

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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| In the Matter of the Petition | : | |
| of | : | |
| WEST-HERR FORD, INC. | : | DECISION |
| | : | DTA NO. 818510 |
| for Revision of a Determination or for Refund of Sales | : | |
| and Use Taxes under Articles 28 and 29 of the Tax Law | : | |
| for the Period June 1, 1997 through May 31, 2000. | : | |

Petitioner West-Herr Ford, Inc., S-5025 Camp Road, Hamburg, New York 14075, filed an exception to the determination of the Administrative Law Judge issued on September 12, 2002. Petitioner appeared by Phillips Lytle, LLP (Gary J. Gleba, Esq., of counsel). The Division of Taxation appeared by Mark F. Volk, Esq. (Cynthia E. McDonough, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument, at petitioner's request, was heard on June 11, 2003 in Troy, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether cars leased by petitioner from a third party were leased for resale to petitioner's own customers.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

As a result of a sales tax field audit, the Division of Taxation (“Division”) issued to petitioner, West-Herr Ford, Inc. (“W-H”), a Notice of Determination, dated March 13, 2001, assessing sales tax due in the amount of \$130,485.93 for the period June 1, 1997 through May 31, 2000 plus interest and penalty.¹

W-H operates a Ford automobile dealership, selling and servicing new and used automobiles. On audit, W-H produced all of the books and records requested by the Division's auditors, and those books and records were found adequate for the purposes of conducting a complete audit of W-H's books and records. W-H executed a Test Period Method Election form enabling the Division to conduct an audit of sales and recurring expenses based on a test period.

Based on the test period audit, the Division determined additional tax due for the audit period of \$160,438.46. W-H disagreed only with that portion of the audit resulting from sales tax assessed on charges paid by W-H for its rental of vehicles used as loaner cars. It paid the agreed portion of the tax assessment in the amount of \$29,952.53 leaving a tax due of \$130,485.93, all of it attributable to charges for rental cars. W-H does not dispute the calculation of tax due on the rental vehicle charges; rather, it contends here, as it did on audit, that these vehicles were rented for resale and, as such, the charges were not subject to sales tax.

¹ Petitioner, by its chief financial officer, executed consents extending the period for assessment of tax due for the period June 1, 1997 through February 28, 1998 to March 20, 2001.

In general, W-H made loaner cars available to service and repair customers who had purchased a new automobile from W-H and to customers who had purchased a new or used automobile and an Extended Service Plan contract on that automobile.

A customer purchasing a vehicle from W-H pays sales tax on the agreed net price which includes the cost of the vehicle's basic warranty. Customers purchasing a new Ford vehicle receive a three-year or 36,000 mile limited warranty from Ford Motor Company ("Ford"). The 1999 Model Warranty Guide is typical of warranty booklets provided to new-car purchasers. It contains the following provisions:

Your NEW VEHICLE LIMITED WARRANTY gives you specific legal rights. You may have other rights that vary from state to state. The New Vehicle Limited Warranty is the only express warranty applicable to your vehicle. Neither Ford or Ford Motor Vehicle Assurance Company assumes nor authorizes anyone to assume for it any other obligation or liability in connection with your vehicle or this warranty.

Ford, Ford Motor Vehicle Assurance Company and your dealer are not responsible for any time that you lose, for any inconvenience you might be caused, for the loss of your transportation, or for any other incidental or consequential damages you may have.

The Ford warranty guide provided to customers does not provide for reimbursement of transportation expenses nor does it obligate W-H or the dealer to provide transportation.

The warranty guide also states:

Ford Motor Company and your selling dealer thank you for selecting one of our quality products. Our commitment to you and your vehicle begins with quality protection and service.

When you need warranty repairs your selling dealer would like you to return to it for that service, but you may also take your vehicle to another Ford Motor Company dealership authorized for warranty repairs.

Ford provides its dealers with a Warranty and Policy Manual for use by service departments. This manual spells out the terms of the limited warranty in greater detail than does the guide provided to customers. Two provisions in the manual apply to transportation expenses incurred by the dealer as follows:

NOTE: For Ford and Mercury cars and light trucks, alternate transportation in the form of shuttle service or service rentals may be available under the Transportation Assistance Program. Consult with dealership service management for details.

As part of the Lincoln Commitment Program, Lincoln vehicle owners will be provided with transportation assistance for warranty repairs in the form of shuttle service, loaner vehicle, or up to \$35 per day rental assistance.

In addition to the basic warranty, new and used car customers may purchase a Ford Extended Service Plan for an additional charge. The application for a Ford Extended Service Plan contract contains the following provisions regarding transportation:

Transportation reimbursement applies only after it has been determined by the repairing dealer that:

1) the repair is covered under this contract; 2) the vehicle is inoperable due to an original factory limited warranty or covered ESP/ESC repair under this contract; and 3) the vehicle must be kept overnight by the repairing dealer.

The rental benefit will be provided for rental charges incurred up to the plan limits while the repair is being completed. The rental vehicle must be rented from the servicing dealership or other commercial agency to be eligible for reimbursement.

The application for contract is not valid until accepted by ESP headquarters.

When a prospective customer visited W-H's dealership, he or she was greeted by a sales person and given a description of the vehicles, an explanation of the Ford warranty and information about the benefits of W-H's service department. In the course of negotiating the sale of a new or used vehicle, W-H's salesmen typically advised the potential customer of W-H's car

loaner policy. Essentially, customers were told that new car buyers and purchasers of the Extended Service Plan could obtain a loaner vehicle while their car was being serviced at W-H's service department. W-H considers the providing of loaner cars to its customers to be an additional inducement to purchase from W-H.

In addition to the car purchase, W-H also provides financing, life insurance, disability insurance and other products to its customers. These additional items may be purchased separately, and they are discussed with potential customers during the course of purchase negotiations.

When a customer and W-H arrive at a mutually satisfactory price, the customer is asked to sign a purchase agreement and to make a deposit on the car. The agreement identifies the car sold and the negotiated purchase price. All of the items purchased and additional charges are calculated in a section entitled "Retail." A sample purchase agreement entered into evidence shows the base price of the car, trade-in credit, discounts, an additional charge for the extended service plan, the three-year basic warranty (for no additional charge), sales tax, registration fee, inspection fee, application fee and the total due on delivery. The service loaner policy is not an item stated on the purchase agreement. The purchase agreement is signed by W-H and the prospective buyer. Among other things, it contains the following provision:

5. **Disclaimer of Warranties.** I UNDERSTAND THAT YOU EXPRESSLY DISCLAIM ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND THAT YOU NEITHER ASSUME NOR AUTHORIZE ANY OTHER PERSON TO ASSUME FOR YOU ANY LIABILITY IN CONNECTION WITH THE SALE OF THE VEHICLE, except as otherwise provided in writing by YOU in an attachment to this Agreement or in a document delivered to ME when the vehicle is delivered.

When a customer takes delivery on a new car, he or she meets with a business office representative who explains the details of the sale. If pertinent, explanations would be provided of financing arrangements, life insurance, disability insurance and extended service contracts. In addition, W-H's service loaner policy is explained to the customer and the customer is asked to sign a service loaner policy statement. The September 1999 Service Replacement Policy statement is typical of those used during the audit period and provides as follows:

West-Herr provides service replacement rentals through Thrifty Car Rental. West-Herr pays the daily rate but, [sic] you are responsible for the car, as well as, excess mileage (over 150/day), gas used, damage up to \$100.00.²

1. Service Replacement Rentals are only available on appointment basis, and only for the registered owner or spouse.
2. Privileges will remain in effect for the term of your New Vehicle's basic warranty.
3. Rentals **WILL NOT** be provided for collision or insurance related repairs.
4. In the event of an emergency, rentals will be issued on the basis of availability.
5. A rental **MUST** be requested at time of making service appointment.
6. The minimum age is 18. Drivers age 18, 19, or 20 will be required to pay \$51.95 / day Youthful Driver Surcharge to Thrifty Car Rental.
7. Purchasers of used vehicles will only be provided Service Replacement Rentals if they have purchased an Extended Service Plan Contract.
8. A credit reference (credit card or credit check) must be verified prior to rental. Valid Driver's License **MUST** be provided at time of rental.

