

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

ADMINISTRATIVE DECISION

IN THE MATTER OF

████████████████████
████████████████████

**GROSS RECEIPTS
TAX ASSESSMENT
(ACCT. NO.: ██████████)**

DOCKET NO.: 19-411

**LETTER ID: ██████████
(\$████████)¹**

RAY HOWARD, ADMINISTRATIVE LAW JUDGE

APPEARANCES

This case is before the Office of Hearings and Appeals upon a written protest submitted on or about February 13, 2019, and signed by ██████████, Trustee, on behalf of ██████████ (hereinafter “the Trust” or “the Taxpayer”). The Taxpayer protested an assessment of Gross Receipts Tax (“sales tax”) issued by the Department of Finance and Administration (“Department”).

A telephone hearing was held on May 14, 2019, in Little Rock, Arkansas, at 10:00 a.m. The Department was represented by Lauren Ballard, Attorney at Law, Office of Revenue Legal Counsel (“Department’s Representative”). Present for the Department, via telephone, was Barbara Montgomery - Tax Credits Supervisor. The Trustee appeared at the hearing, via telephone, and represented the Taxpayer.

¹ The reflected amount consists of tax (\$████████), penalty (\$████████), and interest (\$████████) with credit for a payment of \$████████.

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.

FINDINGS OF FACT/CONTENTIONS OF THE PARTIES

The Department issued a proposed assessment against the Taxpayer on January 29, 2019. The Taxpayer's Protest Form reflects the following reason for its disagreement with the proposed assessment, "[t]he vehicle is/was mine & I registered it. I am [REDACTED] AND I am The [REDACTED]. I own and registered all vehicles in question. The full credit should be applied. . . . I also do not agree with the penalty & interest because I was told in 2017 that I didn't owe anything else. [P. 1]." The Department's Answers to Information Request addressed the facts of the case and stated, in part:

On or about June 3, 2017, [REDACTED] purchased a [REDACTED] from [REDACTED] in [REDACTED] for \$ [REDACTED]. Prior to registering the vehicle on June 27, 2017, the couple presented a Trustee's Statement for Certification of Title to register the vehicle in the name of the [REDACTED] ("Trust"). At the time the vehicle was registered, Trust presented three (3) bills of sale in order to claim the motor vehicle private sale credit. Two of the bills reflected sales of vehicles owned and registered to the Trust. However, one bill of sale reflected the sale of a [REDACTED] by [REDACTED], individually, to [REDACTED] for \$ [REDACTED] on May 19, 2017. A copy of the title work is attached collectively as **Exhibit 1**.

After reviewing the submitted bills of sale, the Department discovered that the [REDACTED] was owned and registered to [REDACTED], individually, and not the Trust. The Department disallowed the credit. An Explanation of Tax Adjustment was sent on January 29, 2019 and is attached as **Exhibit 2**. In addition, the Department sent a Notice of Proposed Assessment on January 29, 2019 (attached as **Exhibit 3**). The Notice of Proposed reflected the removal of the credit for the [REDACTED], which resulted in an

additional tax liability of \$ [REDACTED], penalty in the amount of \$ [REDACTED], and interest in the amount of \$ [REDACTED].

The Trust timely protested the assessment on February 13, 2019. A copy of the protest is attached as **Exhibit 4**. [P. 1-2].

The Trustee filed the Taxpayer's Answers to Information Request on April 26, 2019, and stated as follows:

I, [REDACTED], am the trustee of the [REDACTED]. Since I am financially responsible for any taxes due by the trust, I am also the same entity as the trust. My husband & I own all property that is in the trust therefore what applies to the trust, applies to us. Also, the [REDACTED] was in our trust at the time of the sale of the vehicle which is shown is exhibit 1, 2017 personal property assessment of [REDACTED], attached. Also attached are 2015, 2016 & 2018 property assessments – Exhibits 2 (2015) 3 (2016) & 4 (2018). Also, since Ark DF&A accepted payment from me, [REDACTED], for payment due by [REDACTED], that shows we are the same entity. Because if not me or my husband, then who owes a bill sent to [REDACTED]? Also, I was told in 2017 the credit was applied & no further taxes were due, therefore I believe the penalty & interest charged are unreasonable & unfair. [P. 1-2].

