DAIMLERCHRYSLER CORPORATION 1000 CHRYSLER DRIVE AUBURN HILLS, MI 48326-2766,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Petitioner,	§	DOCKET NO. S. 04-668
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

FINAL ORDER

This case involves denied refunds of sales tax requested by DaimlerChrysler Corporation ("Petitioner") for the periods April 16, 1994 through October 13, 2003 and March 8, 2004 through May 27, 2005. The Petitioner appealed the denied refunds to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(c)(5)a. The parties submitted the case on an amended joint stipulation of facts. Matthew McDonald and Peter Larsen represented the Petitioner. Assistant Counsel Margaret McNeill represented the Department.[1]

ISSUES

Alabama's Motor Vehicle Lemon Law Rights statute, Code of Ala. 1975, §8-20A-1 et seq., requires the manufacturer of a nonconforming or "lemon" vehicle to either refund to the purchaser (sometimes "customer") the full purchase price paid by the purchaser for the vehicle or provide the purchaser with a comparable new vehicle. The Petitioner is a motor

[1] This case was held in abeyance by agreement of the parties in November 2004 pending the final resolution of a Montgomery County Circuit Court case, *Daimler Chrysler Services North America, LLC, et al. v. State of Alabama Department of Revenue*, Case Nos. CV 02-2909H through CV 02-2914H. The Circuit Court granted partial summary judgment for the appellants in the above consolidated cases in September 2006.

On review, the Administrative Law Division determined that although the Montgomery County case had not been finally decided, this case should proceed because different issues are involved. The parties also agreed that this case should proceed, and, as

(continued)

vehicle manufacturer that was required by the Lemon Law to either issue refunds or provide replacement vehicles to customers in Alabama. The primary issue is whether the Petitioner is entitled to refunds of the sales tax paid by the customers when they purchased the nonconforming vehicles. If refunds are due, a second issue is whether some of the refunds are barred by the applicable statute of limitations for claiming refunds at Code of Ala. 1975, §40-2A-7(c)(2)a.

FACTS

The Petitioner manufactures motor vehicles. It sells the vehicles at wholesale to its licensed dealers, who resell the vehicles at retail to the public.

The Petitioner applied to the Department for a sales tax refund on June 24, 2004 concerning 406 transactions that occurred from April 16, 1994 through October 13, 2003. The Petitioner filed a second refund petition on September 16, 2005 concerning 17 transactions that occurred from March 8, 2004 through May 27, 2005. The Department denied the refunds. The Petitioner timely appealed.

The 423 transactions in issue involve vehicles manufactured by the Petitioner that were sold by the Petitioner's dealers to customers in Alabama. The Petitioner was subsequently required, pursuant to Alabama's Lemon Law, to either provide each customer with a comparable new motor vehicle or, at the option of the customer, accept return of the vehicle and refund to the customer the full purchase price for the vehicle. The refunded amounts included sales tax and other applicable fees and charges. Code of Ala. 1975, §§8-20A-2(b)(1), (2), (3), and (4). If the purchaser opted to be reimbursed by the

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indicated, submitted the case on stipulated facts.

Petitioner, the full purchase price remitted to the purchaser was offset by a reasonable allowance for the purchaser's use of the vehicle for the period before it was first reported as a nonconforming vehicle. Section 8-20A-2(b)(4). The offset amount was computed by multiplying the full purchase price of the vehicle by a fraction, the denominator of which is 100,000 and the numerator of which is the number of miles the vehicle traveled before it was first reported as nonconforming. See again, §8-20A-2(b)(4).

The Petitioner refunded the purchase price to the purchasers in approximately 66.7 percent of the 423 transactions in issue. The Petitioner has requested a refund concerning those transactions equal to the sales tax paid by the purchasers when they bought the nonconforming vehicles from the dealers.

