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

ADMINISTRATIVE DECISION

IN THE MATTER OF [redacted] **(ACCT. NO.:** [redacted] **)**	**MOTOR VEHICLE SALES TAX ASSESSMENT**
DOCKET NO.: 19-326	**LETTER ID:** [redacted] **($** [redacted] **)**[1]

RAY HOWARD, ADMINISTRATIVE LAW JUDGE

This case is before the Office of Hearings and Appeals upon a written protest dated November 20, 2018, signed by [redacted], the Taxpayer. The Taxpayer protested an assessment of Gross Receipts Tax ("sales tax") by the Department of Finance and Administration ("Department").

This case was submitted on written documents included with the protest at the request of the Taxpayer. A Briefing Schedule was mailed to the parties on January 24, 2019. The Department was represented by Lisa Ables, Attorney at Law, Office of Revenue Legal Counsel. The Taxpayer represented himself. The Department filed an Opening Brief on January 25, 2019. The Taxpayer filed his Response Brief on March 21, 2019. This case was submitted for decision on April 11, 2019.

ISSUE

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

[1] The reflected amount consists of tax ($[redacted]), penalty ($[redacted]), and interest ($[redacted]).

FINDINGS OF FACT/CONTENTIONS OF THE PARTIES

The Department issued a proposed assessment against the Taxpayer on October 31, 2018. The Department's Opening Brief addressed the basis for the assessment and stated, in part:

> On March 3, 2017 [redacted] ("Taxpayer") purchased a [redacted] (the "[redacted]") from [redacted]. The Bill of Sale reflects that the sales price of the vehicle was $[redacted] *See* the Bill of Sale attached as **Exhibit 1.** Taxpayer applied for an Arkansas title and registration to the [redacted] on April 18, 2017. *See* Application for Title attached as **Exhibit 2**. Taxpayer claimed a deduction for the private sale of two (2) motor vehicles for the sum of $[redacted] and was allowed a private sale deduction in that amount on the title application. Taxpayer provided a Bill of Sale for a [redacted] (the "[redacted]"). The Bill of Sale reflects that the [redacted] was sold to [redacted] on April 14, 2017 for $[redacted] and is attached as **Exhibit 3**. Taxpayer also provided a Bill of Sale for a [redacted] (the "[redacted]"). The Bill of Sale reflects that the [redacted] was sold to [redacted] on April 12, 2017 for $[redacted] and is attached as **Exhibit 4**.
>
> Subsequently, the DFA determined that the Taxpayer was still the registered owner of both the [redacted] and the [redacted]. On January 5, 2018, DFA mailed Notices of *Unregistered or Unpaid Tax* to [redacted] advising him that the alleged vehicles he purchased from the Taxpayer remain unregistered. *See* Notices attached as **Exhibits 5** and **6**. No response was received from [redacted]. On July 30, 2018, the DFA, again, mailed Notices of *Unregistered or Unpaid Tax* to [redacted]. *See* Notices attached as **Exhibits 7** and **8**. Both Notices were returned to DFA on or about September 13, 2018.
>
> After reviewing the Taxpayer's claims for the private sale deductions, the DFA notified the Taxpayer of the discrepancies by letter dated September 20, 2017. The letters advised Taxpayer that the information previously provided "contradicts records from the Office of Motor Vehicle which reflects that Taxpayer still owns the vehicles he claimed as sold," and further, that "the credits will not be allowed, and that additional tax, penalty, and interest will be due." Taxpayer was provided thirty (30) days in which to provide additional documentation to support the claims for credit. *See*

letters attached as **Exhibit 9** and **10**. The Taxpayer responded by letter dated October 29, 2018, and stated as follows:

> *Please find enclosed, two deposit slips for the funds in question. The deposit slip for April 9th was for partial payment of the [redacted]. The remaining $[redacted] was paid approximately 3 weeks later and was deposited with the $[redacted] for the sale of the [redacted]. Those funds were deposited on May 7th.*
>
> *The [redacted] was sold to a [redacted]. The [redacted] was sold to [redacted]. I am not sure if I can locate these two men but am willing to fill out any affidavit form your office requires.*

See Taxpayer letter and copy of two deposits slips attached as **Exhibit 11**.

