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

ADMINISTRATIVE DECISION

IN THE MATTER OF [redacted] (LICENSE ID: [redacted])	**GROSS RECEIPTS TAX ASSESSMENT**
DOCKET NOS.: 21-230	**ASSESSED AMOUNT: [redacted][1] LETTER ID: [redacted]**

TODD EVANS, ADMINISTRATIVE LAW JUDGE

APPEARANCES

This case is before the Office of Hearings and Appeals upon written protests dated November 11, 2020, signed by [redacted] ("Trustees") on behalf of the [redacted], the Taxpayer. The Taxpayer protested an assessment issued by the Department of Finance and Administration ("Department"). The Department was represented by Daniel Parker, Attorney at Law, Office of Revenue Legal Counsel ("Department's Representative").

At the request of the Taxpayer, this matter was taken under consideration of written documents. A briefing schedule was established for the parties by letters dated January 19, 2021. The Department's Representative filed his Opening Brief on January 20, 2021. The Taxpayer filed its response on March 3, 2021. The Department's Representative filed his Reply Brief on March 9, 2021.

[1] This amount represents [redacted] (tax) and [redacted] (interest) after application of a payment in the amount of [redacted].

The record was closed and this matter was submitted for a decision on March 10, 2021.

ISSUE

Whether the Taxpayer demonstrated that it qualified for the motor vehicle tax credit[2] by a preponderance of the evidence. No.

FACTUAL AND LEGAL CONTENTIONS OF THE PARTIES

A. Opening Brief

The Department's Representative provided a statement of relevant facts in his Opening Brief, stating as follows, in pertinent part[3]:

> On December 21, 2018, [redacted] purchased a [redacted] ["Vehicle A"] from [redacted], for [redacted]. A copy of the Bill of Sale is attached as **Exhibit 1**. A copy of the Title Assignment, Trustee's Statement for Certificate of Title, and Odometer Disclosure Statement showing Taxpayer as the purchaser is attached as **Exhibit 2**.[4]
>
> On January 10, 2019, [redacted] privately sold a [redacted] ["Vehicle B"] for [redacted]. A copy of the [redacted] Bill of Sale is attached as **Exhibit 3**.
>
> On January 16, 2019, Taxpayer registered the [redacted] and paid sales tax on the [redacted] purchase price, less a deduction of [redacted] for the [redacted]. See Application for Title attached as **Exhibit 4**.[5] The registration documents, Bill of Sale (**Exhibit 1**), and Title Assignment (**Exhibit 2**) for the [redacted] reflect [redacted] as the sole owner of the [redacted].
>
> In a letter dated October 21, 2020, the Department advised Taxpayer that the sales tax credit and deduction of [redacted] for the sale of the [redacted] from the sales price of the [redacted] had been disallowed because the

[2] The sales tax credit authorized under Ark. Code Ann. § 26-52-510(b)(1)(C)(i) (Repl. 2014) shall be referred to as the "motor vehicle tax credit" in this decision.
[3] All exhibits support the statements for which they are cited.
[4] All of these documents support a finding that the Taxpayer purchased Vehicle A.
[5] Included with this Exhibit is a statement from [redacted] verifying that he intended to register the Taxpayer as the owner of Vehicle A.

Department's records reflect that the vehicle sold was not registered to the same consumer. See Deduction from New Purchase letter, attached as **Exhibit 5**. The vehicle sold was registered to the [redacted] and the vehicle purchased is registered to the Trust. On October 29, 2020, the Department sent Taxpayer a Notice of Proposed Assessment (**Exhibit 6**), Explanation of Tax Adjustment (**Exhibit 7**)[6], and Billing Statement (**Exhibit 8**).

By letter dated November 11, 2020, with accompanying documents (the "Protest"), Taxpayer timely protested the Notice of Proposed Assessment. In the Protest Taxpayer states that after purchasing the [redacted], the [redacted] was established; however, it did not re-title the [redacted] before it was sold. A copy of the Protest is attached as **Exhibit 9**.[7]

Within his Opening Brief, the Department's Representative asserted that the Taxpayer has not demonstrated that it was the owner of Vehicle B at the time of its sale. Since the Taxpayer was not the owner of Vehicle B, he reasoned that the Taxpayer was not entitled to the motor vehicle tax credit based on the sale of Vehicles B.

B. Response Brief

Within the Response Brief, the Trustees provided their objections to the assessment and an analysis stating the following:

> We appreciate the opportunity to reply to the opening brief by Revenue legal Counsel. Neither of us is an attorney and we offer no legal opinions here. And while one of us has some exposure to administrative law topics (e.g., publishing in the Administrative Law Review, the Yale Journal on Regulation, and other law journals) we have no experience in sales tax topics per se.
>
> As a preliminary matter, exhibits 4 and 6 indicate that the tax due was [redacted], the payment was [redacted], which implies a shortfall of [redacted]. The interest shown on exhibit 6 is [redacted] or [redacted] of the shortfall (as of October 29, 2020). Either interest was charged on the full amount of the tax (which would ignore the payment of [redacted]) for some period or an interest rate far greater than 10% (noted in Exhibit 6) was

[6] This Exhibit states that the Taxpayer was assessed based on a purchase price for Vehicle A of [redacted] without any credit for the sale of Vehicle B.

