

ST 08-20

Tax Type: Sales Tax
Issue: Applicability of Tax – Sale or Lease
Gross Receipts

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

THE DEPARTMENT OF REVENUE
OF THE STATE OF ILLINOIS

v.

ABC, INC.,
Taxpayer

No. 06-ST-0000
IBT# 0000-0000
NTL #00 00000000000000
#00 00000000000000
#00 00000000000000

Ted Sherrod
Administrative Law Judge

RECOMMENDATION FOR DISPOSITION

Appearances: Special Assistant Attorney General John Alshuler on behalf of the Illinois Department of Revenue; Michael Wynne and Stephen Blaszyk of Smith, Sachnoff & Weaver on behalf of ABC, Inc.

Synopsis:

This matter is before the Department of Revenue (“Department”) Office of Administrative Hearings as the result of a timely protest by ABC, Inc. (“ABC” or “taxpayer”) of three Notices of Tax Liability (“NTLs”) issued to the taxpayer on June 6, 2006 assessing additional taxes due for amounts collected from customers but not remitted to the Department. The taxpayer sells and leases motor vehicles, and the taxes at issue were assessed with regard to sales the taxpayer made during the period from

January 2002 through September 2004. The issue presented in this case is whether the taxpayer was entitled to collect taxes on sales of vehicles in connection with lease transactions in excess of amounts the taxpayer remitted to the Department as tax collections on its sales tax returns.

At the hearing on this matter, both parties presented documentary evidence, and the taxpayer presented testimony by John Doe, the taxpayer's controller and by Jim Doe, the taxpayer's General Sales Manager. The record in this case also includes briefs submitted by both the Department and the taxpayer. Following the submission of all evidence and a review of the record in this case, it is recommended that the Department's assessment be affirmed and finalized.

Findings of Fact:

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, is established by the admission into evidence of the SC-10-K, the Department's Audit Correction and/or Determination of Tax Due showing a proposed liability of \$627,695 for the period January 2002 through September 2004. Department Exhibit ("Ex.") 1.¹
2. ABC, a corporation registered with the Department to do business in Illinois located in Lombard, Illinois, is engaged in the operation of a new and used automobile dealership and leasing agency. Tr. p. 22; Department Ex. 1. The taxpayer is engaged in the sale and leasing of Cadillac and Subaru model automobiles and

¹ Unless otherwise noted, findings of fact apply to the tax period in controversy.

acquires all of its Cadillac automobiles from General Motors Acceptance Corp. (“GMAC”). Tr. p. 23.

3. ABC is required to file, and does file, ST-556 forms reporting its gross receipts from selling tangible personal property on a transaction by transaction basis. Tr. pp. 14, 15. That is, for each sale it makes, ABC files a separate return. *Id.*²
4. The Department audited ABC regarding the period from January 1, 2002 through and including September 30, 2004. Department Ex. 1. This audit was conducted on a “test check” basis, with the Department’s auditor sampling selected lease transactions engaged in between the taxpayer and various customers during the audit period. Tr. pp. 29, 30; Taxpayer’s Ex. 1A.
5. An “advance trade-in credit” against taxes due on motor vehicle sales is a credit that is earned when a motor vehicle is acquired by a dealer from a purchaser that is contractually obligated to make a purchase of a vehicle from that dealer no more than nine months after the dealer acquires the motor vehicle from the purchaser. 86 Ill. Admin. Code, ch. I, section 130.455. In effect, the acquired vehicle is treated as a “trade-in” for the vehicle the purchaser subsequently purchases from the dealer. *Id.* Because ABC’s sales of vehicles to GMAC exceeded its acquisition of vehicles available for use as “trade-ins” from GMAC, ABC only had enough advance trade-in credits to apply them in less than half of its vehicle sales to GMAC. Tr. pp. 114, 115. The Department’s audit included an examination of ABC’s advance trade-in

² See 35 ILCS 120/3.

credits reported in section 2 of ABC's forms ST-556. Department Ex. 1; Taxpayer's Ex. 1.

