

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

ADMINISTRATIVE DECISION

IN THE MATTER OF

ACCT. NO.: [REDACTED]

DOCKET NO.: 20-539

**REFUND CLAIM
DISALLOWANCE**

**(\$ [REDACTED])¹
PERIOD: 12/01/12 - 12/31/15**

RAY HOWARD, ADMINISTRATIVE LAW JUDGE

APPEARANCES

This case is before the Office of Hearings and Appeals upon a written protest dated July 1, 2014,² signed by [REDACTED], on behalf of [REDACTED] the Taxpayer. The Taxpayer protested the denial of a refund claim resulting from an audit conducted by Lori Cummings, Southeast Audit District,³ for the Department of Finance and Administration (“Department”). The Audit Number is [REDACTED]

This case was submitted on written documents at the request of the Taxpayer. The Department was represented by Michelle Baker, Attorney at Law, Office of Revenue Legal Counsel. The Taxpayer was represented by [REDACTED], the Taxpayer’s [REDACTED]. A Briefing Schedule was mailed to the parties on February 10, 2020. The Taxpayer’s Opening Brief was filed on March 5, 2020. The Department’s Response Brief was

¹ The refund claim was denied in its entirety.

² Based on the contents of the file, the year was 2016 rather than 2014.

³ This is currently a part of the Southern Audit District.

filed on April 8, 2020. The Taxpayer's Reply Brief was filed on May 15, 2020. This matter was submitted for decision on May 5, 2021.

FINDINGS OF FACT/CONTENTIONS OF THE PARTIES

The Taxpayer operates [REDACTED] in Arkansas. During the audit period, the Taxpayer purchased items of tangible personal property and services. As a [REDACTED], the Taxpayer accrued and remitted tax on some purchases of tangible personal property and services.

Subject to the applicability of an exemption, a deduction, or a credit, use tax is imposed on sales of tangible personal property or taxable services made by out-of-state vendors/sellers to in-state purchasers for storage, use, or consumption in this state,⁴ and sales tax is imposed on sales of tangible personal property or taxable services made by in-state vendors/sellers to in-state purchasers.⁵ The Taxpayer requested a refund of the tax paid on certain purchases of certain tangible personal property and services.

Ark. Code Ann. § 26-18-507 (Repl. 2020) provides for a refund of any state tax erroneously paid in excess of the taxes lawfully due. The arguments presented by the Taxpayer, the arguments presented by the Department, and a legal analysis are set forth below.

ISSUE

Whether the Department's denial of the Taxpayer's claim for refund should be sustained? Yes.

⁴ See Ark. Code Ann. § 26-53-101 et seq. (Repl. 2020).

⁵ See Ark. Code Ann. § 26-52-101 et seq. (Repl. 2020).

CONCLUSIONS OF LAW

Standard of Proof

Ark. Code Ann. § 26-18-313(c) (Repl. 2020) 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) (Repl. 2020). 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) (Repl. 2020). 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) (Repl. 2020).

A taxpayer bears the burden of proving by a preponderance of the evidence that the claimed refund was erroneously paid and in excess of the taxes lawfully due under Ark. Code Ann. § 26-18-507 (Repl. 2020).

Refund Claim

With respect to taxes paid for trailer leases during the audit period, the Taxpayer's Opening Brief stated, as follows:

██████████, several invoices - ██████████ leased trailers from ██████████ during the audit period. I provided information to the auditor showing that ██████████ paid sales tax at the time of registration and that the trailers were leased to ██████████ on a long term basis.

ACA 26-52-103 states that a lease can be considered "fixed or indeterminate" which was interpreted as that ██████████ does not have to have a set lease period established just so as long as the trailers were leased for 30+ days.

I have attached the e-mail correspondence and documentation between the ██████████ personnel, The State Auditor & myself which shows that taxes were paid by ██████████ and that the trailers were leased for 30+ days.

It was also discovered that ██████████ remitted the local tax twice on invoices of \$2,500 or more. This was done because a single invoice was allocated and paid in 2 different companies. The local tax was accrued and remitted each time the invoice was paid in a different company.

██████████ contends that the lease of the aforementioned trailers are tax exempt under **GR-20(C) & (D)**. [P. 1].

The Department's Response Brief addressed the Taxpayer's contention regarding the trailer leases and stated, in pertinent part, as follows:

In February 2016, the taxpayer filed a claim for refund of sales and use taxes paid in relation to the lease of trailers from ██████████.

The tax reporting periods for which a claim was filed included the periods December 1, 2012 through December 31, 2015. The taxpayer's refund claim asserts entitlement to refund under Arkansas Gross Receipts Tax Rule GR-20-long term leases of trailers. A copy of the refund claim is attached to this brief as Exhibit 1.