The Petitioner provided the purchasers with replacement vehicles in the remaining 33.3 percent of the transactions. The Petitioner paid the applicable sales tax when it purchased the replacement vehicles from its licensed dealers in Alabama. The Petitioner has, however, only requested a refund of the sales tax paid by the purchasers when they originally purchased the nonconforming vehicles. The sales tax paid by the purchasers for the nonconforming vehicles was sometimes less than the sales tax paid by the Petitioner for the replacement vehicles because some of the purchasers traded in a vehicle, which consequently reduced the taxable sales price of the vehicle.[2]

[2] Concerning the replacement transactions, the last sentence in ¶ 13 of the Amended Stipulation states that "DaimlerChrysler has refunded or given the customer credit for the sale (sic) tax paid on the original vehicle." I do not understand that sentence because concerning replacement vehicles, the Petitioner was not required to refund any cash amount to the original purchaser.

ANALYSIS

The statutory right to a refund is a matter of legislative grace, and like exemptions and deductions, must be strictly construed for the government. *Patterson v. Gladwin Corp.*, [Ms. 1001747, May 12, 2002] _____ So.2d _____, (Ala. 2002), citing *Board of Revenue & Road Comm'rs of Mobile County v. Jones*, 181 So. 908 (Ala. 1938); *Department of Revenue v. Bank of America, N.A.*, 752 So.2d 637 (Fla. 2000).

Tax refunds are governed in Alabama by Code of Ala. 1975, §40-2A-7(c)(1). That statute provides that any "taxpayer" may file a petition for refund with the Department "for any overpayment of tax or other amount erroneously paid to the department or concerning any refund which the department is required to administer." "Taxpayer" is defined in pertinent part as "[a]ny person subject to or liable for any state or local tax; any person required to file a return with respect to, . . . any state or local tax. . . ." Code of Ala. 1975, §40-2A-3(23).

The Petitioner claims that the sales tax paid by the customers when they purchased the nonconforming vehicles was "erroneously paid" because the sales were statutorily rescinded – "Thus, at the time of rescission, the taxes became overpaid or erroneously paid. . . ." Petitioner's Brief at 4. The Petitioner also argues that it was a "taxpayer" within the scope of §40-2A-7(c)(1) because it was liable under the Lemon Law to refund the sales tax to the customers. I disagree.

First, the initial sales by the dealers to the customers were not statutorily rescinded. The Lemon Law only obligated the Petitioner to either replace the vehicle or refund the purchase price to the customer. That did not cause or constitute a recision of the original sale. The sales tax paid by the customers also was not erroneously paid because the sales

by the dealers to the customers were retail sales under Alabama law, and thus subject to the sales tax levied on automotive vehicles at Code of Ala. 1975, §40-23-2(4). The sales tax paid by the customers to the dealers on those sales, and (presumably) remitted by the dealers to the Department, was thus correctly paid.

The Petitioner also is not a "taxpayer" within the context of the refund statute. For purposes of the refund statute, "taxpayer" must be construed as the person or entity that was required to file the return and pay the tax in issue to the Department. The dealers, not the Petitioner, were the taxpayers that were subject to and liable for the sales tax in issue. The fact that the Petitioner was in some cases required to refund the sales tax to the customers is thus irrelevant. Consequently, even assuming that the sales tax was erroneously paid, which it was not, the Petitioner was not a "taxpayer" entitled to the refund. The fact that the Petitioner pays property, unemployment, wage withholding, and other taxes to the Department, see Petitioner's Brief at 5 n. 1, also does not make the Petitioner a "taxpayer" for purposes of obtaining a refund of the sales tax paid by the customers.

The Petitioner also argues that the refund statute, §40-2A-7(c)(1), "anticipates that someone other than the person that collected and remitted the tax is entitled to seek a refund . . . (because the statute) provides that a taxpayer may file a petition for refund for erroneously or overpaid tax 'or concerning any refund which the department is required to administer.'" Petitioner's Brief at 5. The Petitioner contends that the Department is required to administer refunds of sales tax reimbursed to purchasers under the Lemon Law, and that it is thus "entitled to receive a refund that the Department is required to administer." Petitioner's Brief at 5. I again disagree.

Most refunds issued by the Department involve tax that was overpaid or erroneously

paid. However, the Department is also required to administer and issue refunds of gasoline tax that is not initially overpaid or erroneously paid. Code of Ala. 1975, §40-17-100 et seq. provides that if taxed gasoline is subsequently used on a farm for agricultural purposes, the user is entitled to petition the Department for a refund of a portion of the gasoline tax paid on the product. Because the gasoline tax in that situation is not initially overpaid or erroneously paid, the drafters of §40-2A-7(c)(1) included the phrase – "or concerning any refund which the department is required to administer."[3] That phrase insures that farmers entitled to a refund under §40-17-100 et seq. may also petition the Department for the refund, even though the tax was not initially overpaid or erroneously paid.

The above phrase does not apply in this case because the Lemon Law does not include a special provision that allows motor vehicle manufacturers to petition the Department for a refund of sales tax.[4] There is thus no Lemon Law-related refund that the Department is required to administer.

The Petitioner next argues that it is entitled to refunds because when a customer returns property to a retailer and receives a full refund of the sales price, the sale proceeds

[3] The refund provision at §40-2A-7(c) was enacted in 1992 as part of the Taxpayer Bill of Rights and Uniform Revenue Procedures Act, Code of Ala. 1975, §40-2A-1 et seq. I was the chairman of the ad hoc committee of tax attorneys, CPAs, Department employees, and enrolled agents that drafted the legislation, which the Alabama Legislature unanimously enacted into law in 1992 as Act No. 92-186, Acts 1992.

[4] Most states have a Lemon Law, although they vary somewhat in content. Some Lemon Laws provide that the manufacturer is entitled to petition the state for a refund. See, for example, Arizona Code §44-1263; California Code §1793.25; Maryland Code §14-1503; Minnesota Code §325F.665; Vermont Code §4172; and Wisconsin Code §218.015. As indicated, however, Alabama's Lemon Law includes no such refund provision; nor, as discussed, is the manufacturer otherwise entitled to petition for a refund under Alabama's general refund statute, §40-2A-7(c)(1).

are not included in taxable "gross proceeds of sales," as defined for sales tax purposes at Code of Ala. 1975, §40-23-1(a)(6). That statute provides an exclusion from gross proceeds, as follows – "'gross proceeds of sales' shall not include the sale price of property returned by customers when the full sales price thereof is refunded either in cash or by credit."

The Petitioner's argument is flawed because it did not refund the full sales price to the customers, as required by the statute. Rather, if a customer opted for a refund, the amount of the refund was offset based on a percentage of the customer's use of the vehicle before it was reported as nonconforming. Section 8-20A-2(b)(4). The full sales price thus was not refunded. Concerning the replacement transactions, the Petitioner was not required to and did not refund any of the sales price to the customers.

The Petitioner argues that it made a full refund of the sales price because the customer was given a "credit" for his or her use of the vehicle in addition to the cash refund. "The customer has received a full refund of the purchase price in the combination of mileage usage and cash, thus, (Petitioner) has made a full refund to the customer." Petitioner's Reply Brief at 3. I disagree. Section 40-23-1(a)(6) makes clear that the full sales price must be refunded before the sale proceeds can be excluded from taxable gross proceeds. The plain language of the statute must be followed. *State v. American Brass, Inc.*, 628 So.2d 920 (1993). Consequently, because the Petitioner did not refund the full sales price (or any of the sales price concerning the replacement transactions), the gross proceeds exclusion in §40-23-1(a)(6) does not apply.

Finally, the Petitioner contends that to deny the refunds would deny it "equal protection under the laws because a similarly situated retailer that refunds sales tax to a

purchaser is entitled to a sales tax credit for the refunded sales tax, while (Petitioner) is not." Petitioner's Brief at 7, 8. The Petitioner's claim is incorrect because a retailer that refunds the full sales price to a customer, including all of the sales tax paid, is not similarly situated with the Petitioner because the Petitioner only refunded a part of the sales price (and a corresponding part of the sales tax) to the customer.

There are additional reasons why refunds are not due concerning the replacement transactions.

If a customer opted for a replacement vehicle, the Petitioner was required to purchase a comparable vehicle on which it paid the applicable sales tax. That purchase of the replacement vehicle was a taxable sale separate from the customer's original purchase of the nonconforming vehicle from the dealer. The customers thus correctly paid sales tax when they initially purchased the nonconforming vehicles from the dealers, and the Petitioner correctly paid sales tax when it purchased the replacement vehicles.