. . .

. . .. The OMV records reflect that on October 31, 2018, Ebony Morgan, DFA Service Representative, attempted, unsuccessfully, to contact the Taxpayer by phone to advise that she had received his letter, with attached documentation, by facsimile on October 29, 2018. The documentation included two deposit slips from [redacted]. The deposit slip dated 4/9/18 reflects a cash deposit of $[redacted], and the deposit slip dated 5/7/18 reflects a cash deposit of $[redacted]. Both dates are approximately one (1) year beyond the date that the Taxpayer allegedly sold the vehicles.

Based upon the foregoing, A Notice of Proposed Assessment was sent to Taxpayer on October 31, 2018 in the amount of $[redacted], which consisted of tax in the amount of $[redacted], penalty of $[redacted], and interest of $[redacted]. *See* Notice of Proposed Assessment, attached as **Exhibit 12**. On November 20, 2018, Taxpayer filed a timely protest of the assessment. *See* Protest, attached as **Exhibit 13**. In his protest, the Taxpayer states:

> *"I sold two cars, one to [redacted], and one to [redacted]. Apparently neither titled them. I sent via fax checking Acct deposits that co-inside with the sales."*

The explanation and documentation provided by the Taxpayer in his letter of protest presents more questions than answers. The Taxpayer claims that he sold the [redacted] and the [redacted] to two separate individuals—[redacted] and [redacted]. However, the Bills of Sale submitted with Taxpayer's initial application for

registration of the [redacted], on March 3, 2017, reflect that both the [redacted] and the [redacted] were sold to [redacted], AR [redacted]. The Bills of Sale reflect the following information:

[redacted] (**Exhibit 3**)
The Bill of Sale reflects date sold as 4/14/17 at a price of $[redacted].

[redacted] (**Exhibit 4**)
The Bill of Sale reflects date sold as 4/12/17 at a price of $[redacted].

Neither Bill of Sale reflects a buyer by the name of "[redacted]."

Further, the dates and amounts reflected on the foregoing Bills of Sale, that were provided in the initial application, are inconsistent with the dates and amounts reflected on the deposit slips provided by the Taxpayer. One deposit slip is dated 4/9/18 and reflects a cash deposit of $[redacted]; and the other deposit slip is dated 5/7/18 and reflects a cash deposit of $[redacted].

Even assuming as true the Taxpayer's supplemental documentation, the Taxpayer has not demonstrated that the vehicles that were sold in lieu of a trade-in were sold within the 45 days required under the Arkansas law. Both the [redacted] and the [redacted] remain registered in the Taxpayer's name. The Taxpayer has not met his burden of proof in demonstrating that he actually sold the vehicles.

CONCLUSION

Based upon the foregoing, the Taxpayer has failed to meet his burden in establishing that he is entitled to a credit for the private sale of the [redacted] and the [redacted]. Accordingly, the assessment of the tax by the DFA is proper. The assessment of interest is proper because the tax was due, but not paid, thereby depriving the State of the use of such funds during the period at issue. *See* Ark. Code Ann. § 26-18-508 (Repl. 2012). The assessment of penalty is proper under applicable law for failure to pay the applicable tax due as required by Arkansas law. Ark. Code Ann. § 26-18-208 (Repl. 2012).[2] The DFA respectfully requests that the assessment against Taxpayer be sustained in full. [Footnote added, P. 2 - 5].

[2] The information in the Department's computer system indicates that the Taxpayer was assessed a late sales tax penalty.

The Taxpayer's Response Brief set forth the following reasons for his disagreement with the proposed assessment:

> On or around April of 2017 1 purchased a [redacted]. I did not need my family car any longer, nor one of my work trucks. So, I sold them, the Truck to an [redacted], then residing at [redacted] as best I can remember, and the [redacted] to a [redacted], I believe at the time he lived at [redacted].
>
> I then registered my new van and took the allowed tax exemption.
>
> Sometime later, I received a letter whereby I was informed that my tax exemption had been denied. I could not imagine why so I contacted the DMV. I was told there was no proof I sold the vehicles. Apparently, neither of the two men transferred title of the cars into their names.
>
> I did not know that was a necessary step. I have no idea what these men did with the vehicles. They might have left Arkansas, sold them for parts, wrecked the, who knows. I do not know the whereabouts of these men as they were random buyers.
>
> I provided the Department of Finance and Administration copies of deposit slips I believed to be representative of disposition of the funds paid to me. I do not know what else I can do.
>
> I do not think it is fair to require the seller of a vehicle to be responsible for the transfer of title but if that is the case I will be more careful in the future.
>
> I cannot renew my tags until this is decided, so I will anxiously await your decision. [P. 1].