6. Due to the high number of transactions ABC made during the audit period, the Department's auditor only examined books and records pertaining to three deals in September and October 2002 and fourteen deals in October 2003 in which trade-in credits were claimed. Taxpayer's Ex. 1A. These books and records were kept in the form of "deal bags," which ABC created and maintained for each separate lease transaction the auditor reviewed. Tr. p. 28.
7. After analyzing the audit sample, the Department's auditor determined the amount of tax due regarding the sample transactions and then projected the tax due, based upon this audit sample analysis, to the entire audit period. Taxpayer's Ex. 1A.
8. The tax assessed as a result of the audit was based upon the Department's determination that ABC owed taxes related to its sale of vehicles to GMAC in connection with transactions entered into between ABC and various lease customers involving the transfer of leases between ABC and these customers to GMAC and the sale of vehicles under such leases to GMAC. Tr. pp. 12-15, 131-134. Specifically, the Department's auditor determined that ABC collected taxes from GMAC in connection with the sales of vehicles to GMAC under leases that exceeded the amount of taxes remitted to the Department on each separate ST-556 form filed by the taxpayer to report these transactions. *Id.*; Taxpayer's Ex. 1A.
9. In arriving at an audit determination, the Department's auditor reviewed the following:

- I.** An example of “Advance Trade-In Credit Agreements” entered into between ABC and GMAC which provided in pertinent part as follows: “The undersigned, General Motors Acceptance Corporation (Purchaser) hereby agrees to purchase from ABC (Dealer) one or more vehicles within nine months of the date of this transaction. In exchange, Purchaser is submitting a 2001 Cadillac Seville ... to be used as a trade-in against purchase price of the vehicle(s) referred to above. Dealer represents that it will provide Purchaser a credit (Advance Trade-In Credit) ... for the vehicle traded. The Amount of the Advance Trade-In Credit will be allowed to reduce, for purposes of the Illinois sales tax, the amount of taxable sales price of the vehicle(s) to be purchased from the Dealer within the time period specified above. ... The Trade-In Credit is valid only for the Purchaser named above, and is not transferable.” Taxpayer’s Ex. 1.
- II.** Various documents prepared in connection with leases of the vehicles ABC sold to GMAC including examples of the typical lease entered into between GMAC and vehicle lessees (the so-called “GMAC Smartlease”), and worksheets used to compute the lessee’s monthly rental payment (the so-called “Smartlease Worksheet”), both of which indicate that sales and use taxes are included in the cost price of the vehicle under lease that is sold by ABC to GMAC as part of the lease transaction. *Id.*
- III.** Examples of Motor Vehicle Purchase Orders prepared by ABC and appearing on ABC’s letterhead which purport to invoice GMAC as purchaser of vehicles sold to GMAC (along with the transfer of leases

pertaining to the vehicles) showing a cost price for the vehicles that includes state sales and use taxes in the taxable amount of the cost. *Id.*

IV. ST-556 forms prepared to report lease transactions documented by the aforementioned documentation reflecting “Advance Trade Credit” deductions for the taxable amount of the cost of a previously acquired vehicle being traded in on the acquisition of a vehicle from GMAC pursuant to the “Advance Trade-In Credit Agreement” entered into between GMAC and ABC. *Id.*

Conclusions of Law:

The issue in this case is whether taxes, invoiced to GMAC and reflected as amounts paid by GMAC in the taxpayer’s books and records that exceeded amounts reported as collected from GMAC on the taxpayer’s ST-556 sales tax returns, are required to be remitted to the Department under provisions of the Illinois sales and use tax laws.³ For the reasons enumerated below, I conclude that amounts shown as tax collections in the taxpayer’s books and records exceeding amounts reported as tax collections on the taxpayer’s returns constitute amounts due and owing to the Department pursuant to the provisions of the Illinois sales and use tax laws.

Statutory Burden of Proof

The admission into evidence of the corrected returns by the Department under the certification of the Director at a hearing before the Department or in any legal proceeding establishes the Department’s *prima facie* case. 35 ILCS 120/4; Copilevitz v.

³ The pre-trial order entered in this case states that “[T]he issue to be decided at hearing is whether gross receipts were underreported for purposes of the Retailers’ Occupation Tax Act.”

Department of Revenue, 41 Ill. 2d 154 (1968); Central Furniture Mart v. Johnson, 157 Ill. App. 3d 907 (1st Dist. 1987). Thus, when the Department introduced its corrected return into the record, the Department's *prima facie* case was established.

