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

ADMINISTRATIVE DECISION

IN THE MATTER OF [redacted] **ACCT. NO.:** [redacted]	**GROSS RECEIPTS AND COMPENSATING USE TAX ASSESSMENT**
DOCKET NOS.: 22-216	**($[redacted] – Sales Tax)[1]**
22-217	**($[redacted] – Use Tax)[2]**

RAY HOWARD, ADMINISTRATIVE LAW JUDGE

This case is before the Office of Hearings and Appeals upon a written protest dated August 19, 2021, and signed by [redacted], Company President, on behalf of [redacted], the Taxpayer. The Taxpayer protested the assessment of gross receipts tax ("sales tax") and compensating use tax ("use tax") resulting from an audit conducted by Anita Collins ("Tax Auditor"), from the Southern Audit District of the Office of Field Audit, for the Department of Finance and Administration ("Department"). The audit period was from July 1, 2015, through December 31, 2020 (Audit ID: [redacted]).

A virtual administrative hearing was held on December 7, 2021, in Pine Bluff, Arkansas.[3] The Department was represented by Taylor Skipper and Keith Linder, Attorneys at Law, Office of Revenue Legal Counsel ("Department's

[1] The assessed amount includes tax ($[redacted]) and interest ([redacted]).
[2] The assessed amount includes tax ([redacted]) and interest ($[redacted]). With respect to the assessment of use tax, the Department's Answers to Information Request stated that, "the Department concedes on the assessment of use tax for the postage associated with the direct mail services purchased from [redacted]. Therefore, the only remaining issue is the assessment of sales tax based on the unauthorized use of dealer tags. Adjustments reflecting these concessions will be made at the conclusion of this protest." Consequently, the assessment of use tax will not be addressed in this decision.
[3] The hearing was conducted virtually from the hearing room in Little Rock, Arkansas.

Representatives"). Present for the Department were the Tax Auditor, Michael Carver - Audit Supervisor, and Melissa Guin - Audit District Manager.

The Company President represented the Taxpayer. Present for the Taxpayer were [redacted] – Controller, [redacted] – Vice President, and [redacted] – President of the [redacted] ("Taxpayer's Witness").

ISSUE

Whether the assessment issued by the Department against the Taxpayer should be sustained? Yes.

FINDINGS OF FACT/CONTENTIONS OF THE PARTIES

The Department's Answers to Information Request summarized the facts and issues involved in this case and stated, in part:

> [redacted] ("Taxpayer"), located in [redacted], is an automobile dealership [redacted] to its customers. The business is registered as a sales and use tax monthly filer.
>
> A sales and use tax audit was conducted beginning on January 19, 2021 by Anita Collins ("Auditor"), Tax Auditor for the Department. It was a routine audit to verify that Taxpayer was in compliance with Arkansas law. The audit covered the period of July 1, 2015 to December 31, 2020 ("Audit Period").
>
> ***Sales Tax***
> Records provided for examination included sales invoices, customer's sales reports, exemption certificates, [redacted] and Gentax transcripts. The only discrepancy noted in Taxpayer's sales tax records was [redacted] (collectively as "Vehicles"). Auditor determined that sales tax was owed due to the Taxpayer's withdrawal of the Vehicles from stock which were assigned to the [redacted] (collectively as the "unauthorized users") and issued Dealer License Tags. In accordance with Arkansas law,

only certain employees of a motor vehicle dealership are authorized to drive dealer-plated vehicles.

Because a [redacted] do not meet the definition of a dealer, salesperson, or manager of the dealership as set out in Motor Vehicle Rule 2005-7, the unauthorized users were determined to be ineligible to use the dealer tags. The Vehicles were considered withdrawn from stock pursuant to Ark. Code Ann. § 26-52-322 (Repl. 2020) and taxable transactions. Tax was assessed based on the value of the Vehicles as listed in the National Automobile Dealers Association's Official Used Car Guide. As taxes were not timely paid, interest was assessed pursuant to Ark. Code Ann. § 26-18-508 (Repl. 2020).

Sales tax was also assessed for Taxpayer's withdrawal of shop supplies and tools used in the daily operation of the automobile paint and repair shop. Items were purchased tax exempt and were not resold directly to the customers or became a recognizable integral part of the automobile being repaired, including tools used by the mechanics.

. . .