The Tax Credits Supervisor and the Trustee presented testimony and arguments at the hearing consistent with the facts and arguments set forth in the Department's Answers to Information Request, the Taxpayer's Protest Form, and Taxpayer's Answers to Information Request Exhibit 1. The Trustee also testified that: (1) when the [REDACTED] was purchased, it was titled in her individual name (rather than the Trust); and (2) she forgot to put the title to the [REDACTED] in the name of the Trust and she did not realize it would be a big deal.

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).

Sales 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(30)(A) (Supp. 2017) 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 (Supp. 2017). 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) 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

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.”

corporation and its shareholders are separate and distinct legal entities,³ the 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 legal analysis and arguments presented by the Department, regarding the distinctions recognized or not recognized by Arkansas trust law, are persuasive. 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 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 Trustee clearly had an interest in the Trust, that fact does not allow the separate legal existence of the 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 Taxpayer was not entitled to claim the sales tax credit on its purchase of the [REDACTED] truck (in the name of the

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, 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.

Trust) when the vehicle sold in lieu of a trade-in (██████████) was owned⁵ by a different legal entity (the Trustee - individually).

Interest

With respect to the Trustee's argument that the assessment of interest is unreasonable and unfair, Ark. Code Ann. § 26-18-508 (Repl. 2012) states, in part:

Interest **shall** be collected on tax deficiencies and paid on overpayments as follows:

(1) A tax levied under any state tax law which is not paid when due is delinquent. Interest at the rate of ten percent (10%) per annum **shall** be collected on the total tax deficiency from the date the return for the tax was due to be filed until the date of payment;

(2) Interest on a tax deficiency **shall** be assessed at the same time as the tax deficiency. The tax deficiency together with the interest shall be paid upon notice and demand by the Director of the Department of Finance and Administration; [Emphasis Added].

It is noteworthy that the statute establishing the assessment and collection of interest on a tax deficiency utilizes the term "shall." Utilization of the term "shall" indicates a mandatory action. Based on the mandatory statutory language, it is clear that Office of Hearings and Appeals does not have the discretion to waive the assessment of interest. Consequently, interest was properly assessed against the Taxpayer.

Penalty

With respect to the assessment of penalty, the Department's Answers to Information Request stated, in pertinent part, as follows:

. . . If a taxpayer fails to pay the taxes when due, a 10% penalty is assessed on the amount of taxes due. Ark. Code Ann. § 26-52-510(a)(4).

⁵ The title of the ██████████ was in the name of the Trustee even though the ██████████ was assessed by the Trust. See Arkansas Gross Receipts Tax Rule GR-12.1(B)(3).

...

Penalty and interest were properly applied. Taxpayers were not entitled to take the credit, therefore, they failed to pay the full amount of tax due at the time of registration. Penalty was applied only to the portion of the tax that was not paid at the time of registration. Accordingly, the penalty should be upheld. [P. 3-5].

The Office of Hearings and Appeals has issued and published several Administrative Decisions which concluded that the late payment penalty authorized by Ark. Code Ann. § 26-52-510(a)(4)(A) (Repl. 2014) was not applicable in cases involving facts analogous to 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 (by and through the Trustee) timely registered the [REDACTED] and at the time of registration: (1) the Taxpayer erroneously claimed a sales tax credit relating to the sale of the [REDACTED]; (2) the Taxpayer (by and through the Trustee) made a partial payment of sales tax; and (3) the Department issued a license for the [REDACTED].⁶ 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

⁶ See Department's Exhibit 1.

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 Revenues on a final assessment or refund claim denial; however, the constitutionality of that code section is uncertain.⁷

OFFICE OF HEARINGS & APPEALS



RAY HOWARD
ADMINISTRATIVE LAW JUDGE

DATED: May 16, 2019

⁷ See Board of Trustees of Univ. of Arkansas v. Andrews, 2018 Ark. 12.