STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GELCO CORPORATION	:	DETERMINATION DTA NO. 829011
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Periods June 1, 2012 through August 31, 2015.	:	

Petitioner, Gelco Corporation, 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 periods June 1, 2012 through August 31, 2015.

On September 14 and 15, 2021, respectively, petitioner, appearing by Akerman LLP (Peter O. Larsen Esq., and David J. Rosen, Esq., of counsel) and the Division of Taxation, appearing by Amanda Hiller, Esq. (Anita Luckina, Esq., of counsel) waived a hearing and submitted this matter for determination based on documents and briefs to be submitted by January 26, 2022, which date began the six-month period for the issuance of this determination. After review of the evidence and arguments submitted, Donna M. Gardiner, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner is entitled to credits on its sales tax returns for refunds of sales tax given to lessees for a subsequent decrease in the total amount due at lease end.

FINDINGS OF FACT

The parties executed a stipulation of facts and exhibits in this matter. These facts have been substantially incorporated within the findings of fact set forth below.

1. Petitioner, Gelco Corporation (Gelco), is a fleet management company that leases fleets of vehicles to businesses throughout the United States, including New York.

2. Gelco entered into lease agreements for various motor vehicles (Leased Vehicles) to businesses in New York that were subject to New York sales tax. The vast majority of the Leased Vehicles were motor vehicles with a gross vehicle weight of no more than 10,000 pounds.

3. The lease agreements were for a minimum of 367 days with an option, at the expiration of the lease term, for the lessees to renew the lease agreements on a monthly basis up to a maximum term set forth in the lease agreements.

4. Each of the lease agreements contained a "terminal rental adjustment clause" (TRAC provision) that set forth key calculations for the total rent due under the lease agreement and which adjusted the amount of rent due under the lease agreements based upon the value of the Leased Vehicles at the expiration of the lease agreements. Pursuant to the TRAC provision, a lessee paid a monthly rental amount based on the projected residual book value of the Leased Vehicle at the termination of the lease agreement as set forth in the lease agreement (Estimated Rent), which was then adjusted up or down at the expiration of the lease to determine the actual rent (Actual Rent) due under the lease agreement.

If the residual book value of a Leased Vehicle was less than the projected residual book value set forth in the lease agreement at the end of the lease, then the Actual Rent may have been higher than the Estimated Rent, resulting in the lessee having to pay additional rent, in addition to the Estimated Rent paid throughout the term of the lease. Conversely, if the residual book value of the Leased Vehicle at the expiration of the lease was greater than the projected residual book value of the vehicle as set forth in the lease agreement, then the Actual Rent may have been

less than the Estimated Rent paid throughout the term of the lease agreement, resulting in a refund of rent to the lessee under the lease agreement.

5. Gelco reported and remitted sales tax to the Division of Taxation (Division) on the sum of the total Estimated Rent payments scheduled to be paid under the lease agreements at the time the parties entered into the lease agreements. Upon commencement of the lease of a Leased Vehicle, Gelco reported and remitted sales tax to the Division based on that total Estimated Rent scheduled to be paid for the first 32 months of the lease. If the lease of a Leased Vehicle extended beyond 32 months, petitioner would collect rent due, including tax thereupon, monthly for each monthly option to renew beginning in month 33 and each month thereafter until the lease terminated (i.e., monthly rent). Upon termination of the lease and upon calculation of the Actual Rent, Gelco reported and remitted additional sales tax to the Division if the lessee was required to pay additional rent amounts at the end of the lease. If the calculation of the Actual Rent resulted in a refund of rent to the lessee, Gelco also refunded the tax paid on that rent to its customer and took credits on its New York sales tax returns for the sales tax it refunded to the lessee, since the Actual Rent was less than the Estimated Rent upon which sales tax had been calculated and reported.

6. The Division began a sales tax audit of petitioner in March of 2015. The audit period was June 1, 2012 through August 31, 2015. The Division determined that Gelco could not take credits on its sales tax returns for sales tax it refunded to lessees when the Actual Rent was less than the Estimated Rent paid by the lessee as computed under the TRAC provision. Additionally, the Division computed sales tax on certain lease agreements that contained variable interest rates.

7. On January 30, 2017, the Division issued to petitioner a statement of proposed audit change for additional sales tax due of $3,137,503.05 plus interest. The audit schedules accompanying the statement of proposed audit change reflected that $2,790,956.23 of the additional sales tax asserted was attributable to the TRAC issue and $346,546.82 was attributable to the variable interest rate issue.

8. On February 23, 2017, the Division issued a notice of determination (notice) assessing additional sales tax of $3,137,503.05 plus interest.

9. On July 19, 2017, petitioner filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services in protest of the notice.[1] A conciliation conference was held on November 29, 2017. A conciliation order, CMS No. 276131, was issued on September 7, 2018, sustaining the notice.

10. On December 3, 2018, petitioner timely filed its petition with the Division of Tax Appeals in protest of the conciliation order.

11. With respect to the tax assessed in the amount of $346,546.82 attributable to the issue of the variable interest rate, the parties stipulate that such tax is adjusted to $0 and is no longer at issue in this proceeding. Therefore, the sales tax assessed, in the amount of $2,790,956.23, plus interest, that is attributable to credits taken by petitioner on refunds given to lessees under the TRAC provision remains as the sole issue protested in the petition.

[1] Although it appears that petitioner's protest of the notice was untimely, the parties agreed that petitioner's former representative was not properly issued a copy of the notice on February 23, 2017. Accordingly, the statute of limitations was tolled (***see Matter of Oberlander***, Tax Appeals Tribunal, August 24, 2020).

CONCLUSIONS OF LAW

A. Sales tax is imposed on the retail sale of tangible personal property (***see*** Tax Law § 1105 [a]). A sale includes a lease (***see*** Tax Law § 1101 [b] [5]). Tax Law § 1111 (i) (B) states as follows.

> "Notwithstanding any inconsistent provisions of this subdivision, with respect to a lease of a motor vehicle described in paragraph (A) of this subdivision for a term or one year or more (1) which includes an indeterminate number of options to renew or other similar contractual provisions or which includes thirty-six or more monthly options to renew beyond the initial term, and (2) under which lease the lessee of such motor vehicle has certified in the writing described in clause (i) of subparagraph (C) of paragraph two of subsection (h) of section 7701 on the internal revenue code of 1986, under penalty of perjury, that the lessee intends that more than fifty percent of the use of such vehicle is to be in a trade or business of the lessee, *all receipts due or consideration given or contracted to be given under such lease for the first thirty-two months, or the period of the initial term if greater, of such lease shall be deemed to have been paid or given and shall be subject to tax in accordance with the provisions of this subdivision*. For each such option to renew, or similar provision, or combination of them, exercised after the first thirty-two months, or the period of such initial tern, if longer, of any such lease, tax due under this article shall be collected and paid or paid over without regard to this subdivision" (emphasis added).

Therefore, petitioner properly paid the total amount of sales tax due on the first 32 months of rent under the lease agreements at inception.

B. Sales tax may be refunded where it has been "erroneously, illegally or unconstitutionally collected or paid" (Tax Law § 1139 [a]). Petitioner's payment of sales tax in connection with the lease agreements was properly made pursuant to the relevant provisions of the Tax Law as noted above. Tax Law § 1139 (a) does not require or even allow a refund in this case (***Consolidated Edison Co. of New York v State Tax Commn***., 101 Misc 2d 868 [Sup Ct, Albany County 1979] [statute does not apply to taxes legally due and owing at the time they were paid]). Petitioner argues that it is entitled to take credits on its New York sales and use tax returns for refunds it made to lessees under the TRAC provision.

When construing a statute, the primary focus is on the intent of the Legislature in enacting the statue (McKinney's Cons Law of NY, Book 1, Statutes § 92 [a]; ***see Matter of Sutka v Conners***, 73 NY2d 395 [1989]). 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 Trib.***, 185 AD2d 79 [3d Dept 1993]). In a case such as this where the tax was properly imposed in the first instance, 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 Trib.***, 174 AD2d 805 [3d Dept 1991], ***lv denied*** 78 NY2d 863 [1991]).