Audit Findings

On August 6, 2021, the Department issued its Summary of Findings and Basis for Adjustment. A Notice of Proposed Assessment was issued to Taxpayer on August 9, 2021 in the total amount of $[redacted]. The assessment consisted of tax in the amount of $[redacted] and interest in the amount of [redacted]. Penalty was not assessed because there was no evidence of intentional disregard of the rules and regulations.

Taxpayer disagrees with the Department's assessment and has requested an in-person hearing. In its Protest, Taxpayer states, in relevant part:

1. *There has been no sale to which sales tax could be imposed, applied or collected.*

   …

   The AR Sale tax auditor, Ms. Anita Collins, agreed that no sale of a motor vehicle, in this case a demonstrator, had taken place. There had not been a possession or title transfer from a seller to a buyer for a valuable consideration. Therefore, this code section [GR-12(C)(1)] cannot be applied.

   1. *Withdrawal from stock and personal use:*

The AR Sales tax auditor, Ms. Collins, never cited a code section as the basis of her calculation of the amount assessed in the findings of her audit. She only quoted that these demonstrators were a withdrawal from stock and for personal use.

…

These demonstrator vehicles referred to in the audit are NEVER WITHDRAWN FROM STOCK. These vehicles retain their window sticker invoices and are available for immediate sale. Hence, this from the beginning of this code section [GR-18(D)], IS NOT THE CIRCUMSTANCE AND this code section SHOULD NOT BE APPLIED TO THESE VEHICLES. The employee is taxed on the personal use of the vehicles as a TAXABLE FRINGE BENEFIT and in turn pays FEDERAL and ARKANSAS STATE INCOME TAXES.

As in regard to the term "USES this merchandise", the definition of "USE" is to TAKE or CONSUME. This code section goes on to give examples of windows and food consumption. These examples are citing items that are removed, consumed and leave stock. These items never return to stock. This is not the case of these vehicles. Once against, these vehicles were NEVER withdrawn from stock. They are available for IMMEDIATE sale!

…

3. *If it does fall under the authority of a sales tax audit, which is the statute governing dealer tags (which includes a fine schedule) not used in the enforcement of the alleged infractions[Footnote 9 stated that, "Taxpayer is requesting that the Department impose a fine for the misuse of dealer tags pursuant to Ark. Code Ann. § 27-14-1703(d) (Supp. 2019). The imposition of a fine is outside of the scope of these proceedings."]?*

With its Protest, Taxpayer included receipts evidencing the assessed amounts have been paid, two lists entitled "[redacted] Sales Tax Audit Protest," a vehicle information report for the Vehicles, a NADA pricing guide for the Vehicles, Page 6 and 8 of Auditor's Schedule A- Unreported Taxable Purchases, Invoices from [redacted], excise tax information, a copy of a check to [redacted] a copy of a check [redacted] and a copy of the Agreements for [redacted] It appears Taxpayer only protests the assessment of sale tax based on the unauthorized use of dealer tags . . ..

. . .

Arkansas Gross Receipts ("Sales") Tax

The Arkansas gross receipts ("sales") tax generally applies to all sales of tangible personal property and certain specifically enumerated taxable services unless a specific statutory exemption is applicable. *See* Ark. Code Ann. § 26-52-301 (Supp. 2021). Items withdrawn from stock are identified as subject to sales tax under Ark. Code Ann. § 26-52-322(b)(1) (Repl. 2020). A "withdrawal from stock" means the withdrawal or use of goods, wares, merchandise, or tangible personal property from an established business for consumption or use in the established business or by any other person. Ark. Code Ann. § 26-52-322(a) (Repl. 2020). The calculation of gross receipts tax for a withdrawal from stock is the value of the goods, wares, merchandise, or tangible personal property withdrawn if the goods, wares, merchandise, or tangible personal property were withdrawn for consumption or use in the established business. Ark. Code Ann. § 26-52-322(2)(A)(i) (Repl. 2020) (emphasis added).

