

**STATE OF ARKANSAS
DEPARTMENT OF FINANCE AND ADMINISTRATION
OFFICE OF HEARINGS & APPEALS**

ADMINISTRATIVE DECISION

IN THE MATTER OF

ACCT. NO.:

DOCKET NO.: 17-180

**GROSS RECEIPTS
TAX ASSESSMENT**

\$ ¹

RAY HOWARD, ADMINISTRATIVE LAW JUDGE

This case is before the Office of Hearings and Appeals upon a written protest dated May 10, 2016, signed by [REDACTED], on behalf of himself and [REDACTED], the Taxpayers. The Taxpayers protested an assessment of Gross Receipts Tax (“sales tax”) resulting from a motor vehicle registration review conducted by the Department of Finance and Administration (“Department”). The Letter ID Number is [REDACTED].

This case was originally scheduled for an in-person hearing on March 15, 2017, in Jonesboro, Arkansas. The Department was represented by Lauren Ballard, Attorney at Law, Office of Revenue Legal Counsel. The Taxpayers were represented by [REDACTED], Attorney at Law, [REDACTED]. By agreement of the parties, this case was submitted for consideration based on written documents. A Briefing Schedule was mailed to the parties on April 27, 2017. The Department’s Opening Brief was filed on May 11, 2017. The Taxpayers’ Response Brief was filed on June 9, 2017. This matter was submitted for decision on July 17, 2017.

¹ The reflected amount includes sales tax (\$ [REDACTED]) and interest (which was \$ [REDACTED] as of May 3, 2016) with credit for a payment in the amount of \$ [REDACTED].

ISSUE

Whether the tax assessment issued against the Taxpayers on the purchase of a motor vehicle, resulting from the denial of a claimed sales tax credit, should be sustained? Yes.

FINDINGS OF FACT

On November 19, 2015, the Taxpayers purchased a 2016 Chevrolet [REDACTED] (VIN – [REDACTED]) (“2016 Chevy”) for \$ [REDACTED]. See Department Exhibit 1. When the Taxpayers registered the 2016 Chevy on December 14, 2015, they claimed a credit for the private sale of a 2012 Chevrolet [REDACTED] (VIN – [REDACTED]) (“2012 Chevy”) in the amount of \$ [REDACTED]. See Department Exhibit 4. The Department’s Opening Brief provides, in pertinent part, as follows:

. . . . At the time of the sale, the 2012 Chevy was owned by, and registered in the name of, the “[REDACTED] Family Trust.” [See Department Exhibit 5].

In a letter dated April 14, 2016, Fadime Ledford, DFA Service Representative, advised the Taxpayers of a discrepancy in the registration of the 2016 Chevy. See **Exhibit 6**. The Taxpayers were advised that the Department’s records reflect that the 2012 Chevy was not registered to “[REDACTED],” but rather to “[REDACTED] Family Trust.” The 2016 Chevy was purchased by [REDACTED], and registered in the names of [REDACTED]. Therefore, no credit is allowed. A Notice of Proposed Assessment was mailed to the Taxpayers on May 3, 2016. See **Exhibit 7**. The Taxpayers timely protested the assessment on May 10, 2016. See **Exhibit 8**.

Taxpayers admit that the 2012 Chevy was owned by the “[REDACTED] Family Trust.” Further, the Taxpayers admit that the 2016 Chevy was purchased in the name of “[REDACTED].” In support of their protest, the Taxpayers provided two documents reflecting the name of [REDACTED]; namely, a copy of a vehicle registration certificate issued by [REDACTED].

DFA on June 20, 2012, and a copy of a [REDACTED] Personal Property Assessment for [REDACTED] dated 5/15/2012. The foregoing documents are not relevant for purposes herein.