Once the Department has established its *prima facie* case, the burden of proof shifts to the taxpayer. To overcome the Department's *prima facie* case, the taxpayer must present consistent, probable evidence identified with its books and records. Copilevitz, supra; Central Furniture Mart, supra. Testimony alone is not enough. Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill. App. 3d 203 (1st Dist. 1991); A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3d 826 (1st Dist. 1988). The record in this case establishes that the taxpayer has failed to submit sufficient evidence to overcome the Department's *prima facie* case.

Summary of Applicable Law Regarding Trade-Ins

The tax at issue in this matter is imposed by the Retailers' Occupation Tax Act (the "ROTA"), 35 ILCS 120/1 *et seq.* It is a tax upon persons engaged in the business of selling tangible personal property that is measured by the gross receipts from such sales. 35 ILCS 120/3; Norton Co. v. Illinois Department of Revenue, 340 U.S. 534 (1951). The amount of Retailers' Occupation Tax imposed on a purchase is determined by multiplying the "gross receipts" from the sale of tangible personal property by the prescribed rate. 35 ILCS 120/2-10. The term "gross receipts" is defined as follows:

“(G)ross receipts” from the sales of tangible personal property at retail means the total selling price of the amount of such sales, as hereinbefore defined.”
35 ILCS 120/1.

The term “selling price” is defined in the ROTA as follows:

“Selling price” or the “amount of sale” means the consideration for a sale valued in money whether received in money or otherwise, including cash, credits, property, other than as hereinafter provided, and services, but not including the value of or credit given for traded-in tangible personal property where the item that is traded-in is of like kind and character as that which is being sold ... [.]” (emphasis added)
35 ILCS 120/1

The foregoing definition, when read *in pari materia* with the definition of “gross receipts” provides for the reduction of taxable “gross receipts” by the value or credit properly given for trade-ins.

By regulation, trade-ins for which credit can properly be given includes “Advance Trade Credits.” 86 Ill. Admin. Code, ch. I, section 130.455(a), (b). “Advance Trade Credits” are credits earned when a motor vehicle is traded to a dealer for a future purchase of a vehicle where the purchaser is contractually obligated to make a purchase within nine months after the advance trade. *Id.* An “Advance Trade Credit” is established when a value is assigned to the motor vehicle being traded. *Id.* A credit that is unused after nine months expires. *Id.*

Summary of Facts

The facts at issue in this case are essentially undisputed. ABC is engaged in two types of businesses: 1) the sale of new and used vehicles; and 2) leasing new vehicles to customers. Tr. p. 22; Taxpayer’s Ex. 1. General Motors Acceptance Corp. (“GMAC”) is also engaged in two types of business related to this case, namely: 1) the sale of vehicles; and 2) leasing vehicles to customers. ABC and GMAC had a written understanding that ABC would purchase General Motors cars its sells only from GMAC. Tr. p. 22.

In the conduct of its leasing business, ABC would solicit potential lease customers interested in leasing new vehicles that ABC generally had in its inventory of vehicles at its dealership. Taxpayer's Ex. 1. Once a vehicle was selected by the customer, ABC would enter into a lease agreement with the customer pursuant to which ABC, as lessor, agreed to lease the vehicle to the customer for the term of the lease. *Id.* After entering into the lease, ABC would routinely transfer the lease it entered into to GMAC. Taxpayer's Brief p. 3. GMAC thus assumed the role of lessor. In connection with the transfer of the lease to GMAC, ABC also sold the vehicle under lease to GMAC. *Id.* Thus ABC was both a seller to and purchaser from GMAC.

GMAC sold both new and used cars to ABC. Used cars sold to ABC generally were vehicles coming off lease that GMAC, therefore, no longer needed. Taxpayer's Brief p. 2.

Regulation 86 Ill. Admin. Code, ch. I, section 130.455 noted above is applicable to transactions in which an automobile dealer is selling vehicles to and purchasing vehicles from a vehicle supplier. Specifically, this regulation states as follows:

a) Definitions.

Advance Trade Credit means a trade-in credit earned as the result of the trade-in of a vehicle on the future purchase of a vehicle where the purchaser is contractually obligated to make a purchase within 9 months after the advance trade ...

b) Use of Trade-In Credits

1) A dealer may reduce his gross receipts by the value or credit given for a traded-in motor vehicle where: ...