The taxpayer's refund claim was assigned to field audit for review. During the auditor's review of the refund claim, an employee of the leasing company advised the auditor that the leases were short term rentals. A copy of the email stream identifying the leases as short-term rentals was attached to Taxpayer's protest and is attached to this brief as Exhibit 2. In a subsequent email from [REDACTED] to the taxpayer, a [REDACTED] advised the taxpayer's rentals were short-term rentals. It further advised that the equipment could be kept one day or indefinitely and it could be returned at any time. A copy of this email was attached to the taxpayer's protest but is also attached to this brief as Exhibit 3. A short-term rental agreement is defined by [REDACTED] as an agreement for the renting of equipment at a specified rate and lease term. A copy of an [REDACTED] Standard Terms and Conditions document is attached to this brief as Exhibit 4. This same document provides that all sales and/or use taxes are the responsibility of the Lessee. [REDACTED] Standard Terms and Conditions. page 5.

It was ultimately the auditor's understanding that: (1) the leased trailers could be returned by the taxpayer at any time and (2) there was a twenty-eight (28) day billing cycle for the equipment (trailers) and, if the equipment was returned before the twenty-eight (28) day billing cycle, the taxpayer was only charged rental fees through the day the equipment was returned rather than for the entire billing cycle. For this reason, the auditor determined that the taxpayer's lease of trailers from [REDACTED] were taxable short-term rentals and the refund claim was denied in its entirety on May 12, 2016. A copy of the auditor's Summary of Findings is attached to this brief as Exhibit 5. A copy of the Notice of Refund Claim Denial is attached to this brief as Exhibit 6. In July 2016, the taxpayer timely protested the Notice of Refund Claim Denial, and a copy of that protest is already on file in the Office of Hearings and Appeals.

...

A sale includes the lease of tangible personal property. Ark. Code Ann. § 26-52-103(26)(B)(i) (Supp. 2019). A lease is defined as "any transfer of possession or control of tangible personal property for a fixed or indeterminate term for consideration." Ark. Code Ann. § 26-52-103(21)(A)(i) (Supp. 2019). Tangible personal property is

defined as personal property that can be seen, weighed, measured, felt, touched or that is in any other manner perceptible to the senses. Ark. Code Ann. § 26-52-103(30)(A) (Supp. 2019). The trailers leased by the taxpayer are items of tangible personal property and the lease is a sale for purposes of the levy of Arkansas sales tax.

Arkansas Code Annotated § 26-52-103(D) (Supp. 2019) establishes the basis for the payment of tax on short-term and long-term rentals of tangible personal property and states:

(D)(i) In the case of a lease or rental of tangible personal property, including motor vehicles and trailers for less than thirty (30) days, the tax shall be paid on the basis of rental or lease payments made to the lessor of the tangible personal property during the term of the lease or rental regardless of whether Arkansas gross receipts tax or compensating use tax was paid by the lessor at the time of the purchase of the tangible personal property.

(ii)(a) Except as provided in subdivision (26)(D)(ii)(b) of this section, in the case of a lease or rental of tangible personal property for thirty (30) days or more, the tax shall be paid on the basis of rental or lease payments made to the lessor of the tangible personal property during the term of the lease or rental unless Arkansas gross receipts tax or compensating use tax was paid by the lessor at the time of the purchase of the tangible personal property:

(b) In the case of a lease or rental of a motor vehicle for thirty (30) days or more, the tax shall be paid on the basis of rental or lease payments made to the lessor of the motor vehicle during the term of the lease or rental;

Prior to October 1, 2013, the basis for the payment of tax on the lease or rental of motor vehicles was different than it is today. That method was changed by Act 1164 of 2013. However, the trailers leased by the taxpayer are not motor vehicles as defined in Ark. Code Ann. § 26-52-103(20) (Supp. 2019), which defines a motor vehicle as a self-propelled vehicle required to be registered for highway use. Trailers are not self-propelled. Accordingly, the method for payment of tax on trailers remains unchanged for purposes of evaluating the taxpayer's refund claim.

The Department promulgated Arkansas Gross Receipts Tax Rule GR-20 for purposes of administering the provisions of Ark. Code Ann. § 26-52-103 (Repl. 2008, Repl. 2014, & Supp. 2019). This rule states in pertinent part as follows:

GR-20. LEASES AND RENTALS:

A. GENERAL. Persons in the established business of leasing or renting articles of tangible personal property to consumers are sellers and must collect and remit tax upon the gross receipts or gross proceeds derived from the lease or rental of the property.

B. DEFINITIONS.

...

2. "Long-term lease" means a contract to rent or lease property for a term of thirty (30) days or longer to a single consumer.

...

4. "Motor vehicle" means a vehicle which is self-propelled and is required to be registered for use on the highway, and does not include trailers or semi-trailers.

...

7. "Short-term rental" means a contract to lease property for a term of less than thirty (30) days to a single consumer.

...

C. LONG-TERM LEASES OF TANGIBLE PERSONAL PROPERTY (Except for Motor Vehicles).

1. For long-term leases of tangible personal property, except for motor vehicles, the lessor may either purchase the property tax-free as a sale for resale or pay Arkansas sales and use tax on the purchase. If the lessor purchases property intended for subsequent lease without paying Arkansas gross receipts or use tax, he must establish the requirements necessary for a sale-for-resale exemption. (See GR-53.) At the time of purchase, the lessor must elect to pay the tax on property intended for long term lease or purchase the property tax free as a sale for resale. This election may not be changed after the purchase.

2. If the lessor of property paid Arkansas gross receipts or use tax on the purchase of the item, the lessor is not required to collect gross receipts tax on subsequent long-term leases of the property.

...

D. LONG-TERM LEASES OF MOTOR VEHICLES.

...

c. Trailers and semi-trailers are not "motor vehicles" and may not be registered exempt from gross receipts tax. **The long-term lease of a trailer or semi-trailer which**

has been registered and titled in Arkansas is not subject to gross receipts or long-term rental vehicle tax.

...

E. SHORT-TERM RENTALS OF TANGIBLE PERSONAL PROPERTY (Except for Motor Vehicles).

1. In addition to the state and local sales tax, a one percent (1%) short-term rental tax (see Ark. Code Ann. § 26-63-301 and ET-5) is to be collected by the lessor on short-term rentals of tangible personal property regardless of whether Arkansas gross receipts or use tax was paid by the lessor at the time of purchase.

2. A lessor may purchase property intended for subsequent lease without paying Arkansas gross receipts or use tax if the seller establishes the requirements necessary for a sale-for-resale exemption. (See GR-53.)

3. Repair parts purchased to keep the rental property in working order are exempt from gross receipts tax as sales for resale. (See GR-53.)

4. Lessors must maintain sufficient records to establish the intended term of the rental. In the absence of adequate documentation, payment by the lessee for rental charges for periods of less than thirty (30) days shall be evidence that the term of the rental was for less than thirty (30) days.

...

Emphasis added.

...

To demonstrate eligibility for the refund, the taxpayer must prove by a preponderance of the evidence that it entered into a contract with ██████████ to rent or lease the trailers for a term of thirty (30) days or longer and that ██████████ paid Arkansas sales or use tax on the purchase of the trailers at the time of purchase. In this case, the taxpayer has not provided proof that Arkansas sales and use tax was paid by ██████████ on the purchase of the trailers nor has the taxpayer provided a copy of its rental agreement for the trailers. The Standard Terms and Conditions document that applies to all ██████████ Agreements reveals that the lessor is responsible for sales and use taxes due on the leases. Email correspondence from personnel of ██████████ demonstrate that the taxpayer entered into short-term rental agreements which entitled the taxpayer to keep the trailer for 1 day or indefinitely and provided the taxpayer the

based on a twenty-eight (28) day billing period unless otherwise specified.”⁶ As noted in the Department’s Response Brief, GR-20(E)(4) provides as follows:

Lessors must maintain sufficient records to establish the intended term of the rental. In the absence of adequate documentation, payment by the lessee for rental charges for periods of less than thirty (30) days shall be evidence that the term of the rental was for less than thirty (30) days.

Historically, in cases where parties did not execute written lease contracts setting forth the term of the leases, the Department has interpreted GR-20(E)(4) to mean that leases for indefinite periods with rental charges for periods of less than thirty (30) days, terminable at the will of either party, are a series of renewed short-term leases regardless of the duration of the rentals. The Department’s interpretation of a tax rule is entitled to deference unless the interpretation is clearly erroneous. The Arkansas Supreme Court has recognized that administrative agencies are often required to interpret statutes and rules. In Walnut Grove School Distr. No. 6 of Boone County v. County Board of Education, 204 Ark. 354, 162 S.W.2d 64 (1942), the court’s opinion stated, in part:

. . . the administrative construction generally should be clearly wrong before it is overturned. Such a construction, commonly referred to as practical construction, although not controlling, is nevertheless entitled to considerable weight. It is highly persuasive.

Id. at 359, 162 S.W.2d at 66.

The Department’s interpretation of GR-20(E)(4) is not clearly wrong and a preponderance of the evidence does not support a finding that the Taxpayer’s trailer leases were tax exempt. Consequently, the Department correctly denied the Taxpayer’s refund claim.

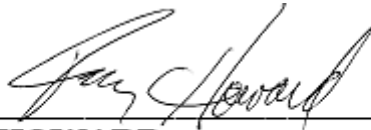
⁶ See Department Exhibit 4 - P. 2.

DECISION AND ORDER

The refund claim denial 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 (Repl. 2020), 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 (Repl. 2020) 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 6, 2021

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