[REDACTED] Family Trust and [REDACTED] are two separate and distinct consumers. They are separate legal entities, with separate legal rights and obligations. Arkansas law does not provide for transfers of credit between two different consumers. Here, as provided in the attached documentation, the Taxpayers purchased the 2016 Chevy in their individual names. The Taxpayers signed all purchase documents in their individual names. The Taxpayers then registered the vehicle in their individual names, and signed the application for title in their individual names. Accordingly, the Taxpayers are ineligible for a sales tax credit on the transaction involving the sale of the 2012 Chevy owned by, and registered in, the name of the [REDACTED] Family Trust. The private sale of the 2012 Chevy owned by the Trust cannot be applied against the purchase price of the 2016 Chevy purchased by the Taxpayers in their individual capacity. [P. 1-2].

The Taxpayers' Response Brief identifies [REDACTED]

[REDACTED] as "Consumer" and states, in part:

The APPLICATION FOR TITLE (DFA Exhibit 4) shows the lienholder to be [REDACTED]. Consumer's understanding was that [REDACTED] required him to borrow the money in his individual name, not in his name as trustee of his living trust, and required him to put the vehicle in his individual name, not as Trustee of his trust. Once the debt was paid and [REDACTED] was off the title, the Consumer understood that he could transfer the truck into the Revocable Living Trust without any consequences.

Furthermore, Consumer had experienced difficulty with General Motors on more than one occasion when he took his 2012 Chevrolet in for warranty work because of the length of the name on the title of his truck, that being "The [REDACTED] Family Trust under trust agreement dated [REDACTED]". For these reasons, he decided to put the 2016 Chevrolet [REDACTED] in his and his wife's name individually rather than in his and his wife's name as Trustee of their trust.

Consumer sold his old truck and bought a new truck for him and his wife. Consumer, individually or as Trustee of the [REDACTED] Family Trust, is one and the same Consumer.

This Consumer should not be penalized by additional taxes for doing thrifty estate planning.

Consumer's sole purpose in establishing the living trust was, is and always will be to avoid probate expenses when Consumer dies. Consumer's goal, to stay out of probate court, was accomplished by establishing a revocable trust. [P. 2].

CONCLUSIONS OF LAW

Standard of Proof

Ark. Code Ann. § 26-18-313(c) (Supp. 2015) provides, in pertinent part, as follows:

The burden of proof applied to matters of fact and evidence, whether placed on the taxpayer or the state in controversies regarding the application of a state tax law shall be by preponderance of the evidence.

A preponderance of the evidence means the greater weight of the evidence.

Chandler v. Baker, 16 Ark. App. 253, 700 S.W.2d 378 (1985). In Edmisten v. Bull Shoals Landing, 2014 Ark. 89, at 12-13, 432 S.W.3d 25, 33, the Arkansas Supreme

Court explained:

A preponderance of the evidence is “not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

The Department bears the burden of proving that the tax law applies to an item or service sought to be taxed, and a taxpayer bears the burden of proving entitlement to a tax exemption, deduction, or credit. Ark. Code Ann. § 26-18-313(d) (Supp. 2015). Statutes imposing a tax or providing a tax exemption, deduction, or credit must be reasonably and strictly construed in limitation of their application, giving the words their plain and ordinary meaning. Ark. Code

Ann. § 26-18-313(a), (b), and (e) (Supp. 2015). If a well-founded doubt exists with respect to the application of a statute imposing a tax or providing a tax exemption, deduction, or credit, the doubt must be resolved against the application of the tax, exemption, deduction, or credit. Ark. Code Ann. § 26-18-313(f)(2) (Supp. 2015).

Sales Tax Assessment

Ark. Code Ann. § 26-52-510(b)(1)(C)(i) (Repl. 2014) creates an entity-specific sales tax credit for the sale of a used motor vehicle in lieu of a trade-in. Stated differently, as reflected in Arkansas Gross Receipts Tax Rule GR-12.1(C)(1),² in order to qualify for the relevant sales tax credit, the same person or entity must be the customer who pays sales tax on the purchase of a motor vehicle and the customer who subsequently sells (or previously sold) a used motor vehicle in lieu of a trade-in.

