

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions :

of :

GRJH, INC. AND ALICIA METZ :

for Revision of Determinations or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period March 1, 1997 through November 30, 2001 :

DETERMINATION
DTA NO. 820006
820065, 820087
AND 820088

In the Matter of the Petitions :

of :

JAMES METZ, JR. AND MARGARET METZ :

for Revision of Determinations or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period June 1, 2001 through November 30, 2001 :

Petitioners GRJH, Inc., and Alicia Metz, PO Box 728, Sharon, Connecticut 06069-0728, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1997 through November 30, 2001.¹

¹ Only a nine month period that covers three sales tax quarters and runs from March 1, 2001 through November 30, 2001 remains at issue for each of these petitioners.

Petitioners James Metz, Jr.,² and Margaret Metz, PO Box 728, Sharon, Connecticut 06069-0728, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 2001 through November 30, 2001.

²Petitioner James T. Metz, Jr. is also known as James T. Metz and is commonly referenced without the “Jr.” designation. He is the father of the other individual petitioners, Alicia Metz and Margaret Metz, as well as another daughter, Lauren Simons, who was involved in the business but is not a petitioner in this proceeding but who was present at the hearing and testified. According to an affidavit of Alicia Metz dated June 27, 2005, her brother, James Metz III, was also one of the “original” owners of GRJH, and GRJH “was originally owned by me, my five (5) siblings (Lauren Simons, Kathryn Helm, James Metz III, Robert Metz and Margaret Metz) and my parents (James Metz and Kathleen Metz).” James T. Metz, Jr. was not in attendance at the first day of the hearing in this matter, but attended and testified at the later date.

A consolidated hearing in these matters was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on April 27, 2005 at 10:30 A.M. and continued to conclusion at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on June 28, 2005 at 10:30 A.M., with all briefs to be submitted by March 24, 2006, which date began the six-month period for the issuance of this determination. Petitioner GRJH, Inc. appeared by its president, Alicia Metz, at the hearing on April 27, 2005 and by John R. Polster, Esq., at the continuation on June 28, 2006. Petitioner Alicia Metz appeared *pro se*. Petitioners James Metz, Jr., and Margaret Metz appeared by Robert DeLucia, CPA.³ The Division of Taxation appeared by Mark F. Volk, Esq. (Lori P. Antolick, Esq., of counsel).

³ The petition of the corporate petitioner, GRJH, Inc., dated May 20, 2004, was signed by Robert DeLucia, CPA, who had been appointed its representative pursuant to a power of attorney dated April 29, 2002 executed by Alicia Metz on behalf of the corporation in her capacity as president. The petition of Alicia Metz dated July 21, 2004 was also signed by Robert DeLucia, CPA, who was appointed to serve as her representative pursuant to a power of attorney dated July 20, 2004. However, at the hearing on April 27, 2005, Alicia Metz chose to represent the corporation and herself. In fact, Alicia Metz offered the testimony of Mr. DeLucia as a witness in support of petitioners' case. The petition of James Metz, Jr., dated July 6, 2004, was also signed by Robert DeLucia, CPA, who was appointed to serve as his representative pursuant to a power of attorney dated December 16, 2003. The petition of Margaret Metz, dated July 6, 2004, as well was signed by Robert DeLucia, CPA, who was appointed to serve as her representative pursuant to a power of attorney dated July 13, 2004. Mr. DeLucia, who was present at

ISSUE⁴

Whether penalties imposed against petitioners for the sales tax quarters ended May 31, 2001, August 31, 2001, and November 30, 2001, should be abated.

FINDINGS OF FACT

the hearing, played a passive, advisory role permitting Alicia Metz, in effect, to advocate for all of the petitioners at the hearing held on April 27, 2005. At the continuation of the hearing on June 28, 2005, attorney John R. Polster appeared on behalf of the corporate petitioner, GRJH, Inc., pursuant to a power of attorney dated June 27, 2005 executed by petitioner Alicia Metz in her capacity as president. At the continuation of the hearing on June 28, 2005, the individual petitioners, Alicia Metz and James Metz, Jr., appeared *pro se*, and each was permitted to question the Division of Taxation's witness. Robert DeLucia, who was again present at the hearing, played an advisory role and not the role of advocate.