Dealer Plates for Motor Vehicles

Arkansas Department of Finance and Administration Motor Vehicle Rule 2005-7 states, in relevant part:

> Pursuant to the authority granted by Ark. Code Ann. § 27-14-403 and Act 1929 of 2005, as amended by Act 484 of 2009, the Director of the Arkansas Department of Finance and Administration does hereby promulgate the following rule governing the issuance and display of motor vehicle dealer license plates and temporary tags by motor vehicle dealers:
>
> A. DEFINITIONS.
>
> ...
>
> 5. Dealer. As used in this rule, unless the context indicates otherwise, the term "dealer" means a person, firm, or corporation engaged in the business of buying and selling motor vehicles and licensed by the Arkansas Motor Vehicle Commission or the Arkansas State Police.
>
> 6.
>
> ...
>
> b. Dealer's Extra License Plate. Dealer's extra license plates are the license plates that are issued to a dealer who has complied with the requirements to be issued a dealer's master license plate, has identified each manager, sales

manager, or salesperson employed by the dealer, and has paid a fee of Twenty-five Dollars ($25) per dealer extra license plate.

7. Manager, Sales Manager, or Salesperson.

a. As used in this rule, "Manager" is any person other than the dealer who is responsible for the overall management of the dealership.

b. "Sales manager" is any person other than the dealer who is responsible for the management of the salespersons of the dealership.

c. "Salesperson" is:

(1) Any person who:

(a) Is employed as a salesperson by a motor vehicle dealer whose duties include the selling or offering for sale of motor vehicles;

(b) For compensation of any kind, acts as a salesperson, agent or representative of a motor vehicle dealer;

(c) Attempts to or in fact negotiates a sale of a motor vehicle owned partially or entirely by a motor vehicle dealer; and

(d) Uses the financial resources, line of credit, or floor plan of a motor vehicle dealer to purchase; sell, or exchange any interest in a motor vehicle, or

(2) Anyone who for compensation of any kind operates as a salesperson, broker, agent, or representative of a used motor vehicle dealer, or any person who attempts to or in fact negotiates a sale of a vehicle owned partially or entirely by a used motor vehicle dealer, or a person or drafter using the financial resources, line of credit, or floor plan of a used motor vehicle dealer to purchase, sell, or exchange an interest in a used motor vehicle.

(3)

B. DEALER PLATES.

1. USE OF DEALER PLATES. Motor vehicle dealer master license plates and extra license plates may not be placed on any vehicle other than a motor vehicle for sale.

2. AUTHORIZED USERS. When a dealer's master license plate or extra license plate is attached to any dealer-owned motor vehicle, the motor vehicle may be used by only the following persons:

a. The dealer

b. A manager

c. A sales manager, or

d. A salesperson employed by the dealership.

3. AUTHORIZED USES OF VEHICLE WITH DEALER

PLATES. A dealer, manager, sales manager, or a salesperson employed by the dealership may use a vehicle with dealer plates for the following purposes:

a. To drive to or from work;

b. For personal or business trips inside or outside the dealer's county of residence;

c. To transport the vehicle; or

d. To demonstrate the vehicle.

DISCUSSION

Generally, vehicles withdrawn from an automobile dealer's stock are subject to sales tax at the time of withdrawal. However, an exemption from tax is allowed for the withdrawal for use with dealer license plates issued by the Department pursuant to Motor Vehicle Rule 2005-7. Sales tax is owed on Taxpayer's withdrawal of the Vehicles from its stock because the drivers of the Vehicles were not authorized to use dealer license plates. Per Rule 2005-7 only certain employees of a dealership may use dealer license plates: the dealer, a manager, a sales manager, or a salesperson employed by the dealership. A [redacted] are not authorized users of dealer tags under Rule 2005-7, and the exemption does not apply when the dealer license plate is improperly used on a withdrawn vehicle.

The Department properly determined the value of the Vehicles and calculated and assessed sales tax owed based on those values. Ark. Code Ann. § 26-52-322(2)(A)(i) (Repl. 2020) states that the calculation of sales tax for a withdrawn good is based the value of the good withdrawn from stock. The Department's assessment is based on the value of the Vehicles as determined by NADA, which is a reputable source of the valuations for motor vehicles.

In its Protest, Taxpayer argues that a sale has not taken place and Arkansas Gross Receipts Rule GR-12(C)(1) cannot be applied. The Department's assessment of tax is not based on the sale of the Vehicles. The assessment is based on Taxpayer's withdrawal of the Vehicles from its stock for use by the unauthorized users. Therefore, Arkansas Gross Receipts Rule GR-12(C)(1) is not applicable. Taxpayer also asserts that because the employees are taxed on the use of the Vehicles, the vehicles are not subject to sales tax. Taxable fringe benefits does not affect the assessment of sales tax on a withdrawal from stock.

Taxpayer also claims that the Vehicles were not withdrawn from stock because they were available for immediate sale. Per Ark. Code Ann. § 26-52-322(a) (Repl. 2020), the use of the Vehicles by the

> unauthorized users sufficiently meets the definition of a withdrawal from stock. The Vehicles' alleged availability for sale has no bearing on the determination of whether it was withdrawn from stock and subject to tax. Additionally, Taxpayer has submitted information evidencing its cost for the Vehicles. It appears that Taxpayer believes that if sales tax is owed on the withdrawals, the assessment should be based on the cost. This belief contradicts Ark. Code Ann. § 26-52- 322(2)(A)(i) (Repl. 2020).
>
> The Department's assessment of sales tax based on the value of the vehicle is proper and Taxpayer has not provided evidence that the valuation is incorrect. The Department properly assessed tax for the Vehicles withdrawn from Taxpayer's stock and the assessment should be sustained in full. Interest was properly assessed because the tax was due, but not paid, and deprived the State of the use of such funds. [Footnotes 1 – 8 omitted, P. 1 – 7].

The Tax Auditor presented testimony consistent with the contentions in the Department's Answers to Information Request and also testified that: (1) no penalty was assessed against the Taxpayer; (2) the basis for the assessment was use of the Vehicles as withdrawals from stock; (3) vehicles withdrawn from stock and operated with dealer tags by an authorized user are exempt from tax; (4) she reviewed the Taxpayer's employee dealer tag assignment listing and determined there were some unauthorized users; and (5) to calculate the assessment, she determined the values of the Vehicles (by using the NADA guide)[4] as provided by Ark. Code Ann. § 26-52-322(b)(2)(A).

Upon cross-examination, the Tax Auditor testified that: (1) the penalties for misuse of a dealer tag, under Rule 2005-7(H), are handled by the Office of Motor Vehicle; and (2) the assessment was based upon withdrawals from stock.

The Department's Representatives contended that: (1) the Taxpayer is [redacted]; (2) the Taxpayer took Vehicles from the lot, placed dealer tags on

[4] See Department Exhibit 3.

the Vehicles, and allowed unauthorized people to use the Vehicles; (3) the Department assessed sales tax against the Taxpayer on the withdrawal of those Vehicles from stock; (4) the Office of Motor Vehicle would impose the penalties in Rule 2005-7(H); (5) the assessment did not include a tax penalty; (6) the Tax Auditor was authorized to examine the records relating to dealer tags; (7) the Taxpayer's use of the Vehicles is consistent with withdrawals from stock; and (8) the assessment was consistent with prior decision of the Office of Hearings and Appeals.

The Taxpayer's Answers to Information Request addressed the Department's contentions and stated, as follows:

> (A) Withdrawal from Stock - Dealer Tags:
>
> The Arkansas State Sales Tax auditor, Ms. Anita Collins, never cited code section or statute as the basis for her calculation of the amount assessed in the findings of her audit. She only quoted that these demonstrators were a withdrawal of stock for personal use. The Company, on numerous times, asked for the code section, statute and /or regulation she was relying on to make this assessment of tax due. The request was never answered or information supplied to the Company. During the Company's review and research of ACA 26-52- 510(a)(2)(A)(i), et seq. we are assuming Ms. Collins is referring to:
>
> **GR-18(D):** ***WHAT CONSTITUES GROSS RECEIPTS-EXAMPLES:...D. WITHDRAWAL FROM STOCK. 1. WITHDRAWAL OF PURCHASED GOODS. IF A SELLER HAS A RETAIL PERMIT AND PURCHASES GOODS FROM ITS SUPPLIERS WITHOUT PAYING TAX TO THOSE SUPPLIERS CLAIMING THE "SALE FOR RESALE EXEMPTION AND THE SELLER WITHDRAWS THE MERCHANDISE FROM STOCK AND GIVES THE MERCHANDISE*** **TO** ***CUSTOMERS OR OTHER THIRD PARTIES, OR USES THE MERCHANDISE ITSELF, THEN THE VALUE OF THE MERCHANDISE IS A PART OF THE SELLER'S GROSS RECEIPTS OR GROSS PROCEEDS AND THE SELLER MUST REMIT THE TAX ON THE***

PURCHASED PRICE OF THE GOODS PAID BY THE SELLER.