C. The TRAC provision sets forth certain calculations for the total rent due under the lease agreements which adjusted the amount of rent due under the leases based upon the value of the Leased Vehicles at the expiration of the lease agreement. Pursuant to the TRAC provision, the lessee paid a monthly estimated rental amount based on the projected residual book value of the Leased Vehicle at the termination of the lease agreement which was then adjusted up or down at the expiration of the lease to determine the actual rent due under the lease agreement. At issue in this case is when the residual book value of the Leased Vehicle at the expiration of the lease was greater than the projected residual book value of the vehicle set forth in the lease agreement, then the Actual Rent may have been less than the Estimated Rent paid throughout the term of the lease agreement, resulting in a refund payment to the lessee.

In cases where the calculation of the Actual Rent resulted in a refund of rent to the lessee, petitioner also refunded the tax paid on the rent to its customer and took credits on its sales tax returns for the sales tax it refunded to the lessees. Thus, the issue is whether petitioner is

entitled to take credits for the sales tax paid at the expiration of the lease agreement when the final calculations are determined under the TRAC provision.

As the Division correctly notes, the New York sales tax is a transaction tax and liability for the tax occurs at the time of the taxable transaction. In this case, Tax Law § 1111 (i) (B) clearly states that the tax is due on the first 32 months of rent at the inception of the lease agreements. There is no provision that allows for a refund of sales tax paid on the initial 32 months payments under the lease. Petitioner argues that the statute acknowledges that certain leases have an indeterminate number of options to renew and other terms under the leases that may change the actual amount due at the end of a lease. Petitioner argues that this statutory language should be read to grant different treatment than standard leases with a set term and price.

This argument is without merit. The statute clearly states that leases similar to the ones at issue must pay the sales tax on the first 32 months of the lease at the inception of the lease. The Division cites to ***Matter of Prima Asphalt Concrete*** (Tax Appeals Tribunal, February 9, 2017, ***confirmed Matter of Prima Asphalt Concrete v New York State Tax Appeals Trib.***, 162 AD2d 1281 [3d Dept 2018], ***lv denied*** 32 NY3d 914 [2019]) for the proposition that taxable receipts could not later be reduced by discounts or rebates occurring after the taxable transaction and that the sales tax paid at the time of the transactions were deemed properly collected. Petitioner states that this case is easily distinguishable since it involves retail sales transactions under Tax Law § 1105 (a). However, it is noted that Tax Law § 1105 imposes sales tax and the definition of a sale as set forth in Tax Law § 1101 (b) (5) states that a sale includes a lease. Thus, the analysis set forth in ***Prima Asphalt*** is instructive for the proposition that sales tax is imposed on the sales receipts at the time of the taxable transaction.

In ***Prima Asphalt***, the petitioner sold asphalt. In an effort to increase its sales, the petitioner encouraged its customers to buy larger quantities of asphalt and offered a volume purchase discount. The petitioner collected sales tax on each purchase of asphalt. However, once the customer purchased enough product to qualify for the volume discount, the petitioner would retroactively apply a discount to each prior purchase and then it credited its sales tax accrual account for the alleged overpayment of tax.

The Tax Appeals Tribunal (Tribunal) rejected the petitioner's attempt to retroactively reduce its taxable receipts to reflect the subsequent volume discount. The Tribunal reasoned that liability for the sales tax is incurred at the time of the taxable transaction and the petitioner properly collected and paid over tax based on the price at the time its customers made their purchases of asphalt.

In this case, petitioner properly collected and paid tax on the first 32 months of the leases at the beginning of the leases. There is simply no statutory provision that allows petitioner to take credits for refunds of sales tax paid to its lessees under the TRAC provisions.

D. The petition of Gelco Corporation is denied and notice of determination, dated February 23, 2017, as modified in accordance with finding of fact 11, is sustained.

DATED: Albany, New York
July 21, 2022

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE