as Appendix 1, with its post-hearing memorandum of law. Such documentation has not been reviewed by the administrative law judge and is not received in evidence in this matter.

37. At the request of the parties, official notice is taken of the record and findings of fact in ***Matter of Getgo Gas Station Corp***. (DTA No. 820290).[3]

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

CONCLUSIONS OF LAW

A. Preliminarily, regarding the exhibit attached to petitioner's brief (***see***, Finding of Fact "36"), the Tax Appeals Tribunal has established a firm policy of not allowing the submission of evidence after the record is closed (***see***, ***e.g.***, ***Matter of Equity Title and Closing Services***, Tax Appeals Tribunal, July 20, 2006). Petitioner did not request that the record be held open for the submission of evidence post-hearing (***see***, Finding of Fact "35"). Accordingly, pursuant to the Tribunal's policy, petitioner's attempt to offer the exhibit attached to his brief is properly rejected.

B. When conducting an audit, Tax Law § 1138(a)(1) requires the Division to determine tax due from the information that is available. It is well established that if records are available from which the exact amount of tax due can be determined, then resort by the Division to estimation procedures is arbitrary and capricious and lacks a rational basis (***see***, ***Matter of Grant Co. v. Joseph***, 2 NY2d 196, 159 NYS2d 150, ***cert denied*** 355 US 869, 2 L Ed 2d 75; ***Matter of Korba v. State Tax Commn.***, 84 AD2d 655, 444 NYS2d 312, ***lv denied*** 56 NY2d 502, 450 NYS2d 1023). However, when records are not available or sufficient, the use of external indices is permissible so long as the audit method is reasonably calculated to reflect the taxes due (***see***, ***Matter of Ristorante Puglia, Ltd. v. Chu***, 102 AD2d 348, 478 NYS2d 91, 93). Under such circumstances, the Division is not required to compute the amount due with exactness (***see***, ***Matter of Convissar v. State Tax Commn.***, 69 AD2d 929, 415 NYS2d 305) and the burden rests with the taxpayer to show by clear and convincing evidence that the audit method was unreasonable or that the amount assessed was erroneous (***see***, ***Matter of Shukry v. Tax Appeals Tribunal***, 184 AD2d 874, 585 NYS2d 531, ***Matter of Meskouris Bros. v. Chu***, 139 AD2d 813, 526 NYS2d 679).

C. The use of external indices in the instant matter was permissible given Hoja's failure to produce any records of its sales during the audit period. Indeed, petitioner does not contest the Division's right to use external indices under the present circumstances. The Division has considerable latitude in selecting an estimated audit method and need only adopt an audit method reasonably calculated to determine the amount of tax due (***Matter of Grant Co. v. Joseph***, 2 NY2d 196, 159 NYS2d 150, ***cert denied*** 355 US 869). "As long as the methodology employed was rational given the circumstances of petitioner's business, it is sustainable" (***Matter of SRS News, Inc.***, Tax Appeals Tribunal, September 12, 2002).

D. Petitioner contends that the method used to compute Hoja's selling prices was so fundamentally erroneous as to lack a rational basis and that therefore the determination should be cancelled. Petitioner asserts that the Division failed to properly identify the OPIS Report and the New York City consumer price report in the record and that such failure is grounds to declare its use irrational pursuant to the Tax Appeals Tribunal's holdings in ***Matter of Fokos Lounge*** (Tax Appeals Tribunal, March 7, 1991) and ***Matter of Fashana*** (Tax Appeals Tribunal, September 21, 1989).

This contention is rejected. The purpose of the requirement that the record contain information identifying the external index used is to provide petitioner with access to the source of the external index used and therefore with the opportunity to challenge the soundness or applicability of the index (***see***, ***Matter of Bitable on Broadway***, Tax Appeals Tribunal, January 23, 1992). Here, that requirement has been met through the testimony of the auditor and the introduction of the reports.

Specifically, as noted, for the first sales tax quarter of the audit period, the Division determined selling prices using the "Citywide Average Price" for the same period as indicated by

the New York City consumer price report (***see***, Findings of Fact "16" through "20"). The report was identified in the record through the auditor's testimony, and the report itself was received in evidence. For the balance of the audit period the Division used the OPIS report, which was also identified in the record through the auditor's testimony and was itself received in evidence (***see***, Findings of Fact "8" through "12"). The record thus contains information identifying the external indices used by the Division in performing the audit. Accordingly, the Division has established a rational basis for the use of the reports and a rational basis for its audit methodology (***see***, ***Matter of Fokos Lounge***, Tax Appeals Tribunal, March 7, 1991).

E. Having determined that the audit had a rational basis, it became petitioner's burden to show that the audit method was unreasonable or that the amount assessed was erroneous (***see***, ***Matter of Shukry v. Tax Appeals Tribunal***, ***supra***). Petitioner has failed to meet this burden.

Petitioner's objections to the audit contest the accuracy of the Division's determination of Hoja's selling prices for gasoline. Specifically, petitioner notes, correctly, that the Division used the prices for regular gasoline at a single gas station as its basis to determine Hoja's selling prices for much of the audit period; that the station in question was branded and Hoja was unbranded (***see***, Finding of Fact "13"); and that, with respect to the period for which New York City prices were used, such prices are generally higher than prices in the area of Hoja's stations (***see***, Finding of Fact "21").