⁴ The individual petitioners did not contest their status as individuals responsible for the collection of tax on behalf of the corporate petitioner. Further, the Division at the hearing by its representative conceded that the taxes plus minimum interest had been paid leaving only the issue of penalties for the quarters not covered by the granting of amnesty.

1. The corporate petitioner, GRJH, Inc. (“GRJH”⁵), is operated by the Metz family, which includes the individual petitioners named in this proceeding, Alicia Metz, James Metz, Jr., and Margaret Metz. In early 1997, GRJH purchased from a related Metz family business, Peterson Petroleum of New Hampshire, Inc., some convenience and gas station stores operated under the name of Cobble Pond Farms in the upstate counties of Dutchess, Columbia and Rensselaer. Business was conducted in the following fashion: GRJH leased out the convenience store portion to unrelated third parties while retaining ownership of the Sunoco⁶ gasoline and diesel sold by the gas station portion of the enterprise. The auditor’s log⁷ indicates that the sales at the following nine stores were audited and also noted the following third parties as the operators:

Location	Name of operator
(i) Stanfordville (Dutchess County)	Ravinder Sharma
(ii) Millerton (Dutchess County)	Gary Singh
(iii) Copake (Columbia County)	Gary Singh
(iv) Hillsdale (Columbia County)	Shashi Sharma
(v) Hudson (Columbia County)	Dilo Singh
(vi) Ghent (Columbia County)	Meer Khan
(vii) Chatham (Columbia County)	Satnam Sidnu

⁵ According to Lauren Simons, a sister of Alicia and Margaret Metz, who was also involved in the family business serving as vice-president, GRJH are random letters that stood for “absolutely nothing.” Mr. Metz testified that “It was an acronym done years ago and it related to my bankruptcy, but I can’t remember exactly.”

⁶ For a short period of time in 2000, some locations were branded Getty.

⁷ The original auditor, Eric Linendoll, is no longer employed by the Division.

(viii) Valatie (Columbia County)	not indicated
(ix) East Greenbush (Rensselaer County)	Ghulam Murtaza

2. GRJH oversaw the sales of gasoline and diesel by requiring the store operator, who is sometimes also described as the store “owner,” to make daily deposits of the receipts from the previous day’s gasoline and diesel sales into GRJH’s bank account.⁸ The store operator would fax a copy of a daily sheet to the corporate petitioner’s main office in Sharon, Connecticut so that GRJH could reconcile on a daily basis the daily sheet with meter readings to the daily deposits. On a monthly basis, GRJH paid a commission of between five cents to six cents per gallon of gasoline and diesel sold in the previous month to the store operator, who paid monthly rent to GRJH on the first of each month. The record does not disclose the level of commission paid, specifics on the monthly rent charged or details concerning the operators of the stores.⁹

⁸ The record does not clearly disclose the volume of GRJH’s motor fuel sales although Alicia Metz testified that over a four-year period, approximately 30 or 40 million gallons were sold. Based on the amended returns noted in Finding of Fact “6”, the extent of its motor fuel sales is reflected by the following reported motor fuel sales, which the Division accepted as substantially correct:

Period	Amount of taxable motor fuel sales	Source document
6/1/97-5/31/98	\$ 4,097,332.00	Annual Schedule FR
6/1/98-2/28/99	3,175,103.00	Annual Schedule FR
3/1/99-2/29/00	5,502,973.00	Annual Schedule FR
3/1/00-2/28/01	8,613,899.00	Annual ST-101
3/1/01-5/31/01	2,349,055.00	Quarterly Schedule FR
Total taxable motor fuel sales	\$23,738,362.00	

⁹ Petitioners were not forthcoming concerning the nature of GRJH’s operation. The auditor’s log reveals that the Division of Taxation’s inspections of the nine stores and its interviews with employees and operators at the stores provided the basis for its uncovering the nature of petitioner’s business. The Division of Taxation’s auditors expended considerable time and effort to determine that GRJH, in fact, owned the service station buildings and the fuel that was sold by the Cobble Pond Farms convenience and gas station stores, which were operated under contract by unrelated third parties who were paid a commission on the gasoline sales.

3. GRJH's sales tax filing history, which reflects that it initially claimed to have *no taxable sales*, was summarized by the auditor in his report as follows:

March 1-May 31, 1997 was due on 06/20/1997. There is no copy of the tax return in files. Per a Consolidated Statement of Tax Liabilities dated 11/24/1997 there was a balance owing of \$6,371.55 for this period plus interest and penalty. Per a Disagreement with Findings page stamped in 11/7/97 the taxpayer disagrees. They wrote "they are a wholesale company with *no taxable sales*."

June 1-August 31, 1997 was due 09/20/1997 and filed on 10/03/1997 showing Gross sales of \$1,200,000 with the box checked that there were *no taxable sales*.

September 1-November 30, 1997 was due 11/20/1997 and was not filed. On a Notice of Estimated Determination, Disagreement With Findings Section, in dated July 3, 1998, the taxpayer responds "We do not sell to the public and therefore *do not collect sales tax*. Sales Tax is paid to Sun Oil Co. and sold to dealers for resale."

December 1, 1997-February 28, 1998 was due on 03/20/1998. A Failure to File Sales Tax Return was issued on 05/22/1998 to GRJH. On GRJH letterhead dated June 22, 1998 J.T. Metz writes that "...the property in question is owned by Peterson Petroleum of New Hampshire. I am confident that Peterson Petroleum has filed the proper tax returns with you. Please contact them if you have any questions."

March 1- May 31, 1998 was timely filed with all zero's [sic] on June 19, 1998. June 1-August 31, 1998 was due on 09/20/1998. On 2/12/1999 taxpayer filed on a Notice of Non receipt of Sales and Use Tax Return stating *zero sales* and a note "We never have had any!!" signed by J.T. Metz.

September 1-November 31, 1998 was due on 12/20/1998 and filed on a ST-103 on April 15, 1999, showing a \$50 late fee with the box checked for *no taxable sales*.

On July 21, 2000 a "quarterly" ST-100 was filed for the period December 1, 1998-February 28, 1999 signed by Alicia Metz reporting gross sales of \$1,215,815 and "*none*" for taxable sales. There was a note on Page 1 stating "We were switched to the annual FR report and did not receive a form for this quarter."

On April 7, 2000 the taxpayer filed a [sic] annual ST-101 for the period March 1, 1999 to February 29, 2000 reporting \$0 gross sales. This return was signed by James T. Metz-Vice President. (Emphasis added.)

4. In the early fall of 2000, a sales tax audit of GRJH was commenced. From the start, the Division of Taxation (“Division”) was suspicious of the corporation’s operations based upon the corporation’s sales tax filing history showing no taxable sales as well as the auditor’s sense of hostility directed at him by petitioner James Metz, Jr. The auditor’s log for the date October 6, 2000 includes the following notation:

Note Mr. Metz was very hostile on the phone. When asked why no NY sales tax were [sic] paid, Mr. Metz stated the NY Fuel sales taxes were paid at the rack. . . . I requested a detailed list of store names, . . . Mr. Metz said he would only respond if he received the request in writing.

5. By the following summer of 2001, GRJH was cooperating with the auditors and provided “daily sheets, supplier invoices, sample leases they sign with station operators, etc.” Nonetheless, the Division responded that it “planned on doing a third party confirmation with Sunoco and Getty on gallons purchased.” GRJH cooperated by granting permission to the Division to obtain gallon information from Sunoco and Getty. The audit report summarizes the methodology utilized by the Division to compute additional sales tax due for the original audit period of March 1, 1997 through May 31, 2001 of approximately \$500,000.00,¹⁰ as detailed in Finding of Fact “8”, as follows:

[B]y taking the third party gallons @ an average PPG [price per gallon] per OPIS [oil price information service] with a mark up for premium grade fuel = Estimated Gross Sales. We then backed out Sales Tax and 12A tax to get it down to Taxable Sales. We did this by location and got an Estimated Sales Tax Due. We gave them credit for the Pre Paid Sales Tax paid at the Rack for an Estimated Net Additional Sales Tax Due.

¹⁰ The Division initially estimated taxes due of \$700,000.00 but apparently was persuaded to rework its calculation by making an adjustment to reflect that 85% of the fuel sold was regular unleaded and only 15% was the higher priced “ultra and super” rather than allocating more of the fuel sold to the higher priced premium types.

6. On January 8, 2002, the Audit Division referred this matter to the Revenue Crimes Bureau for possible criminal prosecution for fraud. The audit report summarizes the basis for the Audit Division's mistrust of GRJH as follows:

The fact this Corporation has not filed or paid any NYS sales tax on this fuel and are [sic] the same family that ran Peterson Petroleum who did file sales tax returns. They should have known there [sic] obligation in filing and paying the sales tax. They were not new to this industry.

They would also know that they marked up the fuel they purchased at the rack¹¹ vs. what they were selling at the stores and thus would owe sales tax on the mark up, even if what they paid at the rack was in fact retail sales tax (whereas we know it was a Pre Paid Tax and not retail tax).

They were saying on the Delinquent notices that they were Wholesalers of gas and not selling to the public but in fact have been making retail sales all through out [sic] the audit period.

James Metz has had a history of tax problems with NYS, was involved with Peterson Petroleum of New Hampshire, who sold the business to GRJH. Mr. Metz was also involved with GRJH throughout the audit period, with his signature on many documents, but we were constantly told he has no involvement with GRJH.

The form AU-349, Referral of Possible Problem Case, completed by the auditor for purposes of the referral to the Revenue Crimes Bureau, noted that the explanation provided by Lauren Simons and James Metz on behalf of GRJH for the "apparent understatement or noncompliance" was they "thought sales tax was paid upon purchase at the rack." GRJH submitted amended quarterly sales and use tax returns to the Revenue Crimes Bureau which were received on *April 29, 2002*,¹² and it paid the amounts shown as due in full. The Division found GRJH's calculations to be substantially correct. Further, the majority of the amended returns were

¹¹ GRJH picked up the gasoline it sold at the convenience stores at the oil company's terminal, i.e., "at the rack."

¹² Such filing and remittance occurred approximately two months after the issuance of the Notice of Determination detailed in Finding of Fact "8".

eligible for amnesty, and GRJH took advantage of the amnesty program. The matter was ultimately returned to the Audit Division without prosecution by the Revenue Crimes Bureau.

7. The Division also proceeded to issue a total of eight notices of determination against petitioners.

8. A Notice of Determination dated February 19, 2002 was issued against the corporate petitioner, GRJH, asserting sales and use taxes due of \$509,418.00 plus penalty and interest, over a period of 4 years and 3 months or a total of 16 sales tax quarters, as follows:

Tax Period Ended	Tax Asserted Due	Interest	Penalty
5/31/97	\$ 17,248.00	\$ 12,958.44	\$ 15,103.22
8/31/97	15,283.00	10,695.88	12,989.44
11/30/97	14,118.00	9,173.32	11,645.66
2/28/98	4,717.00	2,838.07	3,777.54
8/31/98	9,364.00	4,753.78	7,058.89
11/30/98	8,810.00	4,081.10	6,445.55
2/28/99	3,362.00	1,413.99	2,387.99
5/31/99	10,695.00	4,045.52	7,370.26
8/31/99	38,758.00	13,069.43	25,913.72
11/30/99	49,499.00	14,740.73	32,119.87
2/29/00	53,091.00	13,801.89	33,446.44

5/31/00	74,744.00	16,625.58	45,684.79
8/31/00	60,774.00	11,305.10	36,039.55
11/30/00	49,695.00	7,507.27	28,601.14
2/28/01	46,396.00	5,452.10	25,924.05
5/31/01	52,864.00	4,452.35	28,658.18
Totals	\$509,418.00	\$136,914.55	\$323,166.29

This notice issued against the corporate petitioner provided the following explanation:

Based on our audit of your records, we determined that you owe tax, interest and applicable penalties, under sections 1138 and 1145 of the Tax Law.