These demonstrator vehicles referred to in the audit are NEVER WITHDRAWN FROM STOCK. These vehicles retain their window stickers and are available for immediate sale on the Company's property. Hence, these units are not withdrawn from stock and this code section is not applicable. The employee is taxed on the personal use of the vehicles as a TAXABLE FRINGE BENEFIT and in turn pays FEDERAL AND ARKANSAS STATE INCOME TAXES on this personal use.

As in regard to the term *"USES THIS MERCHANDISE",* the definition of "USE" is to TAKE OR CONSUME. This code section goes on to give examples of windows and food consumption. These examples are citing items that are removed, consumed and LEAVE stock. These examples never return to stock. The code section was written to cover items where a company, say Walmart, is in the business to sell toilet paper. The toilet paper is removed from the shelf, a withdrawal of stock, place in the restroom on the dispenser, then used by a third party. Walmart would then need to include the purchase price of the toilet paper in its gross receipts and remit sales tax on the purchase price of the toilet paper. This is not the case regarding these vehicles. Once again, these vehicles were NEVER withdrawn from stock. They are available for IMMEDIATE SALE, they are still have a MSO (Manufacturers Statement of Origin) and NEVER leave the dealer's inventory. The verbiage of this code section is very clear that items are REMOVED FROM STOCK, USED AND CONSUMED.

The Arkansas Motor Vehicle Commission Act, DFA Rule 2005-7, Amended 06/2011, states the verbiage regarding the USE of a demonstrator for Arkansas Automobile Dealers. An authorized user of a dealer plate is a manager.

<u>There has been no sale to which SALES TAX could be imposed, applied or collected:</u>

GR-12. SALE OF MOTOR VEHICLES, TRAILERS AND SEMITRAILERS: ... C. TAXABLE TRANSACTIONS. 1. A TRANSACTION IS A "SALE" FOR PURPOSES OF IMPOSING TAX WHEN POSSESSION OR TITLE TO A MOTOR VEHICLE OR TRAILER IS TRANSFERRED FROM SELLER TO BUYER FOR VALUABLE CONSIDERATION.

The Arkansas State Sales Tax auditor, Ms. Anita Collins, agreed with the Company that no sale of a motor vehicle, in this case a

> demonstrator, had taken place. There had not been a possession or title transfer from a seller to a buyer for a valuable consideration. Therefore, this code section cannot be applied. [P. 1 – 3].

The Company President testified that: (1) the Taxpayer disagrees with the findings (other than the finding that the Taxpayer misused four [4] dealer tags);[5] (2) he is not sure why dealer tags were looked at in a sales tax audit; (3) the Department used Rule 2005-7 to determine how dealer tags were to be used but ignored the penalty section of Rule 2005-7; (4) Section H of Rule 2005-7 defines the penalty for misuse of a dealer tag; (5) the Taxpayer disagrees that the Vehicles were withdrawals from stock;[6] (6) if the Department used Rule 2005-7 to determine what the Taxpayer did wrong, the Department should be limited to imposing the penalties in Rule 2005-7(H); (7) the Vehicles with the dealer tags were not sold; (8) there were no withdrawals from stock because Vehicles are titled goods and different from things that are withdrawn from stock and used up like toilet paper; (9) with respect to the definition of withdrawal from stock, the Vehicles are used but title is not transferred under GR-18(D)(2)(a); and (10) in summary, he wants to know why Section H of 2005-7 is not being used when it covers all of the scenarios for misuse of a dealer tag and none involve sales tax.

The Taxpayer's Witness testified that: (1) he has extensive experience relating to motor vehicle businesses; (2) the issue of dealer plate usage and sales tax, to the best of his knowledge, have never been brought together until now; (3) Rule 2005-7 is a consolidated framework for the use of dealer tags; (4) Rule

[5] The Company President agreed the Taxpayer misused four [4] dealer tags.

[6] The Company President asserted that: (1) the Vehicles were not taken out the Taxpayer's inventory; (2) the Vehicles were in the inventory (on the books); (3) the Vehicles were on the Taxpayer's website for immediate sale at any time; and (4) basically what happened was somebody just drove the Vehicles home after work (with the exception of [redacted] and the [redacted], they were available).