CONCLUSIONS OF LAW

Standard of Proof

Ark. Code Ann. § 26-18-313(c) (Supp. 2017) 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. 2017). 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. 2017). 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. 2017).

Tax Assessment

As a general rule, all sales of tangible personal property in the State of Arkansas are taxable unless a specific statutory exemption is applicable. See Ark. Code Ann. § 26-52-101 et seq. (Repl. 2014, Supp. 2017). Ark. Code Ann. § 26-52-103(21)(A) (Repl. 2014) defines "tangible personal property" as "personal

property that can be seen, weighed, measured, felt, or touched or that is in any other manner perceptible to the senses[.]" A motor vehicle is tangible personal property. The liability for sales tax on sales of tangible personal property is upon the seller in most circumstances. See Ark. Code Ann. § 26-52-517 (Repl. 2014). However, the liability for sales tax on sales of motor vehicles required to be licensed is upon the purchaser pursuant to Ark. Code Ann. § 26-52-510 (Repl. 2014).

Ark. Code Ann. § 26-52-510(b)(1)(C)(i) (Repl. 2014) authorizes a sales tax credit for the private sale of a used motor vehicle and states, as follows:

> When a used motor vehicle, trailer, or semitrailer is sold by a consumer, rather than traded-in as a credit or part payment on the sale of a new or used motor vehicle, trailer, or semitrailer, and the consumer subsequently purchases a new or used vehicle, trailer, or semitrailer of greater value within forty-five (45) days of the sale, the tax levied by this chapter and all other gross receipts taxes levied by the state shall be paid on the net difference between the total consideration for the new or used vehicle, trailer, or semitrailer purchased subsequently and the amount received from the sale of the used vehicle, trailer, or semitrailer sold in lieu of a trade-in.

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. 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 it 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).

Gross Receipts Tax Rule GR-12.1 ("GR-12.1") was promulgated to implement and clarify the allowance of a sales tax credit for the private sale of a used vehicle and provides, in part:

> A. PURPOSE. This rule is promulgated to implement and clarify the allowance of a sales tax credit for the sale of a used vehicle when the proceeds from such a sale are applied toward the purchase price of another vehicle.
> B. DEFINITIONS.
> 1. "Consumer" means any private individual, business, organization or association.
> 2. "Vehicle" means an automobile, truck, motorcycle (registered for highway use), trailer and semitrailer.
> 3. **"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**. A sale does not occur, and therefore no credit will be allowed, when the title to a damaged vehicle is transferred by a consumer to an insurance company in exchange for a cash settlement paid by the insurance company.
> C. GENERAL INFORMATION.
> 1. If 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.
>
> . . .
>
> D. CERTIFICATION.
> 1. **In order to obtain the sales tax credit as set forth in this rule, the consumer must provide a properly completed bill of sale to the Department**.
> a. If the vehicle sold by the consumer in lieu of a trade-in is sold prior to the time the consumer registers and pays sales tax on his or her newly purchased vehicle, a bill of sale for the vehicle sold must be submitted to the Revenue Office at the time the newly purchased vehicle is registered. **The bill of sale must be signed by both the consumer and the purchaser. The bill of sale must include name and address of purchaser and seller, vehicle description and VIN, sales price, and date of sale**. (A Bill of Sale form and instructions can be found on the DFA website in the Motor Vehicle Section.) Failure to provide a bill of sale will result in the disallowance of the deduction. [Emphasis added].

[redacted]. The Bill of Sale for the [redacted] (Department Exhibit 4) is dated 4/12/17, and reflects that the "Purchaser" was [redacted]. The case file contains conflicting evidence regarding the purchaser of the [redacted]. The Taxpayer's Protest Form and the Taxpayer's Response Brief indicate that the purchaser of the [redacted] was [redacted]. Consequently, the Bill of Sale for the [redacted] did not satisfy the certification requirements of GR-12.1(D)(1)(a) and the Department correctly denied the credit claimed by the Taxpayer relating to the purported sale of the [redacted].

[redacted]. The Taxpayer purchased a [redacted] on March 13, 2017, for $[redacted].[3] When the Taxpayer registered the [redacted], he claimed a credit relating to the sale of a [redacted] in the amount of $[redacted]. Department Exhibit 3 is the Bill of Sale for the [redacted] which indicates the "Date Vehicle Sold" was 4/14/17. Department Exhibit 11 is a letter submitted by the Taxpayer which states that, ". . . the $[redacted] for the sale of the [redacted]. Those fund were deposited on May 7th." The deposit slip associated with the proceeds from the sale of the [redacted] is dated "5/7/18."[4]

As a legislative enactment, the Arkansas General Assembly established the parameters of the sales tax credit in Ark. Code Ann. § 26-52-510(b)(1)(C)(i) (Repl. 2014) and the Arkansas General Assembly granted the credit only when the purchase and sale transactions were within forty-five (45) days of each other. Ark. Code Ann. § 26-52-510(b)(1)(C)(i) (Repl. 2014) utilizes mandatory language, leaving no discretion to apply a different time period even if a taxpayer establishes that unusual or exigent circumstances prevented compliance with the

[3] See Department Exhibit 1 – P. 3.
[4] See Department Exhibit 11 – P. 3.

time period. In the absence of any legislative intent or a duly promulgated rule to the contrary, compliance with the forty-five (45) day time period is an absolute requirement for entitlement to the credit.

Under the facts and circumstances of this case, a preponderance of the evidence does not support a finding that the Taxpayer sold the [redacted] within forty-five (45) days of the date he purchased the [redacted] since the proceeds related to the purported sale of the [redacted] were deposited more than a year (5/7/18) after the [redacted] was purchased (3/13/17).

The Taxpayer failed to prove entitlement to the sales tax credit provided by Ark. Code Ann. § 26-52-510(b)(1)(C)(i) (Repl. 2014) for either the [redacted] or the [redacted]. Consequently, the Department correctly assessed sales tax against the Taxpayer.

Interest and Penalty

Interest is owed upon the tax deficiency for the use of the State's tax dollars. See Ark. Code Ann. § 26-18-508 (Repl. 2012).

The Department's records reflect that a ten percent (10%) late payment penalty was assessed against the Taxpayer under the provisions of Ark. Code Ann. § 26-52-510(a)(4)(A) (Repl. 2014). The late payment penalty authorized by Ark. Code Ann. § 26-52-510(a)(4)(A) (Repl. 2014) is not applicable under the facts of this case. Ark. Code Ann. § 26-52-510(a)(4) (Repl. 2014) provides, as follows:

> (4) If the consumer fails to pay the taxes when due:
> (A) There is assessed a penalty equal to ten percent (10%) of the amount of taxes due; and
> (B) The consumer shall pay to the director the penalty under subdivision (a)(4)(A) of this section and the taxes

> due **before** the director issues a license for the motor vehicle, trailer, or semitrailer. [Emphasis added].

In the instant case, the Taxpayer timely registered the [redacted] and at the time of registration: (1) the Taxpayer erroneously claimed a sales tax credit; and (2) the Department issued a license for the [redacted].[5] The late payment penalty was not properly assessed against the Taxpayer.

DECISION AND ORDER

The tax and interest portions of the assessment are sustained. The penalty portion of the assessment is set aside. 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. 2017), unless the Taxpayer requests 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 Taxpayer has requested a revision.

Ark. Code Ann. § 26-18-406 (Supp. 2017) provides for the judicial appeal of a final decision of an Administrative Law Judge or the Commissioner of

[5] See Department's Exhibit 2.

Revenues on a final assessment or refund claim denial; however, the constitutionality of that code section is uncertain.[6]

OFFICE OF HEARINGS & APPEALS

RAY HOWARD
ADMINISTRATIVE LAW JUDGE

DATED: April 23, 2019

[6] See Board of Trustees of Univ. of Arkansas v. Andrews, 2018 Ark. 12.