Arkansas Gross Receipts Tax Rule GR-3(J) defines “person” to mean “any **individual**, partnership, limited liability company, limited liability partnership, corporation, estate, **trust**, fiduciary, **or any other legal entity**. [Emphasis added].” Based upon the same rationale used to support a conclusion that a corporation and its shareholders are separate and distinct legal entities,³ the

² GR-12.1(C)(1) states that, “[i]f a consumer purchases a vehicle and within forty-five (45) days of the date of purchase, either prior to or after such purchase, sells a different vehicle in lieu of a trade-in, the consumer will be entitled to a credit against the sales or use tax due on his or her newly purchased vehicle.”

³ In Mountain Valley Superette, v. Bottorff, 4 Ark. App. 251, 254 – 255, 629 S.W.2d 320, 322 (1982), the opinion of the Court of Appeals of Arkansas stated, “[i]n the case at bar, the stockholders who created the corporation in order to enjoy the advantages from its existence as a separate legal entity are asking that its existence be disregarded where it works a disadvantage to them. They ask us to treat the corporation as if it were a partnership. The corporate structure cannot be so lightly disregarded. A corporation is a legal entity separate and apart from its shareholders. [Citations omitted].” See also, Atkinson v. Reid, 185 Ark. 301, 306, 47 S.W.2d 571,

Office of Hearings and Appeals has consistently held that a trust and the settlor or trustee of the trust are separate and distinct legal entities.⁴

The Taxpayers' Response Brief set forth the following legal analysis and arguments in support of the contention that the Taxpayers and the Family Trust are "one and the same" legal entity:

██████████ is a Consumer and ██████████ is a Consumer, either individually or as Trustee of the ██████████ Family Trust. Either is the Settlor. Either is the Trustee. Either is the Primary Beneficiary. Either is one and the same whether he/she is acting in his/her individual capacity or as trustee of their revocable trust.

Under ACA Sec 28-73-401, "A trust may be created by: (2) declaration by the owner of property that the owner holds identifiable property as trustee;..." This is exactly what Consumer did.

In Leathers, Commissioner of Revenue, Arkansas Department of Finance and Administration v. Active Realty, Inc., (876 S.W.2d 583, 317 Ark. 214 (1994), the court states, "We first note the cardinal rule in construing tax legislation: a tax cannot be imposed except by express words indicating that purpose, and **where there is ambiguity or doubt it must be resolved in favor of the taxpayer.** Pledger v. The Grapevine, Inc., 302 Ark. 18, 786 S.W.2d 825 (1990). (emphasis added)

As stated in the DFA Legal Analysis and Argument, in order to qualify for the sales tax credit, the person or entity must be the same **consumer** who is liable for payment of the sales tax on the purchase of a motor vehicle and who subsequently sells (or previously sold) a used motor vehicle in lieu of trading it in. The person who sold the 2012 Chevrolet ██████████ was ██████████, the Consumer. The person who purchased the 2016 Chevrolet ██████████ was ██████████, the Consumer. He is one and the same person.

The Arkansas Department of Finance and Administration recognized this when it sent ██████████ Vehicle Registration

573 (1932) (stating, "the fact that one person owns all the stock in a corporation, does not make him and the corporation one and the same person.").

⁴ As demonstrated by GR-3(J), a trust is distinguished from an individual as a separate and distinct legal entity.

Renewal Notice to [REDACTED] on his 2012 Chevrolet (owned by him as Trustee) on the 2nd day of May, 2015 (Consumer's Exhibit 3) as they had done the year before on the 4th day of May, 2014 (Consumer's Exhibit 4). The DFA did not differentiate between [REDACTED] individually and [REDACTED], Trustee of his Revocable Trust!

Under Arkansas Gross Receipts Rule GR-12.1(B), **a consumer means any private individual, business, organization or association.** (emphasis added) [REDACTED], acting as Consumer, is a private individual. He is not a business, organization or association.

Arkansas Gross Receipts Rule GR-12.1(B), also, defines sale as follows, to-wit: "Sale means the transfer of title to a used vehicle by a **consumer** (the seller) to another individual or business enterprise (the buyer) in exchange for cash or the equivalent of cash, such as a check or money order..." (emphasis added) [REDACTED], the consumer (the seller) transferred the title to a used vehicle (the 2012 Chevrolet [REDACTED]) to another individual ([REDACTED]) (the buyer) in exchange for \$ [REDACTED] cash. This transfer was done within 45 days of his purchase of a new vehicle.

