STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **CLM ASSOCIATES, LLC** 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 September 1, 2004 through August 31, 2010.	DECISION DTA NO. 826735

Petitioner, CLM Associates, LLC, filed an exception to the determination of the Administrative Law Judge issued on February 23, 2017. Petitioner appeared by Arent Fox, LLP (Julius A. Rousseau III, Esq. and Russell P. McRory, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Osborne K. Jack, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division filed a brief in opposition. Petitioner filed a reply brief. Oral argument was heard in New York, New York, on August 10, 2017, which date began the six-month period for the issuance of this decision.

ISSUES

I. Whether the Division of Taxation properly determined that the transfer of titles to motor vehicles from various dealerships to petitioner constituted sales subject to tax pursuant to Tax Law § 1105 (a).

II. Whether petitioner has demonstrated that it is entitled to credit for sales or use taxes previously paid.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except that we have modified findings of fact 14, 18, 25, 26 and 31 to more accurately reflect the record. As so modified, those facts are set forth below.

1. Petitioner, CLM Associates, LLC, was at all relevant times was a single-member limited liability company located in Mount Kisco, New York, and wholly owned by The Premier Collection, LLC (Premier).

2. Premier was an automotive sales and service group comprised of petitioner and eleven dealerships, each of which was also a single-member limited liability company wholly owned by Premier. The dealerships sold various makes of vehicles, including Land Rover, Volkswagen, Jaguar and Volvo.

3. Premier itself was owned by five individual members.

4. Petitioner and the other dealerships were disregarded entities and filed no income tax returns of their own. Instead, Premier filed single unified income tax returns for the group.

5. Premier's dealerships offered loaner cars (loaners) to its customers receiving service in accordance with the requirements of their respective manufacturers. These loaners, which arrived at the dealerships as new cars, were required by New York State law to be "hard-plated," meaning they needed to have a title and a permanent (non-dealer) license plate. Once titled, the loaners became used cars. Prior to 2002, each loaner was titled to the individual dealership that used it. At that time, petitioner was a licensed dealership.

6. Sometime in 2002, Premier restructured its business model. Petitioner ceased to be a licensed dealership, relinquished its dealership license, and instead became the administrative entity for the entire Premier group.

7. At any point during the relevant period, petitioner had approximately 30 employees who served various functions for the Premier group including accounting, human resources, records retention, information technology and marketing. Petitioner had its own office, which was located at one of Premier's dealerships.

8. As part of Premier's restructuring, it was decided that all loaners would be titled and insured in petitioner's name rather than that of the individual dealerships. The purposes for the restructuring were to centralize the loaner program, to facilitate the management of expenses, and to limit the potential liability of any one dealership. Premier's principals had a particular concern with the effects of New York's vicarious liability law (Vehicle and Traffic Law § 388). Sean Coughlin, president, chief operating officer, and a member of Premier, expounded on this latter point during his testimony:

> "[w]ell, if there was an accident that happened and one store couldn't afford to pay or it didn't have enough insurance to pay that accident, we could spread that liability around to a different dealership, so we wouldn't have to bankrupt one of them."

9. In order to effectuate each transaction, an invoice or bill of sale was created by the dealership listing petitioner as the purchaser of the particular loaner. Often, sales tax was reflected on the bill of sale, but never actually paid by petitioner.

10. The New York State Department of Motor Vehicles form MV-50 (retail certificate of sale), filed by the dealerships for each of the loaners, identified petitioner as the purchaser. The titles to the loaners were subsequently issued to petitioner.

11. The loaners that were titled to petitioner, as well as the actual titles themselves, remained in the possession of the dealership that used the particular loaners. Petitioner itself did not use the loaners.

12. Upon petitioner's obtaining title to a particular loaner, the vehicle would go into petitioner's booked inventory, and a payable would be entered on petitioner's general ledger. Likewise, the dealership's booked inventory was reduced, and a receivable would be created for each transaction and entered on the particular dealership's books. No funds were provided by petitioner to the dealership, however. Typically, a loaner was eventually taken out of service and sold to an individual customer as a used vehicle. At that time, the title would be signed on behalf of petitioner by an employee at the particular dealership selling the vehicle, and the aforementioned book entries would be reversed.

13. Petitioner and the dealerships were joint and several obligors on the master floor plan lines of credit for the loaners. The dealerships and Premier guaranteed petitioner's performance of its obligations under the floor plan agreements.

14. Expenses associated with the loaners were directed to the respective dealerships by petitioner. For instance, the interest expense on the floor plan financing on the loaners was billed by the lender directly to petitioner, who then in turn allocated the expense to the respective dealers that possessed the loaners. Similarly, administrative fees for registering titles and deductibles from insured loaner claims, although incurred by petitioner, were allocated to the dealerships that were in possession of the loaners. Meanwhile, petitioner's operating expenses, including payroll, and insurance premiums for the loaners, were allocated to the dealerships based upon a formula derived from the amount of full-time employees at each dealership. Ultimately, the aforementioned expenses were paid out of one master checking account owned by Premier.

15. Petitioner and Premier's dealership group were insured through master multi-level policies covering the whole group. The liability limits on these policies were $6,300,000.00 per

accident for the years 2004 and 2005, and were increased to $26,000,000.00 per accident for the years 2006 through 2010. Between 2004 and 2010, neither petitioner nor the Premier dealership group faced a claim that exceeded its insurance coverage.

16. Petitioner did not have its own checking account during the relevant period.

17. Petitioner did not file any sales tax returns or remit sales tax for the audit period.

18. While performing an audit on another related entity, the Division discovered petitioner's numerous loaner transactions. As a result, on September 27, 2010, the Division commenced a sales and use tax audit of petitioner for the period September 1, 2004 through August 31, 2010 (audit period) and requested books and records.[1] The records provided by petitioner were deemed adequate by the Division in order to perform a direct audit. Given the voluminous nature of the records, however, petitioner and the Division agreed to a test period and petitioner executed an audit method election form, dated October 18, 2010.

19. The Division selected 2009 as the year for its test period, with application of a straight-line method over the other years of the audit period. Petitioner did not object to the use of the year 2009 as the test period or use of the straight-line method.

20. In performance of its audit, the Division examined all transactions in 2009 involving the loaners. The transactions were reflected by bills of sale (or invoices) and the general ledgers. When reviewing the bills of sale, each of which evidenced a purchase price for the loaner, the Division noticed that some showed sales tax due, while others either had the tax entered and erased or not listed at all. Under each circumstance, no sales tax was paid by petitioner on the transaction.

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[1] The Division's auditor testified that the audit only went back to 2004, rather than the date of Premier's restructuring, as a typical unregistered vendor audit would only involve the prior six years.

21. After completing its review, the Division determined that the transfer of the loaners to petitioner constituted taxable sales of tangible personal property without any exemption. The Division concluded that the benefits gained by the dealerships, as well as the liabilities undertaken by petitioner upon transfer of the loaners, constituted the necessary consideration.

22. In reaching its conclusion, the Division also gave petitioner credit for vehicles that were traded in (trade-ins) by petitioner as part of the transaction.[2] The Division found it difficult in many cases, however, to identify a particular vehicle that was directly traded for a new loaner. The invoices used by the dealerships provided for a description of any trade-in and a line item for the value of a trade-in when calculating the taxable sales price. Credit was given by the Division for trade-ins that plainly appeared on the bills of sale or invoices, as was the general practice. Additionally, credit was given for trade-ins that may not have appeared on the bills of sale but had some sort of other evidence (such as a separate note) of the trade, as long as it occurred on the same day as the transaction. Finally, petitioner provided the Division with a list of all claimed trade-ins, whenever they may have occurred and whether documented or not, and the Division gave credit for those that occurred on the same day as the loaner acquisition.

23. The Division examined all transactions involving the loaners acquired by petitioner in 2009, and extrapolated the results over each quarter of the audit period. For the first year of the audit period (September 1, 2004 through August 31, 2005), the Division did not allow for a trade-in credit where there was no evidence that a loaner had been previously taxed or traded-in. The rationale for this method was that the first loaners acquired in the test period had not been previously taxed or purchased by petitioner. Once transferred to petitioner, they became eligible

[2] Typically, these trade-ins were older loaners returned by petitioner to the particular dealership.

to be traded in for new loaners and, once traded back to the dealerships, they were deemed taxed and the appropriate credit given. For years two through six of the audit period (September 1, 2005 through August 31, 2010), the Division gave a trade-in credit for any vehicle that was proven to have been traded to the dealership on the same day as petitioner's acquisition of a loaner. After applying a credit, the difference in value between the loaner acquired by petitioner and the trade-in constituted the amount subject to sales tax.[3]

24. At the conclusion of the audit, the Division issued a notice of determination, dated June 5, 2013, to petitioner, asserting $1,137,835.16 in sales tax and $701,752.35 in interest based on a finding of liability for the audit period. When broken down, the tax due for each quarter in the first year, i.e., September 1, 2004 through August 31, 2005, was $68,570.89. The tax due for each quarter in the second through sixth year, i.e., September 1, 2005 through August 31, 2010, was $43,177.58. The discrepancy was attributed to the unavailability of trade-in credits during the first year of the audit period (***see*** finding of fact 23).

25. In general, during the relevant period, a dealer could compute the state and local use tax on "mixed use" vehicles, i.e. vehicles held in a dealer's inventory for resale but loaned to a customer while his or her vehicle was under repair. The use tax was applicable to vehicles titled and used by the dealer for six months or less with no mileage restriction, or between six months and one year with a 15,000-mile restriction. The use tax on the mixed use vehicles was computed by multiplying the total cost of the vehicles by 1% per month of such mixed use and then multiplying the product by the applicable sales and use tax rate (***see*** TSB-M-02[3]S).

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[3] On occasion, the trade-in had a higher value than the loaner being acquired by petitioner. In that event, according to the Division, no sales tax was due on the transaction.

26. In certain instances with the loaners in the instant case, the dealerships paid a use tax on the mixed use vehicles during the audit period in the belief that it was the proper tax to be paid under the circumstances despite the fact that the loaners were titled to petitioner. In total, the dealerships paid $186,288.73 in use tax on such mixed use vehicles.

27. The dealerships anticipated exceeding the mixed use standards (***see*** finding of fact 25) for several of the loaners in their possession (long term loaners). As a result, the dealerships paid what they deemed to be sales tax on the total cost of the vehicles used as long term loaners. At hearing, petitioner presented invoices and payment records for sales tax paid by the dealerships on long term loaners, which, although titled to petitioner, were possessed by a particular dealership. In total, sales tax totaling $70,774.00 was paid by the dealerships on behalf of petitioner during the audit period for 31 long term loaners.

28. The Division's auditor testified at hearing. In his testimony, he conceded that although petitioner should have paid the sales tax on the long term loaners when titled in its name, "probably it would be fine" if the dealerships paid the tax instead.

29. At hearing, petitioner presented the testimony of John Lucarelli, a certified public accountant hired by petitioner in 2014 to review and assist with the Division's audit.

30. Mr. Lucarelli reviewed and analyzed the Division's workpapers and determination. In response, he found that several adjustments to the Division's audit results were warranted. In addition, he presented his own spreadsheets and conclusions with substitute audit results.

31. Mr. Lucarelli's critique of the audit consisted of three categories of adjustments. First, he gave petitioner credit for all claimed trade-ins involved in the loaner transactions, regardless of the number of intervening days between the sale of the loaner and the trade. That adjustment caused a reduction of $584,660.94 in petitioner's total tax due. Second, Mr. Lucarelli reduced

the Division's calculation of total tax due by the amount of use tax paid by the dealerships on mixed use vehicles (short term loaners) during the audit period, or $186,288.73. Third, Mr. Lucarelli further reduced the Division's tax calculation by the amount of sales tax paid by the dealerships on the long term loaners during the audit period, or $70,774.00. In total, Mr. Lucarelli calculated that if the transfers to petitioner constituted taxable retail sales, as the Division maintained, the true amount of sales tax owed was $327,598.21 after the above adjustments, and not the $1,137,835.16 reflected in the notice of determination.

32. Mr. Lucarelli examined all 159 transactions reviewed by the Division. There was no dispute that 21 of them did not involve a trade-in and, thus, were fully taxed. He also agreed that 64 others were likewise treated as the first car in and fully taxed.

33. Additionally, Mr. Lucarelli presented his own alternative method of calculation of the sales tax owed by petitioner based on its records. Under his method, he ascertained the highest number of loaners at each dealership during any December in the audit period (with the belief that December was a representative month), multiplied that figure by the average loaner value, and then by the applicable sales tax rate to arrive at sales tax owed of $361,809.23. After application of mixed use and sales tax previously paid, and credit for all trade-ins, Mr. Lucarelli concluded that the net sales tax owed by petitioner under his methodology was $114,818.10.

34. Petitioner was neither a governmental entity nor an exempt organization pursuant to Tax Law § 1116.

35. Shortly after the audit period, Premier again changed its business model and the titles of the loaners were no longer transferred to petitioner. Instead, the individual dealerships retained the titles to the loaners.

36. Petitioner submitted with its post-hearing brief proposed findings of fact 1 through 81 and proposed conclusions of law 1 through 15 pursuant to State Administrative Procedure Act (SAPA) § 307 (1). Petitioner's proposed findings of fact 1 through 4, 6 through 17, 19 through 26, 28 through 32, 35 through 41, 44, 49 through 53, 56, 57, 60 through 65, 68, 70 and 76 were accepted and incorporated into the Administrative Law Judge's findings of fact. Proposed findings of fact 5, 18, 43, 45 through 48, 54 and 55 were rejected as not completely consistent with the evidence in the record. The Administrative Law Judge found that petitioner's proposed finding of fact 25 is blank, and therefore did not state a proposed fact. In addition, petitioner's proposed findings of fact 27, 33, 34, 42, 58, 59, 66, 67, 69, 71 through 75 and 77 through 81 were found to be conclusions of law by the Administrative Law Judge, who determined that such proposed conclusions need not be ruled on pursuant to SAPA. For the same reason, the Administrative Law Judge determined that petitioner's proposed conclusions of law 1 through 15 need not be ruled upon.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began his determination by setting forth the first issue to be decided in this matter; namely, whether the transfer of titles of the loaners to petitioner constituted taxable retail sales pursuant to the Tax Law. After examining the relevant sections of the Tax Law and regulations, the Administrative Law Judge determined that such transfers of title qualified as sales of tangible personal property subject to sales tax, reasoning that the Tax Law and regulations provide a presumption that such transfers are subject to sales tax unless the vendor or customer establishes otherwise. The Administrative Law Judge considered petitioner's argument that such transfers of title could not be deemed sales as there was no consideration for the transfers, but determined that both the regulation under the Tax Law and this Tribunal's

precedent included the assumption of liabilities, rendering of services and accrual of benefits to parties to a transaction within the meaning of consideration for purposes of imposition of sales tax. Furthermore, the Administrative Law Judge observed that the accounting entries recording the transfers of the loaner vehicles to petitioner bolstered the conclusion that such transfers qualified as taxable sales under this Tribunal's prior decisions.