Since you have not submitted adequate records for audit, as required under sections 1135 and 1142 of the Tax Law, we determined that you owe tax, interest and any applicable penalties, under sections 1138 and 1145 of the Tax Law, based upon available records and information.

9. The Division issued three notices of determination against petitioner Alicia Metz as an officer or responsible person of GRJH. A Notice of Determination dated March 14, 2002 asserted sales and use taxes due totaling \$509,418.00 in the same amounts shown above in Finding of Fact "8" for the same 16 sales tax quarters as detailed above for GRJH. In addition, interest of \$141,790.68 plus penalty of \$325,604.35 was asserted against Alicia Metz, amounts slightly greater than the interest of \$136,914.55 and penalty of \$323,166.29 asserted against the corporate petitioner as noted above, because the notice issued against Alicia Metz was dated March 14, 2004, approximately one month later than the notice issued against GRJH, resulting in the calculation by the Division of slightly more interest and penalty due. About a year and a half later, the Division issued a Notice of Determination dated September 8, 2003 against Alicia Metz as an officer or responsible person of GRJH, asserting sales and use taxes due of

\$50,738.70 plus interest and penalty for the sales tax quarter ended August 31, 2001. A third Notice of Determination, also dated September 8, 2003, was issued against Alicia Metz as an officer or responsible person of GRJH asserting sales and use taxes due of \$20,846.83 plus interest and penalty for the sales tax quarter ended November 30, 2001.

10. The Division issued two notices of determination, each dated September 8, 2003 against petitioner James Metz, Jr.¹³ as an officer or responsible person of GRJH. The first notice asserted sales and uses taxes due of \$50,738.70 plus penalty and interest for the sales tax quarter ended August 31, 2001, and the other notice asserted sales and use taxes due of \$20,846.83 plus penalty and interest for the sales tax quarter ended November 30, 2001, paralleling the two notices issued against Alicia Metz on the same date of September 8, 2003, as detailed in Finding of Fact “9”.

11. The Division also issued two notices of determination each dated September 8, 2003 against petitioner Margaret Metz, as an officer or responsible person of GRJH. The first notice asserted sales and use taxes due of \$50,738.70 plus penalty and interest for the sales tax quarter ended August 31, 2001, and the other notice asserted sales and use taxes due of \$20,846.83 plus interest and penalty for the sales tax quarter ended November 30, 2001, paralleling the two notices issued against Alicia Metz and James Metz, Jr., on the same date of September 8, 2003, as detailed in Findings of Fact “9” and “10”.

¹³ The notices failed to designate petitioner, James Metz, Jr., as “Junior.”

12. While the audit was proceeding, GRJH's sales tax returns for the quarters ending August 31, 2001 and November 30, 2001 also came due. The auditor advised Lauren Simons who had the responsibility to prepare the returns that "you will probably pay penalties and interest but it's better off that you just get the tax returns in [timely] and we'll figure out the details in the future after all information is gathered" (tr., p. 85). GRJH filed its sales tax returns for such quarters without a check, in the words of Ms. Simons, "to at least go on record as properly filing on time" (tr., p. 86). However, the return for the quarter ending August 31, 2001 nonetheless "might have been late" in the words of GRJH's accountant, Robert DeLucia (tr., p. 158).¹⁴ The Division's records establish that in fact it was filed late, with no remittance. The return for the quarter ending November 30, 2001 was filed timely but with no remittance.

SUMMARY OF THE PARTIES' POSITIONS

13. Petitioners contend that penalties should be abated "because never was GRJH willful in any respect nor did it intentionally attempt to evade filing of any taxes" (tr., p. 40). They argue that they acted in "good faith" and "all the taxes have been paid" (tr., p. 41). Furthermore, since the audit field work was not concluded until early 2002, sales tax returns for quarters ending in 2001 "could not have been properly prepared before March 2002" according to

¹⁴ At the continuation of the hearing, petitioners were permitted to recall Mr. DeLucia. His testimony at such later date, in response to a leading question, that his "understanding" was the Division's auditor "didn't want you to file returns until the audit was complete" was simply not credible and is properly given no weight especially in light of the testimony of Lauren Simons, who described what the auditor advised as noted above.

GRJH's accountant. Petitioners maintain that since the audit, GRJH's tax returns have been filed timely and accurately with the remittance of tax due.

14. The Division counters that petitioners must show "due care and prudence" to support the abatement of penalties. According to the Division, "Claims of lack of knowledge or mistaken belief or reliance on an accountant or an agent do not constitute reasonable cause for [abating] penalties" (tr., p. 44). The Division further argues that petitioners have an "extremely poor filing history," and that "between 1994 and 2004 there have been only three instances of timely filing by GRJH, Inc. and in one of those instances no tax was remitted and in the other two instances the tax was only partially paid" (tr., p. 44).

CONCLUSIONS OF LAW

A. As part of the New York State 2002-2003 budget, a tax amnesty program was authorized (L 2002, ch 85, Pt. R). Under terms of this amnesty legislation, applicants, once accepted into the program, were required to pay their outstanding tax liability, but penalties were waived, and the interest rate on the outstanding tax liability was calculated at a rate that was reduced two percentage points from the pre-amnesty level. This amnesty program applied to tax liabilities for taxable periods ending or transactions or uses occurring on or before December 31, 2000 (with an exception not applicable herein). The amnesty period began on November 18, 2002 and ended on January 31, 2003 with payment required by March 15, 2003 (or the date specified on the Tax Amnesty bill). As noted in Finding of Fact "6", GRJH took advantage of the amnesty program and obtained abatement of penalties and penalty interest on its outstanding tax liabilities covered by the program. However, amnesty was not applicable to the three sales tax quarters ending May 31, 2001, August 31, 2001 and September 30, 2001, and what remains at issue in this proceeding is the imposition of penalties and penalty interest on the additional tax determined due for such tax quarters.

B. Tax Law § 1145(a)(1)(i) imposes a penalty on a taxpayer who fails to pay any sales tax within the time required, and Tax Law § 1145(a)(1)(ii) imposes statutory interest (sometimes referenced as penalty interest) on the amount not paid. Tax Law § 1145(a)(1)(iii) provides for remission of the penalty and reduction of the statutory interest to minimum interest if the failure is due to reasonable cause and not due to willful neglect. As noted in Finding of Fact “8”, as a result of an audit, a determination was made that GRJH owed additional sales tax in the amount of \$52,864.00 for the sales tax quarter ended May 31, 2001. Petitioners do not deny that GRJH failed to pay this required sales tax timely. However, by the time of the hearing in these matters, such tax had been remitted. Further, as noted in Finding of Fact “12”, GRJH did not timely remit tax due for the sales tax quarters ending August 31, 2001 and November 30, 2001. Again, by the time of the hearing in these matters, tax due for these periods of \$50,738.70 and \$20,846.83, respectively, had been remitted. Consequently, since petitioners do not deny that GRJH failed to pay the required sales tax timely for the three sales tax quarters that were not covered by the amnesty program, they are now required to pay penalty and statutory interest on such amounts unless they can shoulder their burden to establish that GRJH’s failure was due to reasonable cause and not due to willful neglect (*see, Matter of Rubin v. Tax Appeals Tribunal*, 29 AD3d 1089, 814 NYS2d 804).

C. In the words of the Tax Appeals Tribunal, in establishing reasonable cause, the taxpayer faces an “onerous task” (*Matter of Philip Morris, Inc.*, Tax Appeals Tribunal, April 29, 1993). The Tribunal explained why the task is onerous by quoting the following language from its earlier decision in *Matter of MCI Telecommunications Corp.* (Tax Appeals Tribunal, January 16, 1992):

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 [citation omitted].

In addition, the Tax Appeals Tribunal in its recent decision in *Matter of AIL Systems, Inc.* (May 4, 2006) took notice of the “hallmarks of reasonable cause and good faith,” which it noted included efforts to ascertain the proper tax liability and an honest misunderstanding of fact or law that is reasonable in light of the experience, knowledge and education of the taxpayer.