...

[REDACTED] is a private individual, not a business, organization, or association. Under the rules of a Revocable Trust, as in the case before the court, when the Settlor, Trustee, and Beneficiary are one and the same, then he should be considered as one and the same Consumer for gross receipts taxes. ACA Sec. 28-73-815 clearly states that a trustee may exercise the same powers over trust property that a competent owner has over individually owned property. In the case before the court, the Consumer had placed the 2012 vehicle in a Revocable Trust. As settlor, trustee and beneficiary of the Revocable Trust, he had the same power over the vehicle as if he individually owned it. When he sold it, he chose, for the sake of convenience, to title the 2016 vehicle in his individual name. The Consumer is still one and the same owner of the two trucks, the Revocable Trust being purely an estate planning device to avoid probate.

The [REDACTED] County Assessor recognized [REDACTED] as owner of the 2012 Chevrolet [REDACTED] on their Personal Property Assessment for 2014 (Consumer's Exhibit 5). On the Personal Property Assessment for 2015, it was noted that [REDACTED]

██████████ traded their 2012 Chevy ██████████ and purchased a 2016 Chevy ██████████. (Consumer's Exhibit 6).

██████████ County Collector, recognized ██████████ as the sole individual owner of all real and personal property that ██████████ own, either individually or as Trustee of their Revocable Trust. (Consumer's Exhibit 7 and 8).

Under Arkansas Code Annotated § 26-73-815, subsection (16), a trustee may exercise elections with respect to federal, state and local taxes. ██████████ have elected to be taxed by the federal government, by the state government, and by local government individually. Consumer files only one Federal income tax return and files only one State income tax return for Consumer individually and as Trustee of the ██████████ Family Trust.

The DFA argues that a revocable trust should be defined as a separate legal entity just as a corporation is a legal entity separate and apart from its shareholders. Arkansas trust law recognizes no such distinctions. A corporation has all kinds of benefits and protections that are not available to a Revocable Trust, to include but not limited to limited liability and responsibility for filing taxes separate and apart from the shareholders, both federal and state. A Revocable Trust has none of these characteristics or protections. (ACA Sec. 2873-501) The Revocable Trust is simply and only a testamentary device used widely in estate planning to avoid the time and expense of probate.

This may be a case of first impression. However, it is analogous to Fitton v. Bank of Little Rock, 210 Ark 280, 365 S.W. 3d 888 (2010). In Fitton, Ms. Fitton argued that the conveyance of the property to a Revocable Trust for estate planning purposes did not destroy her homestead exemption. The Bank of Little Rock argued that Ms. Fitton abandoned any homestead right when she conveyed her property to a revocable trust, **a separate legal entity**, the bank claimed. (emphasis added). The court stated, "The central issue in this appeal is whether a homestead exemption can extend to a revocable trust where the person claiming the exemption is the settlor, the trustee, and one of the beneficiaries of the trust, and maintain the property held by the trust as her principal place of residence." The Court held that, "a married person with a beneficiary interest in a property that she maintains as a principal residence is entitled to a homestead exemption, although the **title of the property is held by a revocable trust.**" (emphasis added)

There is no tangible difference in legal ownership between a vehicle titled in the name of a revocable trust and a vehicle titled in the name of the individuals. As in this case, a vehicle titled in the name [REDACTED], Trustee of the [REDACTED] Family Trust is the same as a vehicle titled in the individual name, [REDACTED]. It is one and the same Consumer.

Consumer, [REDACTED], is the Trustee. The act of either is binding on the other (Consumer's Exhibit 1). Under the terms and conditions of the Revocable Trust, the Trustee is empowered to do all things necessary and convenient for the orderly and efficient administration of the trust estate. **The Trustee is to manage and control the trust estate as fully as the Settlers might do themselves with respect to their own property** (emphasis added). (Consumer's Exhibit 1).

In Helvering Com'r of Internal Revenue v. Clifford (309 U.S.331, 60 S.Ct.554, 84 L.Ed.788, 1940), the United States Supreme Court states: "So far as his dominion and control were concerned it seems clear that the trust did not effect any substantial change. In substance his control over the corpus was in all essential respects the same after the trust was created, as before. The wide powers which he retained included for all practical purposes most of the control which he as an individual would have Since the income remains in the family and since the husband retains control over the investment, he has rather complete assurance that the trust will not effect any substantial change in his economic position." (p. 335)

As in Helvering, the [REDACTED] Family Trust did not effect any substantial change. [REDACTED] control over the corpus, the 2012 Chevrolet as well as the 2016 Chevrolet, is in all essential respects the same. [P. 2-5].

The legal analysis and arguments of the Taxpayers, regarding the distinctions recognized or not recognized by Arkansas trust law, are not persuasive.⁵ Tax deductions and credits, like tax exemptions, exist as a matter of legislative grace. See Cook, Commissioner of Revenue v. Walters Dry Good Company, 212 Ark. 485, 206 S.W.2d 742 (1947); and Kansas City Southern Ry.

⁵ Likewise, the arguments relating to the name(s) on Vehicle Registration Renewal Notices and County Personal Property Records are not compelling.

Co. v. Pledger, 301 Ark. 564, 785 S.W.2d 462 (1990). A taxpayer claiming a deduction or credit bears the burden of proving that he or she is entitled to the deduction or credit by bringing himself or herself clearly within the terms and conditions imposed by the statute that contains the deduction or credit. See Weiss v. American Honda Finance Corp., 360 Ark. 208, 200 S.W.3d 381 (2004). While the Taxpayers might be settlors and trustees of the Family Trust, those facts do not allow the separate legal existence of the Family Trust to be disregarded in order to satisfy the requirements of Ark. Code Ann. § 26-52-510(b)(1)(C)(i) (Repl. 2014) or Arkansas Gross Receipts Tax Rule GR-12.1(C)(1).

Applying the law to the facts of this case, the Taxpayers were not entitled to claim the sales tax credit on their purchase of the 2016 Chevy (in their individual capacities) when the vehicle sold in lieu of a trade-in (2012 Chevy) was owned by a different legal entity (the Family Trust). Consequently, the Department correctly assessed sales tax against the Taxpayers.

Subject to the limitation in Ark. Code Ann. § 26-18-405(d)(1)(C) (Supp. 2015), interest was properly assessed upon the tax deficiency for the use of the State's tax dollars. See Ark. Code Ann. § 26-18-508 (Repl. 2012).

DECISION AND ORDER

Subject to the limitation in Ark. Code Ann. § 26-18-405(d)(1)(C) (Supp. 2015), the assessment is sustained. The file is to be returned to the appropriate section of the Department for further proceedings in accordance with this Administrative Decision and applicable law. Pursuant to Ark. Code Ann. § 26-18-405 (Supp. 2015), unless the Taxpayers request in writing within twenty (20) days of the mailing of this decision that the Commissioner of Revenues revise the

decision of the Administrative Law Judge, this Administrative Decision shall be effective and become the action of the agency. The revision request may be mailed to the Assistant Commissioner of Revenues, P.O. Box 1272, Rm. 2440, Little Rock, Arkansas 72203. A revision request may also be faxed to the Assistant Commissioner of Revenues at (501) 683-1161 or emailed to revision@dfa.arkansas.gov. The Commissioner of Revenues, within twenty (20) days of the mailing of this Administrative Decision, may revise the decision regardless of whether the Taxpayers have requested a revision. The Taxpayers may seek relief from the final decision of the Administrative Law Judge or the Commissioner of Revenues on a final assessment by following the procedure set forth in Ark. Code Ann. § 26-18-406 (Supp. 2015).

OFFICE OF HEARINGS & APPEALS



RAY HOWARD
ADMINISTRATIVE LAW JUDGE

DATED: July 26, 2017