The New York State Tax Appeals Tribunal recently addressed refunds under that State's Lemon Law in *In the Matter of the Petition of DaimlerChrysler Motors Corporation*, Decision DTA No. 819699.

New York's Lemon Law , General Business Law §198-a, also gives the purchaser of a nonconforming vehicle the option of obtaining a refund of the purchase price or getting a replacement vehicle. If the purchaser opts for a refund, the New York statute (unlike the Alabama statute) allows the manufacturer to petition to the State for a refund of the sales tax that was returned to the purchaser. The New York statute does not, however, allow the manufacturer to obtain a sales tax refund if the purchaser opts for a replacement vehicle.

DaimlerChrysler nonetheless argued in the above case that it was entitled to refunds

on transactions in which it had provided purchasers with replacement vehicles. The Tax Appeals Tribunal disagreed, holding that DaimlerChrysler was not entitled to refunds. Of particular relevance is the following:

> We first address the petitioner's claim that the determination of the Administrative Law Judge erroneously requires the petitioner "to remit sales tax on transactions that have already been taxed once" (Petitioner's brief in support, p. 14). Here, the record reflects that the consumer purchased the original vehicle from the automobile dealer and paid tax and later petitioner purchased a replacement vehicle from the dealer and paid sales tax again. Petitioner argues this is double taxation and constitutes a taking without just compensation, in violation of Article 1, § 7 of the New York State Constitution. This argument is without merit. The record shows that there are two separate transactions involved in each instance here. In the first transaction, we have the consumer and the car dealer. In the second transaction, we have the manufacturer and the consumer. Here, we have two separate transactions and each transaction involves separate parties and each are subject to tax. Accordingly, this argument is not supported by the record.

DaimlerChrysler Motors at 13.

The above rationale applies in this case. The initial purchase of the nonconforming vehicle by the customer and the subsequent purchase of the replacement vehicle by the Petitioner were separate transactions, both of which constituted taxable retail sales. As discussed, the Petitioner's purchase of the replacement vehicle did not rescind the original purchase by the customer, nor did it cause the sales tax paid by the customer to somehow become overpaid or erroneously paid.

When a retailer petitions for a refund, the Department can first verify from the retailer's records that the retailer actually remitted the overpaid tax to the Department before issuing the refund. Not so in this case. The dealers from which the customers bought the nonconforming vehicles were obligated to remit to the Department the sales tax paid by the customers. The Department cannot, however, identify those dealers, and also

cannot as a practical matter verify that the dealers in fact remitted the tax to the Department.

The Petitioner has also requested refunds of 100 percent of the sales tax paid by the customers on the nonconforming vehicles. As discussed, however, concerning those transactions involving refunds, the Petitioner was not required to refund all of the sales price because the full amount paid was offset based on the customer's percentage use of the vehicle. For example, assume that a purchaser paid $19,500 for a nonconforming vehicle, plus $500 sales tax, for a total purchase price of $20,000. Also assume that the purchaser drove the vehicle 10,000 miles before reporting it as nonconforming. The Petitioner would have been allowed to offset the $20,000 by 10 percent, or $2,000. The offset would not only proportionately reduce the $19,500 the customer paid for the vehicle down to $17,550 ($19,500 less 10 percent offset of $1,950), but also proportionately reduce the $500 paid in sales tax. Consequently, the Petitioner would have refunded only $450 in sales tax to the purchaser, not the full $500 that the Petitioner is seeking as a refund. And as indicated, concerning the replacement transactions, the Petitioner did not refund to the customers any of the sales tax paid by the customers.

Even if the Petitioner was entitled to refunds, the statute of limitations at §40-2A-7(c)(2) would apply to bar some of the refunds. That statute requires that a petition for refund must be filed within three years from when a return was timely filed, or otherwise within two years from payment of the tax, whichever is later.