² This paragraph did not appear in the 1997 "Service Loaner Policy."

A signature line appears under these provisions with the following statement under the line: "Signature Acknowledges customer has read and fully understands Restrictions listed above."

All documents related to the sale of the vehicle are placed in a "dealer jacket," a type of file folder. The dealer jacket typically contains the purchase agreement, copies of the purchaser's driver's license, financing agreements, life insurance or disability insurance policies, title and registration documents and any other items relevant to the sale. Upon delivery of the car to the customer, a salesman reviews the documents in the dealer jacket with the customer. At that time, the customer is asked to sign the Service Replacement Policy statement, and a copy of it is placed in the dealer jacket.

All customer information is entered in the W-H computer database by date of purchase. This information can be accessed by W-H as necessary. When a customer calls to make an appointment for service, the service department checks the computer system to determine whether the customer is entitled to a service loaner. If the customer has purchased a new car from W-H which is still under warranty or is receiving service under the terms of an extended service plan, a service loaner car is made available.

W-H contracted with Thrifty Car Rental Company to provide loaner cars. W-H's contract with Thrifty requires Thrifty to keep cars available for W-H's customers. The contract does not provide for an exact number of cars to be provided. Rather, Thrifty is obligated to provide cars as needed. Thrifty charges W-H approximately \$30,000.00 to \$40,000.00 per month for rental cars provided to W-H customers. Normally, 6 to 12 Thrifty rental cars are on W-H's property at any one time. Thrifty has porters who bring cars to the W-H dealership throughout the day to

meet W-H's customer's demands for service loaners. W-H does not have loaner cars of its own on the premises. Rather, the customer is sent to the Thrifty service desk and provided with a car by Thrifty. It is the understanding of W-H's employees that customers who have signed the loaner policy agreement are legally entitled to a loaner car, and every effort is made to insure the loaner cars are made available. Each month, Thrifty provided W-H with an invoice of charges incurred for car rentals. Thrifty did not collect sales tax on the rental charges.

Not every customer who is entitled to a loaner car actually receives one at every appointment. Some customers prefer not to have a service loaner. Some use alternative transportation such as a shuttle van provided by W-H or wait at the dealership until their vehicle is serviced. The loaner car is available whether a customer wants it or not. The cost of the loaner policy to W-H is approximately \$100.00 for each new car sold. Even if a customer who did not want to use a loaner car was able to negotiate a \$100.00 reduction in the cost of the new car purchase on that basis, W-H would still make a car available if that customer later demanded one.

Ford reimburses W-H for repair work performed under the terms of the basic warranty. Ford does not reimburse W-H for service loaners provided to customers, because they are not a reimbursable item under the basic warranty. Nonetheless, W-H provides its basic warranty customers with service loaners if the vehicle being serviced was purchased from W-H. Customers who purchased a Ford vehicle at another dealership may have basic warranty service performed by W-H. These customers are not provided with a service loaner.

Ford reimburses W-H for rental car charges incurred under the terms of the Extended Service Plan. These charges are treated as a warranty item and reimbursed by Ford in the same way that other warranty items are reimbursed.

Ford has a transportation assistance program which provides W-H with a set amount of money each year to provide transportation services to its basic warranty service customers. The amount of money provided is determined by a formula based on annual sales. The amount is not directly related to the Thrifty rental car expenses incurred by W-H.

During its audit, the Division distinguished between two types of repair services: those performed under the basic warranty and those performed under the Extended Service Plan. It was the Division's understanding after reviewing all pertinent documents that W-H was legally obligated to provide its customers with a service loaner under the terms of the Extended Service Plan. Consequently, charges incurred by W-H for loaner cars provided under the terms of the plan were deemed to be purchases for resale. The Division believed that W-H was not legally obligated to provide a loaner car under the terms of the basic warranty or any other agreement. The Division concluded that charges incurred to provide such cars were operating expenses and not purchases for resale.