[7] None of the documents attached to the protest indicate that ownership of Vehicle B was transferred to the Taxpayer prior to its sale.

charged. Interest can validly be charged only on the shortfall, not on any amounts already paid.

We believe it is noteworthy that there may have been three methods by which to retain the [redacted] tax credit while purchasing the [redacted] and selling the [redacted]. First by a trade in of the [redacted] to the dealer at the time of the purchase of the [redacted]. Our understanding is that the sales tax assessed at the time of sale would have been upon the net price of the [redacted] less trade in. This net price would be determined despite the title of the [redacted] as [redacted] Arkansas Gross Receipts Tax Rule GR-12.1 was to account for the sale "in lieu of a trade-in". Revenue for legal counsel argues, at least implicitly, that the tax credit that would have accrued with a trade in (with vehicles titled in the same manner as they actually were) should not accrue with sale in lieu of trade in.

Second, we understand if the tax credit would have been retained if the [redacted] were titled as [redacted] The [redacted] could have been later retitled to the [redacted] And Third, if prior to the sale of the [redacted], it had been retitled to the [redacted].

After establishing the [redacted], we visited the [redacted] to discuss retitling all of our motor vehicles. A staff member volunteered that the process may take a substantial period of time, and if we wished to sell a vehicle during that time, we would be unable to do so. The staff person cited a recent anecdote of an owner receiving the title back after a period of months, but without a change in title due to improper information. (We have not attempted to obtain an affidavit). We note that an expectation of delays by the State will lead to greater revenues for the State, at least in some instances.

Consider the following hypothetical. Imagine that there were two [redacted] in Arkansas; we would be surprised if this were not true. Further imagine a circumstance in which the ownership of an asset was in dispute. We expect the dispute would be resolved via examination of the names of the members or trustees along with the address of the trustees perhaps through copies of drivers licenses and utility bills (the same documentation we provided in this case).

In citing Arkansas Code Annotated § 26-52-103(4)(A) Revenue Legal Counsel adds emphasis for "individual" (p. 4). However, the title for the [redacted] was not held by a single individual, but rather by [redacted] This a form of ownership that is sometimes called a poor man's trust. In this case the trustees are the identical individuals/consumers as the tenants by entirety. Our receipt of the tax credit is consistent with a "person-specific" credit.

Finally, we note that Revenue Legal Counsels proposed denial of the tax credit leads to at least the potential for double taxation.

C. Reply Brief

Within his Reply Brief, the Department's Representative initially asserted that the assessment of interest at a ten percent (10%) was properly calculated.[8] While the Taxpayer could have retitled Vehicle B prior to its sale to qualify for the motor vehicle tax credit or simply traded it in, he asserted those hypotheticals does not alter the facts of this matter. With regards to the alleged statements by the Department's staff, he averred that none of alleged statements were inaccurate, misleading, or controlled how the Trustees could choose to title their vehicles. He dismissed the Taxpayer's assertion that a tenancy by the entirety is tantamount to ownership by the Taxpayer, asserting that such a designation is still ownership by the individual trustees. Finally, the Department's Representative dismissed the double taxation argument as not being implicated since separate transactions were involved.

After a general discussion of the burdens of proof in tax proceedings, a legal analysis shall follow.

CONCLUSIONS OF LAW

Standard of Proof

Ark. Code Ann. § 26-18-313(c) (Repl. 2020) provides, in pertinent part, as follows:

[8] The Department's Representative provided evidence from the Department's tax system that [redacted] of the assessed interest derived from annual ten percent (10%) interest accruing upon a base of [redacted] between January 17, 2019 and October 29, 2020. It appears that the [redacted] in additional interest resulted from the inclusion of interest accruing on October 29, 2020 prior to issuance of the Notice of Proposed Assessment.

> 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).

Legal Analysis

Arkansas sales tax generally applies to the entire gross receipts of all sales of tangible personal property and certain specifically enumerated services within

the State of Arkansas. Ark. Code Ann. § 26-52-301 (Repl. 2020). Motor vehicles generally qualify as tangible personal property. A sale is defined as a transfer of title or possession. Ark. Code Ann. § 26-52-103(26)(A) (Repl. 2020). For purchases of motor vehicles, the consumer is responsible for payment of the accompanying sales tax liability to the Department on or before the time of registration. Ark. Code Ann. § 26-52-510(a)(1) (Repl. 2020).

Ark. Code Ann. § 26-52-510(b)(1)(C)(i) (Repl. 2020) authorizes a sales tax credit for the private sale of a used motor vehicle and states:

> 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. [Emphasis supplied.]

Tax deductions and credits, like tax exemptions, exist as a matter of legislative grace. *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. *Weiss v. American Honda Finance Corp.*, 360 Ark. 208, 200 S.W.3d 381 (2004).

Ark. Code Ann. § 26-52-103(4)(A) (Repl. 2020) defines "consumer" as "the person to whom the taxable sale is made or to whom taxable services are

furnished." "Person" means "any **individual**, partnership, limited liability company, limited liability partnership, corporation, estate, **trust**, fiduciary, or any other legal entity. . .. [Emphasis supplied]." Ark. Code Ann. § 26-52-103(22) (Supp. 2019).

Under the provisions cited above, Ark. Code Ann. § 26-52-510(b)(1)(C)(i) (Repl. 2020) does create an entity-specific sales tax credit for the sale of a used motor vehicle in lieu of a trade-in. Stated differently, in order to qualify for the relevant sales tax credit, the same person or entity must be the consumer who pays the sales tax on the purchase of a motor vehicle and the consumer who subsequently sells (or previously sold) a used motor vehicle in lieu of a trade-in. This holding was upheld within the revision to Docket No. 19-167.

While the Trustees asserted that the Taxpayer could have structured the transaction differently and avoided the tax assessment at issue, this assertion is immaterial to the matter at hand. This Office must apply the governing law to the facts that are presented. Similarly, the delays that the Trustees anticipated if they attempted to retitle Vehicle B into the name of the Taxpayer is not relevant to the matter at hand since the Taxpayer did not attempt to retitle Vehicle B prior to its sale. Further, it does not appear that the Trustees had a impending sale of Vehicle B (sold January 10, 2019) at the time that the Taxpayer was created (October 10, 2018). The decision to not retitle Vehicle B into the name of the Taxpayer appears to have been a matter of choice and convenience of the Trustees at that time. Finally, the Trustees' titling of Vehicle B in their names as tenants by the entirety does not amount to a titling of Vehicle B in the Taxpayer's name but resulted in the vehicle remaining under the joint ownership of the Trustees individually.

The Supreme Court of the United States has explained that sales taxes, similar to the tax imposed by Arkansas, are actually taxing the privilege of engaging in the sales transactions and are not a tax upon the property being sold, stating as follows:

> We think it clear from the face of s 514 that state taxation of sales to servicemen is not proscribed. A tax on the privilege of selling or buying property has long been recognized as distinct from a tax on the property itself. And while s 514 refers to taxes 'in respect of' rather than 'on' personal property, we think it an overly strained construction to say that taxation of the sales transaction is the same as taxation 'in respect of' the personal property transferred. Nor does it matter to the imposition of the sales tax that the property 'shall not be deemed to be located or present in or to have a situs for taxation' in Connecticut. The incidence of the sales tax is not the property itself or its presence within the State. Rather it is the transfer of title for consideration, a legal act which can be accomplished without the property ever entering the State. Had Congress intended to include sales taxes within the coverage of s 514, it surely would not have employed language so poorly suited to that purpose as 'taxation in respect of the personal property.'

Sullivan vs. US, 395 U.S. 169, 175-176, 89 S. Ct. 1648, 1652 (1969) (Footnotes omitted.)

Utilizing that and similar case law, the Iowa Supreme Court persuasively reasoned that an instance of double taxation may only be shown when "there is the imposition of the same tax by the same taxing power upon the same subject matter." *Cedar Valley Leasing, Inc. v. Iowa Department*, 274 N.W.2d 357, 361 (1979).

Here, the Trustees appear to allege that double taxation is implicated if they are not allowed a motor vehicle tax credit with respect to Vehicle B. While Vehicle B's purchaser may be fully taxed on the purchase of Vehicle B, that does not implicate double taxation because the proceeds of that transaction are not being taxed more than once. Further, the Taxpayer's initial purchase of Vehicle B

would represent a separate transaction. Thus, the prohibition against double taxation is not implicated.

Consequently, the defenses raised by the Taxpayer in opposition to the assessment are not persuasive.

Here, it is not evident that Vehicle A was purchased by and owned by the same person that sold Vehicle B. Vehicle A was purchased and owned by the Taxpayer. Vehicle B, however, was owned by the Trustees, individually, at the time of sale. Consequently, the Taxpayer was not entitled to the motor vehicle tax credit based on the sale of Vehicle B and that credit was properly denied. The assessment of tax is sustained.

Ark. Code Ann. § 26-18-508 (Repl. 2020) discusses the assessment of interest and provides the following relevant language for this proceeding: "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 . . .. [Emphasis supplied.]" The exhibit provided by the Department evidences that a ten percent (10%) rate was applied to only the outstanding tax balance by the Department's system. The error in the Taxpayer's calculation results from a failure to consider compounding and that more than a single year elapsed between the date of assessment and registration. Consequently, the Taxpayer's argument against the assessed interest is not persuasive and that amount is also sustained.

DECISION AND ORDER

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 (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.[9]

OFFICE OF HEARINGS & APPEALS

TODD EVANS
ADMINISTRATIVE LAW JUDGE

DATED: March 10, 2021

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