D. Here, GRJH properly prepaid sales tax on motor fuel which it purchased “at the rack” for subsequent delivery to the nine Cobble Pond Farm convenience and gasoline stores detailed in Finding of Fact “1”. However, it wrongfully ignored its obligation to then calculate and report to the State the additional sales tax it owed on the markup amount included in the retail price charged to the motorist since it remained the owner of the gasoline at the time of the retail sale. Moreover, the record supports a conclusion that petitioner obscured the arrangement it had with the operators of the nine Cobble Pond Farm convenience and gasoline stores so as to avoid liability for sales tax on the markup amount: its reporting of no taxable sales, as detailed in Finding of Fact “3” was grossly misleading. In fact, such failure to calculate and report additional sales tax on the gasoline sales provided a reasonable justification for the auditors to refer the matter for review by the Revenue Crimes Bureau for possible *criminal* prosecution.

E. Petitioners do not appreciate the crucial point that the sales tax is a tax which a vendor is *entrusted* to collect on behalf of the State. Tax Law § 1132(a)(1) provides specifically that sales tax “shall be paid to the person required to collect it, *as trustee for* and on account of the state” (emphasis added). In fact, sales tax is governed by the “trust fund” provisions of the Bankruptcy Code and is not dischargeable in bankruptcy (*see, Matter of Milne*, Tax Appeals Tribunal, February 17, 2005). The promulgation of Tax Law § 1102 in the mid-1980s, which

requires the *prepayment* of sales tax on motor fuel, prior to its actual retail sale to motorists, was “the culmination of legislative and executive efforts to combat *massive evasion* of the excise and sales taxes imposed on motor fuel” (*Matter of Diamond Terminal Corp.*, Tax Appeals Tribunal, September 22, 1988, *confirmed* 158 AD2d 38, 557 NYS2d 962, *lv denied* 76 NY2d 711, 563 NYS2d 767 [emphasis added]). GRJH’s president used the word “clever” to describe the Division’s requirement that sales tax on the sale of gasoline must be prepaid at the time it is obtained at the rack. This characterization shows a serious misunderstanding of the responsibility of a retailer of gasoline to ensure the collection and remittance of sales tax collected on the sale of gasoline. It is not merely a clever way for the State to get tax revenue “up front” before the actual retail sale of the gasoline but rather a way to avoid the massive evasion of sales tax in the retail gasoline trade exhibited in the past. Since the sales tax on gasoline was prepaid at the time it was obtained at the rack, it became the responsibility of GRJH to properly account for the additional sales tax it owed on the markup price of the gasoline when it was sold to the motorist. GRJH was obligated to properly calculate its retail gasoline sales and then take a credit for its prepayment of tax. It completely failed to do so until it was audited by the Division. Furthermore, not only did it fail to do so, but as detailed in Finding of Fact “3”, it misled the Division by claiming that it did not make retail sales of gasoline to motorists. As noted in Finding of Fact “1”, GRJH structured its business so that the operator of the convenience store did not ever “own” the gasoline sold, but rather was paid a commission by GRJH, the actual owner of the gasoline. GRJH chose this complicated structure for its operations, and it must suffer the consequences of its failure to properly account for the sales tax which it was entrusted to collect and remit to the State. It is nothing short of bold for petitioners to attempt to blame the Division and its auditor for GRJH’s failure to file and timely pay tax due on its gasoline sales for the three sales tax quarters that remain at issue. Such attempt to shift

blame is rejected. When taxpayers pay “zero” tax when tax is actually due, they have fallen far short of “an honest misunderstanding of fact or law that is reasonable in light of the experience, knowledge and education of the taxpayer” (*Matter of AIL Systems, Inc., supra*). This is especially so, given the individual petitioners’ long-term involvement in the motor fuel industry (*see, Matter of Peterson Petroleum of New Hampshire, Inc.*, Tax Appeals Tribunal, January 18, 1996, *confirmed* 236 AD2d 752, 654 NYS2d 433).¹⁵