To determine tax due on Thrifty rental charges for the loaner cars, the Division tested the month of June 1999. It determined that 67% of maintenance and repair work performed during this month were performed under the terms of the basic warranty. The Division concluded that 67% of the charges incurred for rental cars were connected with new car customers during the term of the basic warranty. Consequently, the Division assessed tax on 67% of W-H's rental car expense for the audit period. W-H does not contest the correctness of this methodology.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began by addressing the pertinent sections of the Tax Law and regulations with respect to the sales tax. The Administrative Law Judge narrowed the issue to whether the right to a loaner vehicle was included in the purchase price of the automobile.

The Administrative Law Judge concluded that the purchase price of the car included the car itself and a basic three-year warranty provided by Ford. As such, the entire charge was subject to sales tax at the time of the sale. Therefore, services performed under the warranty were not subject to sales tax because the charge for that service is deemed to be included in the retail price of the vehicle.

The Administrative Law Judge noted that both parties agree that loaner cars were not provided under the terms of the basic warranty. Thus, the Administrative Law Judge concluded that petitioner failed to sustain its burden of proof that the overall retail price of the car included the right to a loaner vehicle.

The Administrative Law Judge rejected petitioner's argument that the purchase agreement read in conjunction with the Service Replacement Policy statement obligated petitioner to provide a loaner car to certain of its customers. Relying on *Crabtree v. Elizabeth Arden Sales Corp.* (305 NY 48), the Administrative Law Judge enunciated the theory that both signed and unsigned written agreements are permitted to be read together provided that each agreement clearly references the same transaction. In applying this principle to the facts of this case, the Administrative Law Judge determined that the unsigned document, i.e., the Service Replacement Policy statement, does not refer back to the new car purchase agreement nor was such statement intended to clarify the purchase agreement or an additional term of the sale.

Thus, the Administrative Law Judge determined that the purchase price of a new car did not include the right to a loaner car and the Thrifty car rentals were not purchases for resale.

ARGUMENTS ON EXCEPTION

Petitioner takes exception to the Administrative Law Judge's interpretation of *Crabtree v. Elizabeth Arden Sales Corp. (supra)*. Petitioner asserts that the Service Replacement Policy statement was not required to refer back on its face to the purchase agreement in order to be read as part of such agreement. Additionally, petitioner states that the Service Replacement Policy statement did not have to expressly indicate that it was prepared with the intention of evidencing the purchase agreement or as an additional term of sale. Petitioner maintains that the Administrative Law Judge erred in her finding that the disclaimer of all warranties in the purchase agreement was fatal to petitioner's case. Petitioner alleges that the right to a loaner vehicle was included in the purchase price of its new car sales.

In opposition, the Division states that the Administrative Law Judge correctly determined that the Service Replacement Policy statement was not part of the purchase agreement and, as such, was not a contractual obligation on the part of petitioner to provide a loaner car.

The Division maintains that since petitioner did not charge its customers for the loaner cars, it follows that a resale could not have occurred. The Division notes that, in order for there to be a sale, there needs to be a transfer of property for a consideration which are not the facts of this case.

Moreover, the Division argues that the facts of *Crabtree v. Elizabeth Arden Sales Corp. (supra)* are distinguishable from the facts in this case and that the Statute of Frauds and the parol evidence rule are inapplicable herein. The Division maintains that the issue in *Crabtree* was

whether, in fact, a contract existed between the parties therein. Here, the Division points out that no one disputes that petitioner had a contract with its customers. Rather, the focus here is whether the Service Replacement Policy statement was part of said contract. The Division emphasizes that where there is no ambiguity in the contract language, the resort to parol evidence is inappropriate.

Additionally, the Division points to the language of the Service Replacement Policy statement as further proof that the provision of loaner cars was not meant to be a contractual obligation. The Division notes that the title of the statement itself indicates that it is merely a policy and not a contract. Also, the Division notes that use of the word privileges also indicates that petitioner was not legally obligated to provide loaner cars to its customers under the purchase agreement. Thus, the Division requests that we sustain the determination of the Administrative Law Judge.