2005-7 was promulgated for the Office of Motor Vehicle; (5) Rule 2005-7 does not mention sales tax; and (6) it does not make sense to apply the withdrawal from stock rules to the use of motor vehicles (other businesses will be impacted by this case).[7]

The Company President contended that: (1) we should not even be talking about withdrawals from stock because Rule 2005-7 (which the Department used to determine the Taxpayer misused dealer tags) has a section that imposes penalties; (2) Section H of 2005-7 was not used and we have not been given a legitimate reason why it was not used; (3) we disagree with the theory of a withdrawal from stock because there was no sale, there was no transfer of title,[8] the Vehicles were not used up, and the Vehicles were for sale all of the time on the lot or at a house nearby (and on the Taxpayer's website); (4) nothing constitutes sales tax here, as far as using a dealer tag; and (5) if the Department is using Rule 2005-7, it should use it all the way.

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.

[7] The Controller and/or the Vice President stated that Rule 2005-7 specifically imposes penalties for misuse of a dealer tag and it should control rather than a sales tax assessment for a violation.
[8] At a later point, the Controller stated that when there finally is a transfer of title, the buyer will owe the sales tax.

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).

Tax Assessment

Subject to the applicability of an exemption, deduction, or a credit, sales tax is imposed on sales of tangible personal property or taxable services made by

in-state vendors/sellers to in-state purchasers.[9] As a general rule, sales tax applies to the entire gross receipts from sales of tangible personal property and certain specifically enumerated services within the State of Arkansas. See Ark. Code Ann. § 26-52-301 et seq. (Repl. 2020). The liability for collecting and reporting sales tax is upon the seller of the tangible personal property or taxable services unless the purchaser claims an exemption. See Arkansas Gross Receipts Tax Rule GR-79(C).

I.

The Office of Hearings and Appeals has previously determined that withdrawals of motor vehicles from the stocks of automobile dealerships (for use by the dealerships) were taxable transactions. See Ark. Code Ann. § 26-52-322 (Repl. 2020) and Arkansas Gross Receipts Tax Rule GR-18(D). Those Administrative Decisions were not revised by a revision of the Commissioner of Revenues. Consequently, the Taxpayer's argument (that the assessment should be set aside because a "sale," as defined by Arkansas Gross Receipts Rule GR-12(C)(1), did not take place) is not persuasive.

II.

The Taxpayer also argued that the assessment should be set aside because the Vehicles were "never withdrawn from stock"[10] and the Vehicles were not "consumed."[11] These arguments are not persuasive. In Weiss v. Central Flying

[9] See Ark. Code Ann. § 26-52-101 et seq. (Repl. 2020 & Supp. 2021).
[10] See Page 2 Taxpayer's Answers to Information Request which asserted that, "[t]hese vehicles retain their window stickers and are available for immediate sale on the Company's property."
[11] See Page 2 Taxpayer's Answers to Information Request which asserted that, "[t]he code section was written to cover items where a company, say Walmart, is in the business to sell toilet paper. The toilet paper is removed from the shelf, a withdrawal of stock, place in the restroom on the dispenser, then used by a third party. Walmart would then need to include the purchase price of

Service, Inc., 326 Ark. 685, 934 S.W.2d 211 (1996), the Arkansas Supreme Court addressed the taxability of aircraft (as withdrawals from stock) used by a taxpayer in the business of selling aircraft and stated, in pertinent part, as follows:

> . . . With respect to a purchaser regularly engaged in the business of reselling items purchased, a sale for resale exemption is provided which relieves him of paying tax on such purchases. *See* Ark. Code Ann. § 26-52-401(12)(A) (Supp. 1995). However, if that purchaser withdraws and uses an item from his inventory rather than resell it, such an event constitutes a withdrawal from stock and the purchaser is deemed the consumer. *Georgia Pacific Corp. v. Lay*, 242 Ark. 428, 413 S.W.2d 868 (1967). Items withdrawn from stock become subject to gross receipts tax, usually based on the purchase price of the items used. Ark. Code Ann. § 26-52-103(a)(4) (Supp. 1995). Once an item is withdrawn from stock, the protection of the resale exemption is lost, and the tax is due on or before the 20th of the month following the month in which the items or goods were withdrawn. Ark. Code Ann. § 26-52-501 (Supp. 1995).
>
> In 1975, the General Assembly enacted § 26-52-409 which was obviously intended to give aircraft dealers, such as Central, some tax relief. Before enactment of § 26-52-409, a dealer who purchased a plane exempt from tax as a sale for resale, but who withdrew it from inventory for use in his business would have been required to pay the tax based on the purchase price of the plane, and the tax was due in the month following the plane's withdrawal from inventory. After § 26-52-409 was enacted, an aircraft dealer who purchases a plane for resale can now use it for rental or charter service without payment of sales or use tax for a period not to exceed one year from its purchase date. *See* § 26-52-409(a)(1).