Section 40-2A-7(c)(2) implies that only the taxpayer required to file the return and pay the tax is entitled to apply for a refund of the tax. The Petitioner in this case did

neither. In any case, assuming that the Petitioner was entitled to refunds, the statutory deadlines in §40-2A-7(c)(2) would still apply. The burden was also on the Petitioner to establish its right to refunds by proving that its petitions were timely filed. *Puzon v. State of Alabama*, Inc. 92-348 (Admin. Law Div. 5/7/1993); *Howard v. State of Alabama*, Inc. 93-162 (Admin. Law Div. 4/28/1993). The Petitioner concedes that "[t]here is nothing in the record to indicate when the sales tax returns were filed (by the dealers) or when the tax was paid (by the dealers)." Petitioner's Brief at 10. Consequently, even if refunds were due, the Petitioner has failed to carry its burden of proving that it timely petitioned for the refunds pursuant to §40-2A-7(c)(2).

The Petitioner argues that the statute of limitations at §40-2A-7(c)(2) did not begin running until its right to claim the refunds accrued, i.e., when it either refunded the purchase price or provided replacement vehicles to the purchasers. The Petitioner cites *Kroger Co. v. Limbach*, 68 Ohio App. 3d 330 (Ohio Ct. App. 1990), in support of its position.

In *Kroger*, the taxpayer's 1978 Ohio franchise (income) tax was changed based on a federal audit that was completed in 1985. The taxpayer petitioned for a refund in 1987 based on the federal audit change. The State denied the refund as untimely because it was not filed within three years from when the 1978 tax was paid, as required by the applicable Ohio statute. The Ohio Court of Appeals held that the three year statute did not begin running until the date it was determined that the payment was illegal or erroneous. Consequently, it held that the taxpayer's petition was timely because it was filed in 1987, within three years from when it was determined per the IRS audit in 1985 that the tax had been erroneously paid.

To begin, Alabama has a specific statutory provision governing the assessment and

refund of tax based on federal audit changes. Code of Ala. 1975, §§40-2A-7(b)(2)g.1 and 2 provide that the Department may assess additional tax or a taxpayer may request a refund based on federal audit changes within one year from when the changes become final. Consequently, under Alabama law, the taxpayer in *Kroger* would have had one year from when the IRS audit was completed in 1985 to apply for a refund.

The language of §40-2A-7(c)(2) is unambiguous as to when a refund petition must be filed. That plain language must be followed. *State v. American Brass*, *supra*. With the exception of the special one year statute for obtaining a refund based on IRS changes, Alabama law requires that a refund petition must be filed within three years if the return on which the tax was reported was timely filed, or otherwise within two years from when the tax was paid, whichever is later.[5]

The holding in *Kroger*, while perhaps equitable under the circumstances, is contrary to §40-2A-7(c)(2). The statutory time limit under Alabama law begins on the date a return is filed or the tax paid. It is irrelevant when the overpayment or erroneous payment is discovered.

In *DaimlerChrysler v. Pennsylvania*, 2007 Pa. Lexis 1346 (Penn. Sup. Ct. decided June 25, 2007), DaimlerChrysler argued, as it does in this case, that the refund statute began running only when its right to the refund accrued, i.e., when it repurchased the defective vehicles. The Pennsylvania refund statute of limitations is similar to the Alabama statute in that it requires that a taxpayer must file a petition within three years from when

[5] A taxpayer and the Department may extend the statutory period by waiver, see Code of Ala. 1975, §40-2A-7(b)(2)i. However, the waiver provision has no effect on when the statutory period begins.

the tax was paid. The Pennsylvania Supreme Court held that the language of the statute must control, and that the doctrine of equitable tolling did not apply. The Court noted that a lower court judge had concerns that the result was inequitable, "but concluded that this was a problem for the General Assembly to address. . . in light of (DaimlerChrysler's) failure to demonstrate the timeliness of its petitions, the requests are time-barred under the language of the statute itself." *DaimlerChrysler*, 2007 Pa. Lexis 1346 at 3, 4.

The above rationale applies in this case. The Alabama Legislature may, of course, amend Alabama's Lemon Law to allow manufacturers to apply to the Department for a refund of sales tax that they are required to return to a customer. Absent that statutory enactment, refunds are not due.

The Department's denial of the Petitioner's refund petitions is affirmed.

This Final Order may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered August 13, 2007.

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BILL THOMPSON
Chief Administrative Law Judge

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