B) A lessor trades a motor vehicle he owns on the purchase of a new or used motor vehicle for subsequent lease ...

86 Ill. Admin. Code, ch. I, section 130.455

In order to avail itself of the trade-in credit benefit noted above, ABC entered into agreements with GMAC regarding this credit. An example of such an agreement is the

Advance Trade-In Credit Agreement entered into between ABC and GMAC in connection with a transaction involving the lease of a vehicle to a Mr. XXXX. The lease transaction involving Mr. XXXX was one of the transactions reviewed by the auditor in arriving at a liability in this case. This Advance Trade-In Credit Agreement states in part as follows:

The undersigned General Motors Acceptance Corporation (Purchaser) hereby agrees to purchase from ABC (Dealer) one or more vehicles within nine months of the date of this transaction. In exchange, Purchaser is submitting a 2001 Cadillac Seville ... to be used as a trade-in against the purchase price of the vehicles(s) referred to above. Dealer represents that it will provide Purchaser a credit (Advance Trade-In Credit) ... for the vehicles traded. The Amount of the Advance Trade-In Credit will be allowed to reduce, for purposes of Illinois sales tax, the amount of taxable sales price of the vehicles(s) to be purchased from the Dealer within the time period specified above ... The Trade-In Credit is valid only for the Purchaser named above, and is not transferable.

Taxpayer's Ex. 1.

Pursuant to this agreement, ABC was entitled to apply a trade-in as a credit in determining the amount of gross receipts to be collected from GMAC on sales of vehicles to GMAC in connection with lease transactions when reimbursing itself through the collection of use tax to offset its sales tax liability pursuant to section 8 of the Use Tax Act, 35 ILCS 105/8.⁴ However, rather than applying the credit and reducing the amount of gross receipts it collected from GMAC by the amount of the available trade-in credit, ABC charged GMAC the full amount of tax due on the purchase of vehicles ignoring any available trade-in credit. The "Smartlease" , "Smartlease Worksheet" and invoices to

⁴ Under the terms of the Retailers' Occupation Tax Act, a retailer is liable for tax on an item when the retailer sells it. On the same transaction, the buyer is separately liable for use tax, which the retailer must collect and remit under the terms of the Use Tax Act. However, pursuant to section 8 of the Use Tax Act, 35 ILCS 105/8, the use tax that the retailer collects need not be remitted if, on the same transaction, the retailer pays a retailers' occupation tax.

GMAC contained in the record clearly demonstrate this. Taxpayer's Ex. 1. So, even though ABC was entitled to take trade-in credits, the documents of record do not show that it did so on the sales of vehicles to GMAC at issue in this case.

Despite having ignored available trade-in credits in its invoices and other records of sales to GMAC, and despite having shown in these records collections of tax on gross receipts without reflecting any such credits, the trade-in credits at issue in this case were claimed on ST-556 returns filed regarding these transactions. *Id.* On its ST-556 returns reporting the aforementioned transactions, the taxpayer treated the vehicles acquired from GMAC coming off lease as trade-ins for vehicles sold to GMAC. Taxpayer's Ex. 1. The Department's auditor computed the taxpayer's liability by allowing these trade-ins as deductions for purposes of determining taxes due on ABC's sale of vehicles to GMAC. However, he determined that the discrepancy between tax amounts in invoices naming GMAC as purchaser and shown in the taxpayer's books, and tax reported on the taxpayer's ST-556 returns, resulted in a collection of tax by the taxpayer that was not properly reported, and, accordingly, the auditor assessed a liability for unpaid taxes.

Analysis

Section 3-45 of the Use Tax Act ("UTA"), 35 ILCS 105/3-45 provides as follows:

§ 3-45. Collection. The tax imposed by this Act shall be collected from the purchaser by a retailer maintaining a place of business in this State or a retailer authorized by the Department under Section 6 of this Act, and shall be remitted to the Department ... [.] ... If a seller collects use tax measured by receipts that are not subject to use tax, or if a seller, in collecting use tax measured by receipts that are subject to tax under this Act collects more from the purchaser than the required amount of the use tax on the transaction, the purchaser shall have the legal right to claim a refund of that amount from the seller. If,

however, that amount is not refunded to the purchaser for any reason, the seller is liable to pay that amount to the Department.

The applicability of this provision to retailers collecting use tax as reimbursement for retailers' occupation taxes due from customers is indicated in section 130.901(g) of the Department's sales tax regulations. This section provides as follows:

If a seller collects an amount (however designated) that purports to reimburse the seller for Retailers' Occupation Tax liability measured by receipts that are not subject to retailers' occupation tax, or if a seller, in collecting an amount (however designated) that purports to reimburse the seller for Retailers' Occupation Tax liability measured by receipts that are subject to tax under the Act, collects more from the purchaser than the seller's Retailers' Occupation Tax liability on the transaction, the purchaser shall have a legal right to claim a refund of that amount from the seller. If, however, that amount is not refunded to the purchaser for any reason, the seller is liable to pay that amount to the Department.

86 Ill. Admin. Code, ch. I, section 130.901

The Department contends that the taxpayer overcollected tax pursuant to these provisions when it collected more tax than it remitted to the Department.

The record indicates that GMAC charged ABC an amount which exceeded the value of used vehicles it sold to ABC. Tr. p. 92. This additional charge was intended to account for the "Advance Trade Credit" tax benefit arising from ABC's ability to reduce its tax cost by the amount of this credit on future purchases from GMAC. *Id.* The taxpayer contends that, as an accounting practice, the taxpayer recouped this additional charge by calculating tax to be collected from GMAC without taking into account any "Advance Trade Credit" and that, therefore, the taxpayer did not overcollect taxes due and owing. Specifically, the taxpayer argues as follows:

The Department would have ABC refund to GMAC an amount equivalent to the tax on the Advance Trade In amount that GMAC gave to ABC when ABC purchased an off-lease vehicle from GMAC. That

“refund” would unjustly enrich GMAC at ABC’s expense, since GMAC would receive a payment in the amount of the tax on the Advance Trade In amount – an amount that ABC already paid to GMAC once before, when it purchased the off-lease vehicle from GMAC that gave rise to the Advance Trade In Credit. In an actual over-collection, the refund of the additional tax should not affect the benefit of the bargain that either party negotiated. Since that is precisely what a ruling in favor of the Department would accomplish here, the proposed adjustment is itself proof that no unjust enrichment occurred.

Taxpayer’s Brief p. 3

Section 3-45 of the UTA provides that any collection of tax from a purchaser over and above that due must either be refunded or paid to the State. Based upon a plain reading of section 3-45, the Department contends that the amount added to the taxpayer’s bill when no tax was actually due must be paid to the State. Tr. p. 133.

There is no question that the amount charged the taxpayer in excess of the fair market value of vehicles on account of “Advance Trade Credits” was an expense to the taxpayer. For this reason, the taxpayer argues that the amounts collected from GMAC representing a reimbursement to the taxpayer of amounts previously paid to GMAC by the taxpayer did not constitute an “overcollection” and therefore were not properly subject to the provisions of section 3-45 of the UTA. Specifically, the taxpayer asserts the following:

The legislative purpose for the provision on which the Department relies ... to issue an over-collection assessment [section 3-45 of the UTA] “is to prevent unjust enrichment of an Illinois seller when the seller collects a tax measured by receipts which are not subject to the retailers’ occupation tax or collects more than the amount of tax due on receipts which are subject to tax.” Acme Brick and Supply Company v. Illinois Department of Revenue, 133 Ill. App. 3d 757 ...(1985), interpreting the over-collection provisions of the Retailers’ Occupation Tax Act (“ROTA”). For that reason the Use Tax Act, the Retailers’ Occupation Tax Act, and the Department’s regulations provide that a purchaser in a transaction in which the vendor has over collected tax

“shall have a legal right to claim a refund of that amount from the seller.”

The Department’s derivative statutory right to claim the unjust enrichment for itself by issuing an assessment does not arise unless the amount “is not refunded to the purchaser for any reason.” Where the Department is unable to prove that a retailer was unjustly enriched at a purchaser’s expense, the Department lacks authority to exercise its derivative right to recover the unjust enrichment. Competent evidence shows that the Department lacked that authority here.”

Txpayer’s Brief pp. 1, 2.