F. The objection by petitioners that evidence accepted into the record should have been restricted to only the three sales tax quarters that remain at issue is meritless. Simply stated, the Division’s overall audit and GRJH’s prior conduct is relevant in determining whether its failure to timely file and pay sales tax for the remaining quarters at issue was due to reasonable cause and not willful neglect. Furthermore, although it appears that GRJH has properly accounted for sales tax due on its gasoline sales since the period at issue (and its expansion of retail gasoline sales into five counties from the three counties during the period at issue), such improvement does not establish that its earlier failure was due to reasonable cause and not willful neglect. Neither did petitioner’s presentation of the testimony of its employee, Lloyd Helm, whose testimony was presented at the continued date of the hearing, serve to shoulder its burden of establishing reasonable cause and not willful neglect for GRJH’s failure to timely file and pay

¹⁵ By a letter dated May 6, 2005, the administrative law judge provided notice to the parties that he “will be taking ‘official notice’ of the findings of fact contained in the decision of the Tax Appeals Tribunal in *Matter of Peterson Petroleum of New Hampshire, Inc.*”

tax. Mr. Helm's testimony that the failure to properly report and pay tax resulted from his personal mistake in failing to include the sales of all of the Cobble Pond Farm stores due to a "spread sheet" error is belied by GRJH's tax filing history detailed in Finding of Fact "3". Furthermore, petitioners' reliance on Mr. Helm's testimony when he was not even listed on petitioners' hearing memorandum as a potential witness lends support to a conclusion that his testimony was contrived in the period between the first hearing date in April and the continuation in June. At the April hearing, no witness presented by petitioners even mentioned Mr. Helm by name and his responsibility for or involvement in the preparation of petitioner's tax returns. Moreover, even if credence were to be given to the testimony of Mr. Helm, an arithmetic or clerical error made in the preparation of tax returns does not necessarily result in the conclusion that a taxpayer has shouldered its burden to establish reasonable cause and not willful neglect for its underpayment of tax due. In addition, given the complexity of GRJH's operational structure for conducting its business of gasoline sales and the level of such sales, approximately \$25,000,000.00 during the audit period, it cannot be said that reliance on an individual like Mr. Helm, who does not have any educational background in accounting or finances, was reasonable.

G. Petitioners' contention that the granting of amnesty for earlier periods supports the abatement of penalties for the remaining three sales tax quarters at issue is also without merit. Under terms of the amnesty legislation noted in Conclusion of Law "A", ineligibility for amnesty was specified for a taxpayer who had been convicted of a crime related to a tax for which tax amnesty was sought. In addition, a taxpayer was not eligible for tax amnesty for a tax and period in which the taxpayer was a party to a criminal investigation or pending criminal or civil litigation related to such tax and period. Amnesty was granted GRJH not as the result of any conclusion that it had operated in good faith, but rather it was automatic since there was no

criminal conviction or a continuing or *pending criminal investigation* against it. As noted in Finding of Fact "6", the matter was ultimately returned to the Audit Division without prosecution by the Revenue Crimes Bureau. In short, the three remaining sales tax quarters at issue, ending May 31, 2001, August 31, 2001 and November 30, 2001, were simply not covered by the amnesty program. As a final point, petitioners were fortunate indeed that the amnesty program covered most of the sales tax quarters covered by the audit at issue so that penalties and penalty interest were abated under amnesty in light of the conclusion herein that they failed to establish that GRJH's underpayment of sales tax was due to reasonable cause and not willful neglect.

H. The petitions of GRJH, Inc., Alicia Metz, James Metz, Jr., and Margaret Metz are denied, and (i) the Notice of Determination dated February 19, 2002 against GRJH and the Notice of Determination dated March 14, 2002 against Alicia Metz, as modified under amnesty, are sustained, and (ii) the two notices of determination dated September 8, 2003 against Alicia Metz, the two notices of determination dated September 8, 2003 against James Metz, Jr., and the two notices of determination dated September 8, 2003 against Margaret Metz are sustained.

DATED: Troy, New York
September 21, 2006

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE