STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CHARLES G. MOERDLER	:	DETERMINATION DTA NO. 816969
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Year 1997.	:	

Petitioner, Charles G. Moerdler, 7 Rivercrest Road, Riverdale, New York 10471, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the year 1997.

A hearing was held before Roberta Moseley Nero, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on October 14, 1999 at 10:30 A.M., with petitioner's reply brief being received on February 9, 2000, which date began the six-month period for the issuance of this determination. Petitioner appeared by Susan R. Friedman, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Robert A. Maslyn, Esq., of counsel).

ISSUE

Whether petitioner is entitled to a refund of sales tax paid on the commencement of a lease of a motor vehicle for that part of the sales tax representing lease payments that were never paid because of the theft of the motor vehicle.

FINDINGS OF FACT

1. On January 21, 1997 petitioner leased a new 1997 Land Rover Range Rover 4.0SE from Pepe Autos, Ltd. of White Plains, New York. The lease was accomplished through BMW Financial Services.

2. The lease provided for 36 monthly payments of $743.87 totaling $26,779.32. There was an initial amount due at the inception of the lease which included the first monthly payment of $743.87.

3. At the inception of the lease petitioner paid $2,209.29 in sales tax on the 36 monthly payments ($743.87 x 36 = $26,779.32; $26,779.32 x 8.25% = $2,209.29).[1]

4. In addition to the initial payment required at the inception of the lease, petitioner made three more payments of $743.87, for a total of four monthly payments totaling $2,975.48.

5. Pursuant to the terms of his lease petitioner maintained insurance coverage on the motor vehicle that was payable to BMW Financial Services. Section 15(C) of the lease provided petitioner with GAP or total loss coverage. If the motor vehicle was stolen and not recovered in 30 days, petitioner's termination liability under the lease was to be limited to the proceeds paid by the insurance plus petitioner's deductible, a $250.00 termination fee and any past due amount as of the time the motor vehicle was stolen.

6. On May 6, 1997 the motor vehicle was stolen. Petitioner reported this to the police, the insurance company and BMW Financial Services.

7. BMW Financial Services received payment under the insurance policy in the amount of $52,848.57. Petitioner received payment under the insurance policy of $2,206.43 for certain

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[1]The parties' assertion that $2,209.32 in sales tax was paid at the time of the lease is a slight miscalculation as shown by the above calculation and the Pepe Autos, Ltd. Vehicle Cash Lease Agreement.

personal property that was in the motor vehicle at the time it was stolen. Neither of these payments included reimbursement for any lease payments made by petitioner or sales tax paid by either BMW Financial Services or petitioner.

8. In December of 1997 the motor vehicle was recovered out of state and petitioner was notified. Petitioner contacted the insurance company to inquire about continuing the lease at that point. Petitioner was told that the lease had been canceled and terminated upon report of the theft and the payment by the insurance company and that all rights to any recovered vehicle had already been assigned by the insurance company to a third party.

9. By application dated June 5, 1997, petitioner requested a refund in the amount of $2,326.47. By letter dated July 29, 1997 the Division of Taxation ("Division") denied petitioner's application for a refund stating: "There is no provision in the New York State Sales and Use Tax Law to allow for a refund of sales tax paid on the lease of a vehicle that is terminated prematurely, either by choice, or in the case of the vehicle being stolen."

10. Petitioner filed a request for a conciliation conference which was held on May 7, 1998. By Conciliation Order dated November 13, 1998 the conferee sustained the Division's disallowance of petitioner's refund claim. A petition was filed with the Division of Tax Appeals on February 10, 1999.

11. By concessions made at the hearing and in his briefs petitioner agrees that the amount of the refund claim at issue is not $2,326.47 as set forth in the petition, but $1,963.84 (32/36 of $2,209.32).

12. The amount of the refund claim at issue is hereby further adjusted to $1,963.82 (32 unpaid payments x $743.87 = $23,803.84; $23,803.84 x 8.25% = $1,963.82).

SUMMARY OF THE PARTIES' POSITIONS

13. Petitioner argues that he is entitled to a refund pursuant to Tax Law § 1132(e) and 20 NYCRR 534.6. Tax Law § 1132(e) authorizes the Division to provide by regulations for excluding "from taxable receipts . . . amounts representing sales where the contract of sale has been canceled, the property returned" and for refunds under such circumstances where the tax has been paid. The regulation adopted under this provisions provides for refunds of sales tax paid "where a contract of sale has been canceled or the property returned and the tax collected therefrom refunded to the customer." (20 NYCRR 534.6.) Petitioner argues that his lease of the motor vehicle was a sale under the definition of sale contained in Tax Law § 1101(b)(5), that the lease was therefore a contract of sale and when the lease was canceled due to the theft of the vehicle, he was entitled to a refund of the sales tax on the unpaid lease payments. Petitioner further argues that the motor vehicle was, in effect, property returned to the lessor because the lessor received the proceeds from the insurance policy.

Petitioner also argues that the sales tax on the unpaid lease payments became tax paid "erroneously, illegally, or unconstitutionally" (Tax Law § 1139) at the time of the theft since no further lease payments were owing or would be paid. Therefore, pursuant to Tax Law § 1139, petitioner argues he was entitled to a refund. Petitioner urges that the tax is also improper because it would lead to double taxation should the subject motor vehicle be leased again.

Petitioner argues that Tax Law § 1111(i) does not prohibit a refund under the circumstances of this case. Tax Law § 1111(i) deems all of the payments under a long-term lease to be made at the inception of the lease for purposes of collecting sales tax. Petitioner argues that the regulation adopted by the Division pursuant to this section that does not allow for refunds in the case of the early termination of a lease is inconsistent with Tax Law § 1132(e) and

Tax Law § 1139 which clearly provide for a refund in this case. Therefore, petitioner asks that the regulation be declared invalid.

Finally petitioner argues that 20 NYCRR 527.15 is contrary to the legislative intent to provide parity between long-term leasing of motor vehicles and installment sales. Since Tax Law § 1132(e) and § 1139 and 20 NYCRR 534.6 and 534.7 allow a refund in an installment sale situation where the contract is canceled or the property is returned, a refund should also be allowed in the long-term lease situation.

14. The Division argues that the legislative intent behind Tax Law § 1111(i) was to equate long-term leases of motor vehicles with sales of motor vehicles. Since there is no provision in the Tax Law specifically allowing a refund in the case of a long-term lease terminated because the motor vehicle was stolen, it is perfectly logical to treat the leased motor vehicle as an outright purchase where there would be no refund of sales taxes had the vehicle been stolen.

The Division further argues that its regulation (20 NYCRR 527.15) precluding a refund of sales tax in the case of an early termination of a lease is consistent with Tax Law § 1111(i), since this provision deems all payments due on the lease payable at the inception of the lease.

The Division asserts that petitioner's argument that the theft of the car and the insurance settlement constitute a cancellation of a contract allowing a refund under Tax Law § 1132(e) and 20 NYCRR 534.1 is incorrect in that Tax Law § 1132(e) allows the Division to adopt regulations allowing for refunds in these cases and the regulation as adopted by the Division provides for refunds only to retailers not consumers. Furthermore, the Division asserts that there was not a cancellation of contract in this case because the parties were not returned to their original positions prior to the transfer (i.e., petitioner had four months use of the motor vehicle, his payments were not returned to him and BMW Financial Services did not reacquire the motor

vehicle). The Division points to the Motor Vehicle Leasing Act (Article 9-A of the Personal Property Law) to show the difference between the cancellation of a lease and the early termination of a lease which includes thefts of motor vehicles.

The Division argues that the tax was not collected erroneously, illegally or unconstitutionally in this case because pursuant to Tax Law § 1111(i) the tax was due and owing at the time of the inception of the lease and subsequent events cannot alter correctly collected tax.

Finally, the Division argues that, while Tax Law § 1132(d) allows the Division to adopt a regulation providing for the payment of sales tax on installment sales as each individual payment is due, the Division has never adopted such a regulation, meaning that installment sales also require full payment of sales tax at the inception of the sale. Furthermore, there is no provision allowing for refunds in installment sales except where the contract is canceled or the property is returned. Again there was no cancellation of the lease in this matter and in any event 20 NYCRR 527.15(e) specifically requires that no refund be allowed in the case of lease payments.

CONCLUSIONS OF LAW

A. Tax Law § 1105 imposes a tax on the sale of tangible personal property in New York State. Pursuant to the definition of sale set forth in Tax Law § 1101(b)(5) a lease is considered a sale. Until 1990, pursuant to these provisions a long-term lease of a motor vehicle was subject to sales tax at the time each individual payment was made under the lease. In 1990 Tax Law § 1111(i) was adopted[2] which provided in relevant part:

> (A) Notwithstanding any contrary provisions of this article or other law, with respect to any lease for a term of one year or more of (1) a motor vehicle . . . all receipts due or consideration given or contracted to be given for such property

[2]L 1990, ch 190, §181.

> under and for the entire period of such lease . . . shall be deemed to have been paid or given and shall be subject to tax, and any such tax due shall be collected, as of the date of first payment under such lease . . . or as of the date of registration of such property with the commissioner of motor vehicles, whichever is earlier.

The intent behind this legislation appears to be two-fold in that the Legislature was seeking parity of long-term motor vehicle leases with installment sales, while accelerating the collection of sales tax revenues (***see***, New York State Senate Memorandum in Support of Legislation, Bill S5282-B and A-8355-C, Governor's Bill Jacket, L 1992, ch 20 [dealing with amendment to section 1111[i] not relevant to the current matter). In order to accomplish this the Legislature, in enacting Tax Law § 1111(i), stated that, notwithstanding that such lease payments were already taxable at the time each individual payment was made, the total amount of the payments would be deemed to have been paid as of the date of the first payment and would be subject to tax at that time. Pursuant to this provision there is no question that the total amount of the lease payments made by petitioner was subject to tax as of January 21, 1997, the date of his first payment.

B. Having determined that the tax was properly imposed in the first instance, the question is whether the Division properly disallowed petitioner's claim for refund. The Division adopted a regulation regarding the taxation of long-term leases of motor vehicles which addressed the issue of refunds. 20 NYCRR 527.15(e) provides: "Limitations on refunds and credits. No refund or credit shall be allowed based upon the fact that receipts are not actually paid as in the case of early termination of a lease . . . since, under section 1111(i), such receipts are deemed to have been paid." Pursuant to this regulation the Division denied petitioner's refund in this case. Therefore, the question is one of statutory and regulatory interpretation as to whether the regulation as applied by the Division in this case comports with the intent of the statute.

C. When construing a statute the primary focus is on the intent of the Legislature in enacting the statute (McKinney's Cons Laws of NY, Book 1, Statutes § 92[a]; ***see***, ***Matter of Sutka v. Connors***, 73 NY2d 395, 541 NYS2d 191; ***Matter of American Communications Technology v. State of New York Tax Appeals Tribunal***, 185 AD2d 79, 592 NYS2d 147, ***affd*** 83 NY2d 773, 611 NYS2d 125). When that intent is clear from the wording of the statute itself, the inquiry ends (McKinney's Cons Laws of NY, Book 1, Statutes § 76; ***see***, ***Matter of American Communications Technology v. State of New York Tax Appeals Tribunal***, ***supra***). However, when there is an ambiguity in the words of the statute, the inquiry extends to other methods of ascertaining legislative intent (***see***, McKinney's Cons Laws of NY, Book 1, Statutes, §§ 76, 92; ***Matter of American Communications Technology v. State of New York Tax Appeals Tribunal***, ***supra***). In a case such as this where the tax was properly imposed in the first instance and petitioner is arguing that the amount of the lease payments that were never paid should be excluded from tax, petitioner is required to prove that its interpretation of the statute is the only reasonable interpretation, or that the Division's interpretation is unreasonable. (***Matter of Marriott Family Rests. v. Tax Appeals Tribunal of State of New York***, 174 AD2d 805, 570 NYS2d 741, ***lv denied*** 78 NY2d 863, 578 NYS2d 877; ***Matter of Aetna Casualty & Surety Co. v. Tax Appeals Tribunal***, 214 AD2d 238, 633 NYS2d 226, ***lv denied*** 87 NY2d 811, 644 NYS2d 144; ***see also***, ***Matter of Grace v. State Tax Comm.***, 37 NY2d 193, 371 NYS2d 715; ***Matter of Federal Insurance Co. v. State Tax Comm.***, 146 AD2d 888, 536 NYS2d 595). These principles of statutory construction also apply to the interpretation of regulations (***see***, ***Matter of Cortland-Clinton v. NYS Dept. Of Health,*** 59 AD2d 229, 399 NYS2d 492).

D. While Tax Law § 1111(i) does not specifically provide that no refunds will be allowed in the case of an early termination of a long-term lease of a motor vehicle, neither does the statute provide for such refunds or even allow the Division to provide for such refunds by regulations (***compare*** Tax Law § 1132[e]; 20 NYCRR 534.6). The statute simply fails to mention refunds. However, the statute does provide that all of the payments are deemed made on the date of the first payment and subject to tax. There is nothing inconsistent with the Division's regulation specifically stating in the case of an early termination of a long-term motor vehicle lease that no refunds will be allowed. Furthermore, the regulation is certainly not inconsistent with the primary objective of the statute which was to increase revenues (***see***, New York State Senate Memorandum in Support of Legislation, Bill S5282-B and A-8355-C, Governor's Bill Jacket, L 1992, ch 20 [dealing with amendment to 1111[i] not relevant to the current matter). Therefore, the question is whether the regulation as applied to the particular circumstances of this case is invalid (**see**, ***Matter of Lake City Manufactured Housing***, Tax Appeals Tribunal, November 14, 1991, ***annulled on other grounds***, 184 AD2d 33, 590 NYS 325 [wherein the Tribunal noted that the Division of Tax Appeals is specifically authorized to rule on the validity of the Division's regulations]) because of other provisions of the Tax Law or regulations that would allow a refund to be issued to petitioner.

E. Tax Law § 1139(a) provides for the refund of tax that was "erroneously, illegally or unconstitutionally collected or paid." The tax paid by petitioner pursuant to Tax Law § 1111(i) was properly paid at the time of the first lease payment. Tax Law § 1139(a) does not require or even allow a refund in this case (***Consolidated Edison Company of New York v. State Tax Comm.***, 101 Misc 2d 863, 422 NYS2d 294 [provision does not apply to taxes legally due and owing at the time they were paid]). Therefore, Tax Law § 1139(a) does not show that the

Division's regulation utilized to deny petitioner's claim for refund is contrary to Tax Law § 1139(a) and thus invalid.

F. Tax Law § 1132(e) allowed the Division to adopt regulations providing for a refund of sales tax in a case "where the contract of sale has been canceled" or "the property returned." The Division adopted such regulations in 20 NYCRR 534.1 and 534.6. While BMW Financial Services received a payment from the insurance company for the loss of the motor vehicle, the property, as such, was not returned to it (***see***, ***Matter of Kowalski***, State Tax Comm., March 6, 1975). Furthermore, pursuant to the terms of the lease, the lease was terminated upon the theft of the car. The early termination of the lease does not amount to a cancellation of the contract because the parties were not returned to their original positions, in that the motor vehicle was not returned and petitioner had use of the motor vehicle for part of the term of the lease (***see***, General Business Law §§ 198-a, 198-b [sales tax refunds under the motor vehicle "Lemon Law" require the return of the motor vehicle]; Personal Property Law §§ 331, 335, 341, 344 [theft of a motor vehicle is considered an early termination of a lease and there is a separate provision for cancellation of lease which is considered to occur after payment of all obligations under the lease]; ***Matter of Kowalski***, ***supra***). While petitioner's interpretation that he was entitled to a refund (because either the property was returned in the form of the insurance proceeds or the termination of the lease was a cancellation of sale pursuant to these provisions) might be plausible, the Division's interpretation that petitioner is not entitled to a refund pursuant to Tax Law § 1132(e) and 20 NYCRR 534.1 and 534.6 cannot be held to be unreasonable. Therefore, petitioner has not met his burden to show that his interpretation of the statutes and regulations is the only reasonable interpretation, nor did he prove that the

Division's regulation utilized to deny petitioner's claim for refund is contrary to these provisions.

G. Petitioner's argument that the application of 20 NYCRR 527.15 to deny him a refund in this case is contrary to the statutory and regulatory provisions allowing for a refund in an installment sale situation where the sale is canceled or the property returned fails for the same reasons as those set forth in Conclusion of Law "F" dealing with the cancellation of contracts for sale.

H. The petition of Charles G. Moerdler is denied and the Disallowance of Refund is sustained.

DATED: Troy, New York
July 27, 2000

/s/ Robert Moseley Nero
ADMINISTRATIVE LAW JUDGE