Section 3-45 of the UTA clearly is designed to prevent unjust enrichment on the part of retailers through the collection of retailers’ occupation related use taxes in excess of that allowed on the property subject to tax. Both Acme Brick and Supply Company, supra, and Adams v. Jewel Companies, Inc., 63 Ill. 2d 336 (1976) acknowledge this. According to the taxpayer, the revenue collected from GMAC shown on the taxpayer’s invoices and other books and records, while denominated a tax collection, served an accounting rather than a tax function. It argues that this amount related to money collected by ABC effectively increasing the price to GMAC to reflect the fact that the taxpayer already paid GMAC for “Advance Trade Credits” when it purchased the off lease vehicles enabling it to qualify for these credits.

The taxpayer’s argument contests the applicability of section 3-45 of the UTA in this case. However, as pointed out by the Department, section 8 of the UTA, 35 ILCS 105/8 provides as follows:

§ 8. Any retailer required to collect the tax imposed by this Act shall be liable to the Department for such tax, whether or not the tax has been collected by the retailer, except when the retailer is relieved of the duty of remitting the tax to the Department by virtue of having paid a tax imposed by the Retailers’ Occupation Tax Act upon his or her gross receipts from the same transaction. To the extent that a retailer required to collect the tax imposed by this Act has actually collected

that tax, such tax is held in trust for the benefit of the Department.
(emphasis added)

Even accepting the taxpayer's argument that it has not been unjustly enriched because it was recouping amounts it had already paid to GMAC through the mechanism of a tax charge, it is clear that the taxpayer collected use tax to reimburse itself for retailers' occupation tax imposed by the ROTA by virtue of its invoices to GMAC showing state sales and use taxes due. This is evident from the manner in which such tax charges are reflected on the "Smartleases" and "Smartlease Worksheets" prepared to show the cost of vehicles under lease. Taxpayer's Ex. 1.

Pursuant to section 8 of the UTA, if a seller collects use taxes due the Department (including amounts intended to reimburse the seller for retailers' occupation tax) the amounts collected become the property of the State. Upon collection of such amounts, the taxpayer becomes a "fiduciary" holding the State's funds in trust. As a consequence of section 8, the Illinois sales and use tax law simply does not permit a taxpayer to collect a properly determined tax amount without remitting it to the State.

The taxpayer argues that section 8 of the UTA only applies when use tax is collected to reimburse a retailer for the amount of retailers' occupation tax that is properly due and owing. In this case, the taxpayer argues, the tax reflected in the taxpayer's books and records and on invoices prepared in connection with the taxpayer's sale of vehicles to GMAC was not the proper amount of retailers' occupation tax due and owing because the taxpayer was entitled to reduce the amount of retailers' occupation tax due by the amount of "Advance Trade Credits" it received from GMAC. Specifically, the taxpayer argues as follows:

Under the Illinois ROTA, a retailer is not required to include in taxable gross receipts the value given by the retailer to the purchaser that is redeemed in making the sale, such as a retailer's coupon, the face value of which can be redeemed by a purchaser when making a purchase from the retailer. Saxon-Western Corporation v. Mahin, 81 Ill. 2d 559 ... (1980). Unlike a manufacturer's rebate or coupon, where the retailer receives additional gross receipts from a third party and must therefore include those additional gross receipts as taxable gross receipts, in this instance the Advance Trade In Credit GMAC gives to ABC represents moneys paid by ABC to GMAC for the purchase of the off-lease vehicle. The Advance Trade In Credit itself states that GMAC received value from ABC, and that in exchange for GMAC's promise to make a subsequent purchase from ABC, ABC will reduce the tax due from GMAC when GMAC makes a purchase from ABC within 9 months.

The Court explained that "[w]here receipts are in no way increased as a result of a discount program, only so much of the seller's gross receipts as are actually realized are taxable." Saxon-Western Corporation v. Mahin, 81 Ill. 2d 559 ... (1980). ABC had to credit the GMAC Advance Trade In Credit account with an amount that GMAC would redeem from ABC upon the purchase of a new vehicle from ABC within 9 months. When GMAC purchased a new SmartLease vehicle, ABC credited GMAC with the value of the Advance Trade In Credit, reducing the tax due from GMAC and to be remitted to the State, and debited its own account in the amount it had set aside for GMAC when it purchased the off-lease vehicle generating the Advance Trade In Credit. The amount so credited and debited ... did not constitute consideration for the sale of a vehicle and in no way increased the gross receipts from the sale. As a reimbursement by a purchaser of amounts advanced by the seller for a tax benefit that the Department's regulations allow for purchasers that qualify to give and use Advance Trade In Credits, the reimbursement amount does not increase ABC's gross receipts from the sale.