The Administrative Law Judge next addressed two of petitioner's arguments. First, the Administrative Law Judge deemed petitioner's argument that the transactions were not taxable because the dealerships under common ownership with petitioner retained possession and use of the loaner vehicles as not persuasive. The Administrative Law Judge reasoned that under the Vehicle and Traffic Law, petitioner became jointly and severally liable for losses stemming from claims for negligent deaths or injuries, and thus assumed liability as a consequence of the transfer of the vehicle titles here at issue. The Administrative Law Judge similarly did not agree with petitioner's argument that the transfer of title was merely pro forma and the transfers did not affect a taxable sale because the dealerships continued to bear the financial responsibility for the vehicles they transferred to petitioner. Citing relevant case law, the Administrative Law Judge concluded that petitioner is bound by the form it has chosen for these transactions and may not choose to ignore the business arrangement it created to avoid a disadvantageous sales tax result.

Next, the Administrative Law Judge considered petitioner's argument that it lacked notice of the sales tax ramifications of its decision to title loaners to petitioner due to its reliance on an advisory opinion. The Administrative Law Judge noted that advisory opinions are non-binding, but an advisory opinion may lend some guidance with regard to a similarly situated taxpayer. However, according to the Administrative Law Judge, the facts of this case were distinguishable

from the fact pattern in the advisory opinion petitioner cited, most significantly in that consideration for the transfer of the title was present in the instant case.

The Administrative Law Judge then addressed petitioner's alternative argument that if the transfers qualified as taxable sales, then a number of adjustments to the sales tax due were warranted. However, the Administrative Law Judge, citing to a prior decision of this Tribunal, concluded that taxpayers may consent to an indirect audit methodology even where complete and adequate records are available. The Administrative Law Judge noted that the burden was upon petitioner to show that such a methodology or the amount of the assessment was erroneous. In this case, the Administrative Law Judge observed that petitioner consented to the test period and method used by the Division in its audit. As such, the Administrative Law Judge concluded that petitioner failed to bear its burden of showing the specific, identifiable trade-in of one loaner vehicle for another and thus sustained the Division's use of the audit method it employed.

The Administrative Law Judge then turned to the question of whether petitioner is entitled to a credit for use tax paid by the dealerships on their use of the loaners. He observed the distinction under the Tax Law between the sales tax and use tax, explaining that the former is a tax on transactions of tangible personal property and the latter a tax on individuals for the in-state use of tangible personal property purchased at retail to the extent not otherwise subjected to sales tax. According to the Administrative Law Judge, the Tax Law and the prior decisions of this Tribunal indicate that sales tax was due upon petitioner's purchase of the loaners from the dealerships and that the use tax is inapplicable to petitioner. The Administrative Law Judge concluded that the dealerships' payment of the use tax on the loaners did not entitle petitioner to a credit against its unpaid sales tax, as the entities involved are different taxpayers under the Tax Law.

The Administrative Law Judge, however, agreed with petitioner that a credit was warranted for the documented sales tax paid on the purchases of long term loaners. The Administrative Law Judge found that petitioner had demonstrated that sales tax in the amount of $70,774.00 had in fact been paid on these vehicles, and even if such tax was remitted by the dealerships, crediting petitioner with that amount of sales tax would be consistent with article 28 of the Tax Law.

The Administrative Law Judge did not accept petitioner's alternative calculation of tax due using its witness' separate methodology, citing case law that holds that the Division's audit cannot be invalidated merely by offering an alternative estimate of tax liability as a substitute for the Division's. Thus, the Administrative Law Judge concluded that petitioner's alternative calculation of tax due must be disregarded.

The Administrative Law Judge concluded by sustaining the notice of determination issued to petitioner and denying petitioner's protest except with regard to the credit for sales tax paid on the long term loaners and directed the Division to thereby modify the notice of determination.

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioner takes exception to the Administrative Law Judge's findings of fact 8, 21, 22, 23, 32, 35 and 36 as not supported by, or for failing to fully reflect, the record established at the hearing and reintroduces the proposed findings of fact and conclusions of law it proposed below. Petitioner argues that its owes no additional sales tax as the transfers in question do not constitute taxable sales as no consideration was given for receiving nominal title to the loaners. Alternatively, petitioner maintains that if there is sales tax due, the Division miscalculated the proper amount because it did not give credit for trade-ins that did not occur on the same day or sales and use taxes paid by the dealerships.

The Division urges us to deny petitioner's exception. It contends that petitioner's purchases of the loaners were subject to sales tax under the Tax Law and regulations as there was consideration passed to the seller in exchange. Additionally, the Division argues that petitioner failed to meet its burden to demonstrate that the audit methodology was unreasonable. Finally, it disputes that petitioner is entitled to credit for sales and use taxes previously paid by the dealerships.

OPINION

We begin with petitioner's reintroduced proposed findings of fact. Under the State Administrative Procedure Act (SAPA), a hearing officer is charged with making a determination only after consideration of the record as a whole and as supported by substantial evidence (SAPA § 306 [1]). Except as otherwise provided by statute, the burden of proof shall be on the party initiating the proceeding (***id.***). The Tax Appeals Tribunal's enabling legislation, as implemented by the Tribunal's regulations, provides for de novo review of a determination by an administrative law judge (Tax Law § 2006 [7]; 20 NYCRR 3000.17 [e] [1]). Although this Tribunal usually defers to an administrative law judge's evaluation of the evidence, we are not bound by that determination (***Matter of Rakusin***, Tax Appeals Tribunal, July 26, 2001). After careful examination of the record, we concur with the findings of fact as determined by the Administrative Law Judge. Except as specifically noted previously, we find that the Administrative Law Judge's findings of fact reflect the record established at the hearing. Specifically, petitioner's proposed findings of fact 1 through 4, 6 through 17, 19 through 26, 28 through 32, 35 through 41, 44, 49 through 53, 56, 57, 60 through 65, 68, 70 and 76 were substantially incorporated into the Administrative Law Judge's findings of fact. We do not disagree with the Administrative Law Judge's characterization of petitioner's proposed findings

of fact 5, 18, 43, 45 through 48, 54 and 55 as not completely consistent with the record. Likewise, we concur with the Administrative Law Judge that petitioner's proposed findings of fact 27, 33, 34, 42, 58, 59, 66, 67, 69, 71 through 75 and 77 through 81 were conclusions of law and are thus not required to be individually ruled upon pursuant to SAPA (***see*** SAPA § 307 [1]).

We turn next to the threshold issue in this matter, namely whether the transfer of titles of the loaner vehicles from the individual dealerships to petitioner constituted taxable retail sales for purposes of article 28 of the Tax Law. A retail sale is defined under article 28 as a "sale of tangible personal property to any person for any purpose" other than a sale for resale as such, among other exceptions (Tax Law § 1101 [b] [4]). In turn, a sale is defined as "[a]ny transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume . . . conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor . . ." (Tax Law § 1101 [b] [5]). Consideration is defined under the Tax Law regulations as including "[m]onetary consideration, exchange, barter, the rendering of any service, or any agreement therefor" (20 NYCRR 526.7 [b]). Monetary consideration, in turn, includes assumption of liabilities, fees, rentals, royalties or any other charge that a purchaser, lessee or licensee is required to pay (***id.***). Under similar circumstances, this Tribunal has applied the common law definition of consideration ("some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other") (***see Matter of Hygrade Casket Corp.***, Tax Appeals Tribunal, December 16, 1993 ***confirmed*** 212 AD2d 843 [3d Dept 1995]).

Here, there is no dispute that titles to the vehicles in question were transferred to petitioner as a result of Premier's decision to centralize administration of its loaner fleet, as evidenced by the bills of sale, Department of Motor Vehicles forms MV-50 and appropriate

accounting entries, including inventory (***see*** findings of fact 9, 10 and 12). Petitioner argues, however, that these transfers cannot be deemed retail sales pursuant to article 28 because there was no consideration for the transactions. We cannot agree. We concur with the Administrative Law Judge that by acquiring title to a loaner, petitioner became jointly and severally liable for claims against any related dealership in possession of a loaner (***see*** Vehicle and Traffic Law §§ 128, 388). It is of no consequence that petitioner was never held liable for any loss resulting from a claim against one of its related dealerships. The dealerships benefitted from the transfer of title of the loaners to petitioner from both the perspective of spreading liability and the benefit of centralized loaner management. We agree that the spreading of liability and the benefit of administrative convenience in managing the combined loaner fleet constituted the consideration required to qualify the transfer of the loaner titles to petitioner as retail sales, and as a result, the transfer of the titles in question were taxable retail sales under Tax Law § 1105 (a).

In its proposed finding of facts, petitioner asks us to deem the transfers of the loaners from the dealerships to petitioner as not subject to sales tax as the transfers lacked consideration and "mere nominal title" to the loaners was conveyed to it. It points to the ultimate economic effect of the transfers, which was that Premier (and consequently its members) bore all financial responsibility for the costs and liability of the loaners, and claims that this demonstrates that the transfers were not retail sales under article 28. Ignoring the form petitioner chose to conduct its business would be contrary to our prior decisions and precedent (***Matter of Greco Bros. Amusement Co. v Chu***, 113 AD2d 622 [3d Dept 1986]; ***Matter of Tops, Inc.***, Tax Appeals Tribunal, November 22, 1989). We find that the evidence in the record of the accounting entries created for the transfers of the loaners' titles, even though made among related entities, provides sufficient evidence that consideration was exchanged in the transfer (***Matter of Hygrade Casket***

Corp., ***citing Matter of 107 Delaware Assoc. v New York State Tax Commn.***, 64 NY2d 935 [1985]; ***Matter of Motion Marketing Assoc.***, Tax Appeals Tribunal, November 22, 1989).

Having concluded that the transfers of the loaners constituted taxable sales for the purposes of article 28, we turn next to petitioner's alternative argument that petitioner is entitled to a credit for sales and use taxes previously paid. Petitioner argues that the Administrative Law Judge erred in determining that it was not entitled to trade-in credit against sales tax for the loaners it transferred back to the individual dealerships that were not substantiated by same-day, contemporaneous documentation of the trade. It argues that not granting a credit for trade-ins that were documented after the fact amounted to arbitrarily ignoring evidence of the trades that was later documented. Where, as here, a sales tax return is not filed or otherwise incorrect or insufficient, the Division may determine the amount of tax due from such information as may be available (Tax Law § 1138 [a]). Additionally, where, as here, even though a taxpayer's records are deemed adequate by the Division for performance of a direct audit, a taxpayer may nonetheless consent to the Division's use of an indirect audit methodology (***see e.g. Matter of 21 Club, Inc.***, Tax Appeals Tribunal, September 4, 2008 ***confirmed*** 69 AD3d 996 [3d Dept 2010]). Under such circumstances, the Division is required to select an audit methodology reasonably calculated to reflect the tax due (***Matter of W.T. Grant Co. v Joseph***, 2 NY2d 196 [1957] ***cert denied*** 355 US 869 [1957]; ***Matter of Meyer v State Tax Commn.***, 61 AD2d 223 [3d Dept 1978], ***lv denied*** 44 NY2d 645 [1978]). The burden is then upon the taxpayer to demonstrate that the audit methodology or the amount of the assessment was erroneous (***id.***). Merely offering its own estimate of its tax liability as a substitute for the Division's does not invalidate the Division's audit results (***Matter of 33 Virginia Place***, Tax Appeals Tribunal, December 23,

2009; ***Matter of Albanese Ready Mix***, Tax Appeals Tribunal, June 15, 1989; ***Matter of Sol Wahba, Inc. v New York State Tax Commn.***, 127 AD2d 943 [3d Dept 1987]).

Despite agreeing to the audit method proposed by the Division, petitioner proposes several adjustments to its assessment, claiming that the convention adopted by the Division to only grant credit for same-day trade-ins was arbitrary. We cannot agree. Each sale of a loaner to petitioner was documented on an invoice or bill of sale. The record demonstrates that petitioner received credit for each trade-in that it documented on the invoice or bill of sale. It was petitioner's responsibility to record the trade-in value on the bill of sale to substantiate its claim for the value on which sales tax was previously paid (***see*** Tax Law § 1135 [a]). Ultimately, this is not a question of the Division unreasonably limiting trade-in credits to contemporaneously documented trade-ins, but rather a question of whether petitioner has borne its burden of demonstrating that it is entitled to a credit on those transactions. The Division granted credit for those transactions that could be shown to be a trade of one specific loaner for another by contemporaneous documentation, notwithstanding petitioner's failure to maintain records of those trades in every case on the bill of sale. In the absence of documentation of identifiable, traceable trade-ins, we find that the Division's method was reasonable.

To the extent that petitioner argues that its alternative calculation of sales tax is correct, we agree with the Administrative Law Judge that merely offering an alternative calculation of tax due is insufficient to show that the Division's audit methodology was invalid. Having found that the Division's method was reasonably calculated to reflect the correct amount of tax due, it was petitioner's burden to show that the amount assessed was erroneous (***Matter of W.T. Grant Co. v Joseph***; ***Matter of Meyer v State Tax Commn.***). Petitioner did not produce evidence sufficient to substantiate each of the trade-ins it claimed, but for which it was denied credit. Thus, we sustain the Division's audit.

However, with regard to petitioner's argument that it is entitled to a credit for the use tax paid on the loaners by the individual dealerships, we agree with petitioner. The Administrative Law Judge distinguished between sales and use taxes, noting that sales tax is a tax on transactions, while use tax is imposed on every person for use within the state of tangible personal property purchased at retail to the extent that such property has not been subject to the sales tax (***compare*** Tax Law §§ 1105 ***with*** 1110 [a]). Based on this distinction, the Administrative Law Judge found the use tax inapplicable to petitioner and deemed its argument for a credit for the use tax paid by the dealerships against its sales tax assessment to be an improper equitable recoupment claim. However, the Division conceded at the hearing that payment of the sales tax on the long term loaners by the dealerships was acceptable. Based on that concession, the Administrative Law Judge found that tax paid by the dealerships on the long term loaners should be credited against petitioner's liability herein. Under present circumstances, we find no significant distinction between petitioner's claim for credit for the tax paid by the dealers on the full value of the long term loaners transferred from the dealerships and its claim for credit for the tax paid by those same entities on the short term loaners. In our view, the Division ignores the distinction between the different taxpayers in the first instance, but argues that such a distinction forecloses petitioner's claim in the latter. Under these specific facts, we reverse the determination of the Administrative Law Judge to deny petitioner's claim for a credit for the use tax paid by the dealerships on the mixed use vehicles and direct the Division to adjust the notice of determination to reflect a credit in the amount of $186,288.73 as established by petitioner and as set forth at pages 13 and 14 in exhibit 27 in the record.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of CLM Associates, LLC is granted to the extent indicated in paragraph 4 below, but is in all other respects denied;

2. The determination of the Administrative Law Judge is reversed to the extent indicated in paragraph 4 below, but is in all other respects affirmed;

3. The petition of CLM Associates, LLC is granted to the extent indicated in conclusion of law L of the determination and as indicated in paragraph 4 below, but is in all other respects denied; and

4. The notice of determination dated June 5, 2013 is sustained, except that the Division is directed to modify the notice to reflect a credit in the amount of $186,288.73 for use tax paid on mixed use vehicles as indicated herein, and except as modified pursuant to conclusion of law L of the determination.

DATED: Albany, New York
February 12, 2018

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Anthony Giardina
Anthony Giardina
Commissioner