Id. at 687.

An application of the rationale of Weiss v. Central Flying Service, Inc., supra, to this case supports the following findings: (1) the fact that the Vehicles could ultimately be sold by the Taxpayer does not negate the fact that the Vehicles were withdrawn from stock for use by the [redacted]

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the toilet paper in its gross receipts and remit sales tax on the purchase price of the toilet paper. This is not the case regarding these vehicles. Once again, these vehicles were NEVER withdrawn from stock. They are available for IMMEDIATE SALE, they are still have a MSO (Manufacturers Statement of Origin) and NEVER leave the dealer's inventory."

[redacted] (those were taxable transactions under Ark. Code Ann. § 26-52-322 (Repl. 2020) and GR-18(D)); and (2) the fact that the Vehicles were not "consumed" by the [redacted] [redacted] is not relevant to the issue of taxability under Ark. Code Ann. § 26-52-322 (Repl. 2020) and GR-18(D).

III.

With respect to the valuation of the Vehicles, for the calculation of the sales tax assessed against the Taxpayer, the Department asserted that:

> . . . Additionally, Taxpayer has submitted information evidencing its cost for the Vehicles. It appears that Taxpayer believes that if sales tax is owed on the withdrawals, the assessment should be based on the cost. This belief contradicts Ark. Code Ann. § 26-52-322(2)(A)(i) (Repl. 2020). [P. 7.]

Act 384 of 2009, codified at Ark. Code Ann. § 26-52-322 (Repl. 2020) addresses the calculation of tax for withdrawals from stock and states, in pertinent part, as follows:

> (2) For purposes of calculating the gross receipts tax or the compensating use tax under subdivision (b)(1) of this section, the gross receipts or gross proceeds for a withdrawal from stock is:
>
> (A) The value of the goods, wares, merchandise, or tangible personal property withdrawn if the goods, wares, merchandise, or tangible personal property:
>
> (i) Were withdrawn for consumption or use in the established business[.]

Based on the Department's interpretation of Ark. Code Ann. § 26-52-322(2)(a)(1) (Repl. 2020), the Department calculated the assessed sales tax based on the values of the Vehicles listed in the National Automobile Dealers Association's Official Used Car Guide ("NADA"). The Department's

interpretation of a statute 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 Ark. Code Ann. § 26-52-322(2)(a)(1) (Repl. 2020) is not clearly wrong and the Department's calculation of the assessed sales tax (based on the values of the Vehicles as determined by NADA rather than the Taxpayer's costs of the Vehicles) is supported by a preponderance of the evidence.

IV.

As a general rule, a withdrawal of a motor vehicle from the stock of an automobile dealership, for use by the dealership, is a taxable transaction under Ark. Code Ann. § 26-52-322 (Repl. 2020) and GR-18(D). However, an exception from taxation is allowed when a withdrawal is for use by an authorized user under DFA Rule 2005-7(B)(2). The [redacted] are not authorized users and the exception does not apply in this case. Consequently, the Department

correctly assessed sales tax against the Taxpayer for the withdrawals of the Vehicles from stock.[12]

Interest

Interest was properly assessed on the tax deficiency for the use of the State's tax dollars. See Ark. Code Ann. § 26-18-508 (Repl. 2020). No penalty was assessed against the Taxpayer.

DECISION AND ORDER

The proposed 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.

[12] Neither the penalty provisions under DFA Rule 2005-7(H) nor the income tax issue relating to the fringe benefits are relevant to this sales tax assessment under Ark. Code Ann. § 26-52-322 (Repl. 2020) and GR-18(D).

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.[13]

OFFICE OF HEARINGS & APPEALS

RAY HOWARD
ADMINISTRATIVE LAW JUDGE

DATED: March 11, 2022

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