Taxpayer's Brief pp. 12, 13

The record shows that the taxpayer had only enough trade-in vehicles from GMAC generating "Advance Trade Credits" to apply these credits to less than half of its sales of vehicles to GMAC. Tr. pp. 114, 115. Accordingly, the taxpayer did not uniformly apply trade-in credits in all transactions in which it sold vehicles to GMAC pursuant to lease transactions entered into with customers transferred to GMAC.

Because of the available amount of trade-in credits, most transactions involving the sale of vehicles to GMAC did not involve the application of trade-in credits to reduce the taxpayer's taxes. *Id.* Transactions wherein trade-in credits were taken, due to the limited availability of trade-in credits, were the exception rather than the rule. *Id.*

With the exception of the ST-556 returns reporting the "Advance Trade Credits" at issue in this case, the records of the transactions audited by the Department are consistent with sales in which no "Advance Trade Credits" were taken. In the event a credit is not taken, retailers' occupation tax is due on the entire gross receipt from GMAC since it is not offset by any trade-in amount. I find the evidence contained in the record consistent with a sale wherein no available trade-in credit was taken rather than with a transaction in which a trade-in credit was taken to reduce the amount of taxpayer's gross receipts. Given the books and records of the transactions the auditor reviewed, the ST-556 reports filed to reflect these transactions simply did not accurately reflect the actual transactions being reported. Accordingly, I find that the taxpayer properly collected taxes on its sales to GMAC since the taxpayer's records show that no trade-in credits were taken into account in determining the gross receipts from these transactions.

What the taxpayer did in filing ST-556 returns reporting the application of trade-in credits not otherwise indicated by its books and records is analogous to a taxpayer reporting a like-kind exchange pursuant to section 1031 of the Internal Revenue Code on its federal return without ever having actually engaged in this type of transaction. Since the return would not actually reflect the true nature of the transaction that took place, the taxpayer would not be entitled to any federal tax benefits simply because its federal returns reported an exempt transaction.

Section 8 of the UTA provides that funds properly collected as taxes can only be used to reimburse a retailer for retailers' occupation taxes the retailer owes. Such collections cannot be used to reimburse the retailer for expenses it has incurred or in any other way benefiting the taxpayer. The purpose of section 8 differs from the function of section 3-45 which is designed to prevent unjust enrichment. What is manifested in section 8 is the State's interest in purchasers not being misled into believing amounts are tax payments that are actually being used for some other purpose. Moreover, allowing taxpayers to designate amounts as tax that actually are designed to be receipts serving some other purpose makes enforcement of the state's tax laws problematic at the least. For the foregoing reasons, I conclude that the Department was justified in requiring the amounts shown as "taxes" on invoices and in the taxpayer's books and records that exceeded amounts remitted to the Department as taxes with the taxpayer's ST-556 forms to be turned over to the state.

In sum, I decide the issue identified by the parties in the pre-trial order entered in this case, namely "whether gross receipts were underreported for purposes of the Retailers' Occupation Tax Act", in favor of the Department. Accordingly, I conclude that the taxpayer underreported the amount of taxes due on the transactions at issue on its ST-556 returns. I further determine that the taxpayer collected the correct amount of tax on these transactions from GMAC. Since the taxpayer collected the correct amount of taxes from GMAC as reimbursements for its Retailers' Occupation Tax liability, it is required to remit these taxes to the Department pursuant to section 8 of the UTA.⁵

⁵ The taxpayer also argues that denial of advance trade-in credits will result in double taxation since the State will obtain tax on the gross price of the vehicle being sold and will receive proceeds from the vehicle traded in when it is sold. Taxpayer's Brief pp. 3 – 5. However, since I find that no advance trade-in credits

WHEREFORE, for the reasons stated above, it is my recommendation that the Notices of Tax Liability at issue in this case be affirmed and finalized.

Ted Sherrod
Administrative Law Judge

Date: September 16, 2008

were used in the transactions at issue, the advance trade-in credits that the taxpayer improperly claimed on its ST-556 returns remain available if they have not expired.