While there is no question that the audit method employed by the Division was less than precise and certainly not "immune from attack," the law is clear that where such imprecision is the result of petitioner's own failure to maintain accurate records of his sales, exactness is not required (***see***, ***Matter of Meskouris Bros. v. Chu***, ***supra***). Here, petitioner offered no evidence of Hoja's sales during the audit period. Hence no adjustments in the audit method or results are

warranted. Additionally, while petitioner objects to the use of selling prices at a single Suffolk County gas station and the use of New York City average selling prices to determine the selling prices of seven Suffolk County gas stations, it is noted that the Tax Appeal Tribunal has sustained audits using statewide average selling prices (***see***, ***Matter of Robert W. Flanagan d/b/a Mid Island Plaza Mobil***, Tax Appeals Tribunal, June 14, 1990; ***Matter of Yel-Bom's Service Center***, Tax Appeals Tribunal, May 10, 1990). Surely, local variations in pricing throughout the entire State are at least as great as variations among Suffolk County stations or between New York City and Suffolk County stations.

Petitioner also contends that the OPIS report was flawed because it provided prices for regular gas only and that the Division's method of calculating audited selling prices for premium gas (***see***, Findings of Fact "14" and "20") was unreasonable. Petitioner further asserts that the OPIS report was flawed because it used only the last sale of the day on a Wright credit card and therefore did not account for any changes in selling price during the day (***see***, Finding of Fact "8"). These contentions also take issue with the exactness of the audit result. As noted previously, exactness is not required under the instant circumstances and no adjustment is warranted.

With respect to the Division's determination of premium gas prices, petitioner contends that the Division's workpapers in evidence do not show how such prices were calculated. Although the Division apparently failed to submit a workpaper setting forth such calculations, a review of the audited prices for regular and premium reveal that premium prices were determined by increasing audited prices for regular by the percentage difference between regular and premium as indicated by the investigator's observation. It is noted that the investigator's

observation report is in the record. Given the lack of sales records available, this method was reasonable.

Petitioner also asserts that the OPIS report was flawed because there were no prices listed in the report for the months of December 1999, January 2001, February 2001, March 2001 and August 2001. While petitioner's observation is correct, it is further observed that the report contains many dates with prices within the sales tax quarters encompassing the months noted above. For example, although there are no OPIS prices for December 1999, the report lists many dates with prices in January and February 2000. There was thus an ample body of data from which the Division could compute audited selling prices for each of the sales tax periods from December 1, 1999 through May 31, 2002.

Petitioner also contends that the Division's computation of Hoja's audited purchases of gas included purchases made by petitioner's other corporations. Although two purchases made by White Stone are included among the few invoices contained in the Division's workpapers, petitioner failed to show that either of these purchases (or any other purchases made by White Stone or Getgo) were included in the Division's calculation of Hoja's audited purchase of gas.

F. Petitioner did not contest the Division's denial of credit for prepaid sales tax on cigarettes. Accordingly, this portion of the audit is also sustained.

G. Turning to the issue of penalty, Tax Law § 1145(a)(1)(i) states that any person failing to file or pay over any sales or use tax to the Commissioner of Taxation and Finance ("the Commissioner") "shall" be subject to a penalty. This penalty may be canceled if the Commissioner determines that the failure was "due to reasonable cause and not due to willful neglect" (Tax Law § 1145[a][1][iii]). Consistent with this statute, the Commissioner's regulations provide that penalty imposed under Tax Law § 1145(a)(1)(i) "must be imposed

unless it is shown that such failure was due to reasonable cause and not due to willful neglect" (20 NYCRR 2392.1[a][1]). "By first requiring the imposition of penalties (rather than merely allowing them at the Commissioner's discretion), the Legislature evidenced its intent that filing returns and paying tax according to a particular timetable be treated as a largely unavoidable obligation [***Matter of F&W Oldsmobile v. Tax Commn. Of the State of New York***, 106 AD2d 792, 484 NYS2d 188]" (***Matter of MCI Telecommunications, Corp.***, Tax Appeals Tribunal, January 16, 1992). The taxpayer faces the "onerous task" of establishing reasonable cause as well as the absence of willful neglect (***Matter of Philip Morris, Inc.***, Tax Appeals Tribunal, April 29, 1993).

H. Petitioner contends that penalties imposed herein should be abated because he reasonably relied on the advice and work of Hoja's accountant, Saranto Calamas. Petitioner cites Mr. Calamas's failures with respect to the audit of White Stone and the preparation of returns for Getgo (***see***, Findings of Fact "31" and "32") as evidence of his improper work and advice.

Petitioner has failed to establish reasonable cause or an absence of willful neglect in the instant matter. As noted, petitioner claims that he reasonably relied on professional advice. In order to establish such reliance as a basis for abatement of penalty, however, it is necessary to show, at a minimum, the specific advice given (***see***, ***LT & B Realty Corp. v. New York State Tax Commn.***, 141 AD2d 185, 535 NYS2d 121; 20 NYCRR 2392.1[g][2][iv]). Here, petitioner has offered no specifics as to what advice Mr. Calamas may have given to petitioner. Rather, petitioner has merely made the general assertion that he relied on an incompetent accountant. Such an assertion is not in itself a basis for waiving penalties imposed under Tax Law § 1145 (***see***, ***Matter of Shukry v. Tax Appeals Tribunal, supra***). Additionally, Hoja's inadequate

recordkeeping, including, most significantly, the failure to maintain any sales records, strongly supports the imposition of penalties (***see***, ***Matter of Marte***, Tax Appeals Tribunal, August 5, 2004).

With respect to penalties imposed for petitioner's failure to remit tax as reported on the return for the period March 1, 2003 through May 31, 2003, petitioner has offered no reason for such failure. Penalties are therefore sustained. It should be noted that under the instant circumstances (***see***, Finding of Fact "33"), failure to pay sales tax as reported on the return does not involve the reliance on any professional advice.

I. The petition of Kemal Akkaya is denied and the notices of determination dated September 25, 2003 are sustained.

DATED: Troy, New York
February 26, 2007

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE