

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**GRJH, INC.** : DETERMINATION  
for Revision of a Determination or for Refund : DTA NO. 825192  
of Sales and Use Taxes under Articles 28 and 29 :  
of the Tax Law for the Period June 1, 2009 :  
through February 28, 2010. :  
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Petitioner, GRJH, Inc., filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 2009 through February 28, 2010.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, in Albany, New York, on December 3, 2013, at 10:30 A.M., with all briefs to be submitted by July 18, 2014, which date commenced the six-month period for the issuance of this determination. Petitioners appeared by Hacker, Murphy, LLC (John F. Harwick, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Robert A Maslyn, Esq., of counsel).

***ISSUES***

I. Whether petitioner's books and records were adequate and sufficient for the conduct of a direct audit, specifically to determine receipts from petitioner's gasoline sales, such that the Division of Taxation was not entitled to resort to an indirect audit methodology, including the use of external indices, in conducting its audit.

II. Whether, if the Division of Taxation was entitled to resort to indirect auditing including the use of external indices, petitioner has nonetheless shown that the audit methodology utilized by the Division was not reasonably calculated to reflect the correct amount of tax due, or that there were errors made in the application of such audit methodology.

III. Whether petitioner was required to include in its taxable receipts from sales of gasoline not only the amounts received from its customers for gasoline purchases made at the pumps at petitioner's stations, but also the amounts of any third-party reimbursements received by petitioner as the result of its participation in a fuel discount program offered by the third party.

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

1. Petitioner, GRJH, Inc., is engaged in business as a motor fuel and diesel fuel distributor. Petitioner makes wholesale sales of such fuels, and also operates various gasoline stations in New York State making retail sales of gasoline and fuel products, and operating convenience stores at some of its station locations. The sales at issue in this proceeding involve gasoline stations operated by petitioner, all of which are branded Sunoco stations and all of which participate in the Price Chopper Fuel Advantage Program.

2. On July 11, 2008, the Division of Taxation (Division) mailed a letter to petitioner scheduling a field audit pertaining to (as is relevant to this proceeding) petitioner's sales and use tax liability for the period June 1, 2005 through May 31, 2008. Subsequent letters advised that the audit period was updated through and including the sales tax quarterly period ended February 28, 2010.<sup>1</sup> The audit was to commence with a July 14, 2010 field visit to petitioner's representative's offices by the Division's auditor.

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<sup>1</sup> Consents extending the period of limitations on assessment were obtained from petitioner.

3. The Division's July 11, 2008 audit appointment letter states that "[a]ll books and records relating to [petitioner's sales and use tax liabilities for the periods in issue] must be available on the appointment date." Referenced in and accompanying this audit appointment letter was a detailed and comprehensive list of records required for audit, including general accounting records as well as records pertaining in particular to sales and use tax audits of service stations. The subsequent letters updating the period of the audit again set forth the advice and requirement that all records pertaining to petitioner's sales and use tax liability were to be made available for review, and included the noted list of required records.

4. The audit encompassed a review of petitioner's liability for motor fuel taxes, sales tax on gasoline sales, and sales tax on sales made at the convenience stores. The only part of the audit remaining in dispute concerns sales tax on gasoline sales, and specifically involves the Price Chopper Fuel Advantage Program (Fuel Advantage Program) discounts. Taxes found due in the other audit areas have been agreed to and are not at issue herein, and credits based on petitioner's overpayment of sales tax on its convenience store operations have been applied in reduction of petitioner's overall liability and are likewise not in dispute herein

5. As noted, petitioner is a participating vendor in the Fuel Advantage Program. Under this program, a customer earns and accrues points by purchasing items at Price Chopper grocery stores. In turn, the accrued points entitle a customer to a reduction of the stated per gallon purchase price of gasoline at participating gasoline retailers based on the number of accrued points applied at the time of the gasoline purchase.<sup>2</sup> The customer accesses and applies accrued points by swiping his or her Price Chopper Advantage card at the gasoline retailer, and the pump price for the gasoline is

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<sup>2</sup> During the period at issue, for every \$50 of merchandise purchased at a Price Chopper store, the customer would earn a 10 cent per gallon discount (up to a maximum of 20 gallons per transaction) against the pump price of gasoline at participating Sunoco gasoline stations.

automatically adjusted to the discounted price per gallon reflecting the applied number of accrued points.

6. Petitioner receives from its customers the sales amount due at the pump, calculated as based on the Fuel Advantage Program discounted price, and is also later reimbursed by its Sunoco distributor for the discounts on the selling price resulting from the Fuel Advantage Program. The reimbursement by Sunoco is made one to two days later, and is reflected on Sunoco reports to petitioner as a credit against petitioner's purchase cost of gasoline from Sunoco. As detailed hereinafter, however, the Sunoco reports do not reconcile the amounts of such credits (discount reimbursements) to the particular sales transactions or pump prices giving rise to such credit amounts. In fact, petitioner's witness admitted that it is virtually impossible to reconcile the later-received Sunoco reports, including the described discount credits, with the daily raw data captured and maintained by petitioner as described hereinafter (*see* Finding of Fact 7). It is undisputed, in any event, that such credit amounts are not included by petitioner as part of its gasoline sales receipts, or reported as such for sales tax purposes.

7. Each of petitioner's station locations sends a daily report to petitioner, via facsimile, showing the volume (gallons) of each grade of gasoline sold, and the total receipts from such sales. Petitioner, in turn, enters this volume and receipts information into a transactional journal. On audit, the Division accepted the total amount of fuel purchased by petitioner from Sunoco as accurately reported, and also agreed that the respective amounts (gallons) of different grades of gasoline (i.e., regular, mid-grade, super and ultra) sold by petitioner were accurately tracked by petitioner. Further, the auditor noted that credits were allowed to petitioner against its purchases of gasoline, as appearing on the reports furnished to petitioner from Sunoco. However, the records maintained and provided by petitioner did not allow the auditor to determine the amount of sales

made pursuant to the Fuel Advantage Program, since such records did not provide selling (pump) prices or the particular discounted prices therefrom at which such Fuel Advantage Program sales were made. In turn, without records of such prices, the auditor was unable to reconcile the credits allowed on the Sunoco reports to the amount of petitioner's reported sales receipts. In short, since petitioner did not maintain a record of its daily pump prices for gasoline, the auditor was unable to match sales with discounts from such pump prices to the subsequently received Sunoco reimbursements for any particular days.

8. In order to determine petitioner's (undiscounted) selling prices for gasoline, so as to determine its receipts subject to sales tax, the auditor utilized Oil Price Information Service (OPIS) data. OPIS is a service that provides daily pricing information for gasoline stations, including petitioner's stations, that accept the Wright's Express fueling card. The OPIS transactional information is specific as to each station address and operator, and captures the selling price for the last Wright's Express credit card transaction for regular grade (87 octane) gasoline on each day.

9. Since the OPIS information provided selling price information for regular grade gasoline only, the auditor relied on petitioner's owner's advice that the selling price of mid-grade gasoline was approximately 10 cents per gallon higher than the regular grade selling price, that the super grade selling price was likewise approximately 10 cents per gallon higher than the mid-grade selling price, and that the ultra grade selling price was approximately 5 cents per gallon higher than the super grade selling price.<sup>3</sup> Using the OPIS selling price information for each of petitioner's stations, in conjunction with petitioner's records of the number of gallons of each grade of gasoline sold per day at each station and the noted price differences between such grades, the auditor

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

determined: a) the prices per grade of gasoline per day during the audit period; b) the undiscounted amount of sales receipts per day for each grade of gasoline sold at each station, and; c) the total audited sales receipts, at such audit-calculated pump prices, for the audit period.

10. The difference between the foregoing calculation of audited sales receipts, based upon pump prices, versus reported sales receipts, was treated as additional taxable sales receipts (i.e., in effect accounting for and including the Fuel Advantage Program reimbursements received by petitioner, on its sales made at discounted prices at the pumps under such Program, as unreported receipts subject to sales tax).

11. On March 18, 2011, the Division issued to petitioner GRJH, Inc., a Notice of Determination (L-035537003-8), based on the foregoing audit and assessing additional tax due for the period June 1, 2009 through February 28, 2010 in the amount of \$64,531.93, plus interest.

#### ***SUMMARY OF THE PARTIES' POSITIONS***

12. Petitioner challenges the assessment at issue, arguing that it properly computed, reported and paid the tax due on its sales of gasoline based on the selling price of the gasoline at the pumps. As noted, petitioner does not dispute that the credit reimbursements from Sunoco, based on the Fuel Advantage Program, were not included for sales tax purposes as part of the taxable receipt for petitioner's gasoline sales. However, in this regard, petitioner maintains that the Fuel Advantage Program is not akin, as the Division asserts, to a manufacturer's coupon, and that the credits petitioner receives from Sunoco as reimbursements against the pump price discounts resulting from the Fuel Advantage Program are not properly includable as part of its receipts for its sales of gasoline. Instead, petitioner maintains that the discounted selling price paid at the pump by Fuel Advantage Program customers is the proper receipt for sales tax purposes, and that the Sunoco reimbursements are appropriately accounted for as a decrease to petitioner's cost of goods sold,

thus resulting in a higher amount of income subject to income or corporation franchise tax.

Petitioner also asserts that its records were adequate and complete, and that the Division was not authorized to resort to estimated audit methodologies, including the use of OPIS information as described. Finally, petitioner maintains that the Division did not allow credit for the expenses petitioner incurs to participate in the Fuel Advantage Program, and did not, in its calculations, allow any reduction in the selling price of gasoline to reflect a discount allowed by petitioner to its customers for purchases of gasoline paid for in cash as opposed to credit card.

13. The Division asserts in contrast that a “receipt” for sales tax purposes is the sale price for the item sold, and includes therein both payments in money plus any other payments received for the item sold, including credits or reimbursements received by the seller. The Division maintains that petitioner’s receipts thus consist of the amounts paid by the customers (i.e., the pump prices), plus the amounts of the Sunoco credits received in reimbursement for the discounts allowed via reduction of the pump prices under the Fuel Advantage Program. The Division also argues that petitioner was unable to provide documents to verify its sales under the Fuel Advantage Program, including the discounted pump prices at which the gasoline was sold, or any means to tie the Sunoco credits to such sales on an ongoing basis, thereby allowing the Division to resort to external indices (the OPIS data) in conducting its audit. Finally, the Division points out that petitioner provided no documentary support for any cash versus credit card price per gallon discount amounts.

### ***CONCLUSIONS OF LAW***

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

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

B. 20 NYCRR 526.5 discusses the items included in taxable receipts, including at paragraph

(c) thereof the tax treatment of “coupons”:

“(1) Where a manufacturer issues a coupon entitling a purchaser to a credit on the item purchased, the tax is due on the full amount of the receipt. The receipt is composed of the amount paid and the amount of the coupon credit. The coupon credit reflects a payment or reimbursement by another party to the vendor.

(2) Where a store issues a coupon, entitling a purchaser to a credit on the item purchased, for which it is reimbursed by the manufacturer or distributor, the tax is due on the full amount of the receipt. The receipt is composed of the amount paid and the amount of the coupon credit. The coupon must indicate, by “mfr” or some other code, that reimbursement is made. The reimbursement from the manufacturer or distributor to the store may be made in any form, such as cash or a credit against purchases or in additional merchandise.

(3) Where a store issues a coupon entitling a purchaser to a discounted price on the item purchased, and receives no reimbursement, the tax is due from the purchaser on only the discounted price, which is the actual receipt.

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

C. The term “receipt” is clearly defined to include the amount of the sale price whether received in money *or otherwise*, and includes any amount for which credit is allowed (Tax Law § 1101[b][3]). Here a discount on the price of gasoline is afforded at the pump to a purchasing customer, and that discount is later reimbursed in the form of credits provided to petitioner by its distributor (Sunoco). There is no dispute that such credits are provided in reimbursement to petitioner for the per gallon pump price discount allowed to the customer at the pump, pursuant to

the Fuel Advantage Program.<sup>4</sup> Hence, under Tax Law § 1101(b)(3), petitioner's receipts for the gasoline it sells under the Fuel Advantage Program include the payments made by the customers at the pumps, as discounted, plus the Sunoco credits based on such discounts and received thereafter by petitioner.

D. The Division's analogy in this case to a manufacturer's coupon is fitting. Petitioner challenges this analogy, arguing that the subject circumstances do not involve a coupon because there is no "coupon" issued and because there is no "manufacturer." This argument is rejected as elevating form over substance and thus entirely missing the appropriateness of the manufacturer's coupon analogy. In fact, the Fuel Advantage Program operates on an ongoing basis by the purchasing customer's use of an "Advantage" card, on which points entitling the cardholder to a gasoline discount are captured and accrued and, at the time of purchase, accessed and applied (*see* Finding of Fact 7). This method of affording a discount, via what is commonly referred to as a "loyalty card," is effectively an ongoing or reusable coupon. Its use, coupled with the subsequent reimbursement to the vendor (petitioner) for the discount so afforded via the allowance of credits, as described herein, fits squarely within the statutory language defining what is included in and comprises a vendor's receipt. In sum, both the pump price received from the customer and the credit received from Sunoco are items of value received by petitioner for the gasoline it sells, and both are clearly encompassed within the statutory language defining "receipt" as consisting of the sale price "valued in money, whether received in money *or otherwise*."

E. As to the audit methodology and calculations utilized by the Division, Tax Law § 1138(a)(1) provides, in relevant part, that if a sales tax return "is not filed, or if a return when

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<sup>4</sup> The record does not disclose whether there may be some adjustment or reimbursement "up the line" between Price Chopper and Sunoco. That information is irrelevant, however, for purposes of this matter.

filed is incorrect or insufficient, the amount of tax due shall be determined [by the Division] from such information as may be available. If necessary, the tax may be estimated on the basis of external indices . . . .” The long-standing statutory and regulatory authority of Tax Law § 1135(a) and 20 NYCRR 533.2(b), together with well-established case law, clearly mandates that complete and accurate records that are adequate to determine the proper amount of tax due concerning a taxpayer’s transactions are to be maintained. These records must be maintained in such form as the Commissioner of Taxation and Finance may by regulation require, and must be made available to the Division for review upon request (Tax Law § 1135[g]; 20 NYCRR 533.2[a][2]). The regulations provide that among the records required to be maintained are a “sales slip, invoice, receipt, contract, statement or other memorandum of sale; . . . guest check, . . . cash register tape and any other original sales document” (20 NYCRR 533.2[b][1]). When faced with inadequate, incomplete or inaccurate records, and acting pursuant to section 1138(a)(1), the Division is required to select a method of audit reasonably calculated to reflect the tax due. The burden then rests upon the taxpayer to demonstrate that the method of audit or the amount of the assessment was erroneous (*Matter of Your Own Choice, Inc.*, Tax Appeals Tribunal, February 20, 2003).

F. Petitioner asserts that the Division was not entitled to resort to indirect auditing methods in this case, maintaining that its books and records were fully adequate. First, the record clearly shows that the Division requested petitioner’s books and records and thoroughly examined the same. In fact, the auditor relied in large part upon petitioner’s books and records, accepting petitioner’s reporting of the number of gallons of gasoline sold, including the number of gallons of each grade of gasoline sold (*see* Finding of Fact 7). The problem presented here is that petitioner’s record keeping did not include individual tracking of the pump prices for gasoline so as to allow the Division to determine sales made pursuant to the Fuel Advantage Program, or to verify that

petitioner was reporting and paying tax on the receipts from such sales at the appropriate price (i.e., here the discounted pump price plus credit reimbursements), rather than on the discounted pump price only (as was the case). In fact, petitioner's witness admitted that records of daily pump prices and of individual sales (including discounted sales made under the Fuel Advantage Program) were not maintained, and that it was essentially impossible to reconcile the Sunoco reports with petitioner's records in terms of marrying the Sunoco credits to the discounted sales made at the pumps. Under such circumstances, the Division's resort to indirect auditing and the use of external indices in order to determine the correct amount of petitioner's receipts subject to sales tax was proper.

G. The Division's method of indirect audit, and specifically its use of the OPIS information together with petitioner's own information as to the price differentials between the various grades of gasoline sold, to determine the pump prices for gasoline, was reasonable. Petitioner argues that the OPIS information based on Wright's Express data captures only the pump price of the last regular grade sales transaction on a given day, and that Wright's Express only represents approximately three percent of petitioner's sales (noting that Visa and Master Card sales represent a much higher portion of petitioner's sales). The use of OPIS information has been sustained in prior cases (*see Matter of Khan*, Tax Appeals Tribunal, September 4, 2008). Moreover, the OPIS information employed in this case reflected the sale price of regular gasoline at petitioner's own stations at the end of each day and, as noted, the grade price differentials were provided by petitioner and were accepted by the auditor. Finally, petitioner points out that no adjustment was made for cash sales discounts offered by petitioner at its stations. Such a cash price discount is akin to a vendor's coupon (as opposed to a manufacturer's coupon), affording the customer a reduction in the sales price for which the vendor, however, receives no reimbursement (20 NYCRR

526.5[c][3]). Unfortunately, the record includes no specific evidence establishing or supporting the amount of such discounts, including the number of gallons of each grade of gasoline paid for in cash as opposed to paid for by credit card, or the specific cash discount amount for such gallons and grades of gas.

H. Petitioner argues that the reimbursements do not make it whole because there are various unreimbursed expenses associated with participating in the Fuel Advantage Program, including a vendor's "participation fee" (calculated as a certain number of cents per gallon of gasoline sold), high speed internet connection costs, necessary cash register and computer program upgrades to attain compatibility with the system requirements of the Fuel Advantage Program, and the expenses of maintaining the same. However, the definition of "receipt" specifically precludes "any deduction for expenses or early payment discounts." Further, 20 NYCRR 526.5(e) provides:

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

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

Similarly, petitioner maintains that it accounts for the Sunoco credits as reductions to the cost of the gasoline it purchases (i.e., a reduction in its cost of goods sold), resulting in a higher amount of income for income tax or corporate franchise tax purposes. While this may be true (and appropriate) for accounting and income or franchise tax purposes, the same has no impact on the statutory definition or calculation of the amount of "receipt" for sales and use tax purposes under Tax Law Articles 28 and 29.

I. Finally, petitioner requests the abatement of penalty and interest. Review of the Notice of Determination reveals that no penalty has been assessed. Further, there is no provision of law

applicable herein that permits reducing interest below the minimum allowable rate, at which interest in this matter is currently fixed (Tax Law § 1145[a][1][iii]). Hence, petitioner's request in this respect is denied.

J. The petition of GRJH, Inc. is hereby denied and the Notice of Determination dated June 27, 2011 is sustained.

DATED: Albany, New York  
January 15, 2015

/s/ Dennis M. Galliher  
ADMINISTRATIVE LAW JUDGE