OPINION

Tax Law § 1105(c) imposes a sales tax on receipts from every sale, except for resale, of a variety of services including the service of installing, maintaining or repairing tangible personal property. A retail sale, as pertinent here, is defined as “[a] sale . . . for use by [any] person in performing the services subject to tax under [Tax Law § 1105(c)(3)]” (Tax Law § 1101[b][4]).

The term *resale* is not defined in the Tax Law. However, the regulations of the Commissioner of Taxation and Finance address the question of when services are purchased by a vendor for resale. 20 NYCRR 526.6(c)(1) provides as follows:

Where a person, in the course of his business operations, purchases tangible personal property or services, which he intends to sell, either in the form in which purchased, or as a component part of other property or services, the property or services which he has

purchased will be considered as purchased for resale, and therefore not subject to tax until he has transferred the property to his customer.

The regulations further address the question of when certain services provided pursuant to a warranty agreement are subject to sales tax as follows:

Warranty work. (1) Repair or maintenance services rendered, without charge to a customer under a warranty agreement are not taxable.

(2) The vendor performing the warranty services may purchase for resale any tangible personal property which is transferred to his customer in connection with the services rendered.

(3) Charges for services rendered which are not covered by the warranty are taxable.

(4) Where a manufacturer reimburses a vendor or repairman performing warranty work, the reimbursement is not taxable, as it was for resale (20 NYCRR 527.5[d]).

We begin by addressing *Crabtree v. Elizabeth Arden Sales Corp.* (*supra*) which case was relied on by both the Administrative Law Judge and petitioner. In *Crabtree*, the issue involved whether the taxpayer had a valid employment contract for a two-year period with the Elizabeth Arden Sales Corporation. Although defendant corporation raised the Statute of Frauds defense, the court allowed certain payroll records and an unsigned office memorandum to evidence the existence of a two-year employment contract between the parties that had never been reduced to a formal written contract (*see also, Matter of Brophy*, Tax Appeals Tribunal, December 7, 1995 [wherein we relied upon certain written memoranda to overcome the Statute of Frauds in establishing that, in fact, an employment contract was in existence]). In this case presented to us on exception, there already exists a formal written contract, that being the purchase agreement between petitioner and its customers. Accordingly, we do not find *Crabtree* controlling on the facts of this case and we decline to rely on it in our decision herein.

The issue that we need to decide is whether the purchase agreement obligates petitioner to provide a loaner car to all its new car purchasers. We find that it does not envision such an obligation.

As set forth by the Administrative Law Judge, the purchase agreement includes an itemization of the charges incurred by the new car purchaser. The agreement includes spaces to show the price of the car minus trade-in credit and discounts, additional charges for the purchase of an extended service plan, inspection fees, processing application fee and taxes. The service loaner policy is not a separately stated item on the invoice and the invoice makes no mention of the obligation to provide a loaner vehicle.

Petitioner argues that paragraph “5” contained in the *Additional Terms of Agreement* attached to the sales invoice, in fact, references the Service Loaner Policy. Petitioner argues that the Service Loaner Policy is another type of warranty which is provided in writing by petitioner and delivered to a new car purchaser at the time that the new car is delivered. However, in reviewing the Service Loaner Policy, it merely states certain criteria for the dealership’s policy in deciding whether it will provide a loaner vehicle in a certain instance. This one page policy cannot be interpreted to be a binding contract which requires petitioner to provide a loaner. Thus, we conclude that since the purchase agreement does not obligate petitioner to provide a loaner car to all of its new car purchasers, petitioner is not entitled to the resale exclusion for its lease of certain vehicles from Thrifty.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of West-Herr Ford, Inc. is denied;
2. The determination of the Administrative Law Judge is sustained;

3. The petition of West-Herr Ford, Inc. is denied; and
4. The Notice of Determination, dated March 13, 2001, is sustained.

DATED: Troy, New York
December 4, 2003

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner