**STATE OF NEW MEXICO**
**ADMINISTRATIVE HEARINGS OFFICE**
**TAX ADMINISTRATION ACT**

**IN THE MATTER OF THE PROTEST OF**
**DRIVETIME CAR SALES CO. LLC**
**TO DENIAL OF REFUND ISSUED ON OCTOBER 15, 2018**

***v.*** Case Number 20.02-032R **, Decision and Order No. 21-12**

**NEW MEXICO TAXATION AND REVENUE DEPARTMENT**

# DECISION AND ORDER

# GRANTING SUMMARY JUDGMENT IN FAVOR OF THE DEPARTMENT

On August 27, 2020, Hearing Officer Ignacio V. Gallegos, Esq., conducted an administrative hearing on the motion for summary judgment in the matter of the tax protest of Drivetime Car Sales Co. LLC (Taxpayer) pursuant to the Tax Administration Act and the Administrative Hearings Office Act. At the hearing, Attorney Peter O. Larsen, Esq. (Akerman LLP) appeared representing Taxpayer. Staff Attorney Peter Breen appeared, representing the opposing party in the protest, the Taxation and Revenue Department (Department).

In quick summary, this protest involves a request for refund of Motor Vehicle Excise Taxes paid by Taxpayer, a motor vehicle dealer, on behalf of its customers. For the taxes at issue in the refund request, the vehicles were returned by the customer and the purchase price (including allowance for excise tax) refunded or applied to a subsequent purchase to the customer by Taxpayer. The Taxpayer's position was that the sales did not occur, hence no tax was due and summary judgment in its favor was appropriate. The Department's position was that the refund was not appropriate since the sale is presumed to occur upon the application for the certificate of title, hence summary judgment would be appropriate for the Department. Ultimately, after making findings of fact and discussing the issue in more detail throughout this decision, the Hearing Officer

grants summary judgment in favor of the Department. Having reviewed the undisputed material facts, and otherwise being informed in the premises, IT IS DECIDED AND ORDERED AS FOLLOWS:

## FINDINGS OF FACT

**Procedural History**

1. On July 27, 2018, Taxpayer requested a refund in the amount of $69,213.66 for Motor Vehicle Excise Taxes paid from January 1, 2015 through June 30, 2018. [Administrative File; JSF #10; Affidavit of Michael Crabtree, ¶15; Taxpayer's MSJ Ex. #4].

2. On October 15, 2018, the Department issued a letter informing the Taxpayer that its refund application had been denied. [Administrative File; JSF #11; Affidavit of Michael Crabtree, ¶16].

3. On January 10, 2019, Taxpayer, through Attorney David Rosen (Akerman LLP) submitted a protest letter, stamped as received by the Department Protest Office on January 11, 2019. [Administrative File; JSF #12; Affidavit of Michael Crabtree, ¶17].

4. On February 18, 2019, under Letter Id. No. L1123735728, the Department acknowledged receipt of Taxpayer's protest. [Administrative File].

5. On February 25, 2020, the Department submitted a Request for Hearing to the Administrative Hearings Office, requesting a scheduling hearing to set deadlines in the adjudication of Taxpayer's protest. [Administrative File].

6. On February 25, 2020, the Department, through Attorney Peter Breen, timely submitted the Department's Answer to Protest to the Administrative Hearings Office. [Administrative File].

7. The undersigned Hearing Officer Ignacio V. Gallegos conducted a telephonic scheduling hearing on March 12, 2020 to discuss the issues at protest and to set deadlines. Attorney David Rosen (Akerman LLP) appeared on behalf of Taxpayer. Attorney Peter Breen appeared on behalf of the Department. Neither the Department nor the Taxpayer objected that conducting the hearing satisfied the 90-day hearing requirements of Section 7-1B-8 (F) (2019). The Hearing Officer preserved a recording of the hearing. [Administrative File].

8. On March 12, 2020, the Administrative Hearings Office issued a Scheduling Order and Notice of Administrative Hearing, setting various deadlines and setting the matter for a merits hearing on August 27, 2020 to take place in-person at the Administrative Hearings Office at the Willie Ortiz Building in Santa Fe, New Mexico. [Administrative File].

9. On April 21, 2020, Attorney Peter O. Larsen (Akerman LLP) submitted an Entry of Appearance with accompanying *pro hac vice* requirements under Rule 24-106 NMRA. [Administrative File].

10. On June 10, 2020, Taxpayer filed its Motion for Summary Judgment and Request for Oral Argument, including Affidavit of Michael Crabtree and exhibits. [Administrative File].

11. On June 18, 2020, Department filed its Response to Motion for Summary Judgment. [Administrative File].

12. On July 13, 2020, Taxpayer filed its Reply to Department's Response to Motion for Summary Judgment. [Administrative File].

13. On August 4, 2020, the Administrative Hearings Office issued an Amended Notice of Hearing Converting In-Person Merits Hearing to Videoconference Hearing on Motion for Summary Judgment. The Order provided a URL link to participate in the hearing by Zoom

videoconferencing application and provided guidance for submitting proposed exhibits before the hearing. [Administrative File].

14. On August 6, 2020, the Department filed its Notice of Filing of Department's Potential Exhibits. [Administrative File].

15. On August 10, 2020, the Department filed its Additional Support from the Department in Favor of Motion for Summary Judgment. [Administrative File].

16. On August 27, 2020, the undersigned Hearing Officer Ignacio V. Gallegos conducted a videoconference hearing on the Taxpayer's Motion for Summary Judgment by Zoom videoconference. Attorney Peter O. Larsen (Akerman LLP) appeared on behalf of Taxpayer. Attorney Peter Breen appeared on behalf of the Department. The Hearing Officer preserved an audio recording of the hearing. [Administrative File].

17. On September 17, 2020, the parties filed a Joint Stipulation of Facts (JSF). [Administrative File].

18. On December 7, 2020, the Administrative Hearings Office issued an Order for Further Factual Stipulation on Motion for Summary Judgment, requesting either a stipulation as to a fact or additional argument as to the existence of a fact. [Administrative File].

19. On December 21, 2020, the parties filed a Stipulation as to Motor Vehicle Excise Taxes Paid and Titles Issued. [Administrative File].

**Substantive Findings**

20. Taxpayer Drivetime Car Sales Co. LLC is a company specializing in sales of used motor vehicles. As part of this business, they own and operate several outlets in the State of New Mexico. [Administrative File; JSF #1; Affidavit of Michael Crabtree, ¶6, ¶7].

21. Taxpayer is a motor vehicle dealer, and each location it operates is licensed by the Motor Vehicle Division of the Department as a used motor vehicle dealer pursuant to NMSA 1978, Section 66-4-2. [Administrative File; JSF #2; Affidavit of Michael Crabtree, ¶6, ¶7].

22. Taxpayer engages in financing motor vehicle purchase loans, and each location it operates is licensed by the New Mexico Regulation and Licensing Department as a motor vehicle sales finance company pursuant to NMSA 1978, Section 58-19-3. [Administrative File; JSF #2; Affidavit of Michael Crabtree, ¶7, ¶8].

23. When entering into a vehicle sales transaction, Taxpayer's customers receive possession of a used vehicle from Taxpayer. Taxpayer's customers also enter into a retail installment contract with Taxpayer. These contracts provide a manner of financing the sales price of the vehicle, including sums allocated to pay New Mexico Motor Vehicle Excise Taxes, and registration fees. Taxpayer's customers pay an initial down payment (either by paying cash, providing a trade-in vehicle, or a combination thereof) then pay the contract balance to Taxpayer over time. [Administrative File; JSF #3; Affidavit of Michael Crabtree, ¶8, ¶9, Taxpayer's MSJ Ex. #1].

24. These retail installment contracts allow Taxpayer's customers to unwind the contract by returning possession of the vehicle. The contracts allow unwinding for any reason within five days of the transaction, with no more than 300 miles driven, and in some instances beyond the five-day limit. [Administrative File; JSF #5, #6; Affidavit of Michael Crabtree, ¶11; Taxpayer's MSJ Ex. #1; Taxpayer's MSJ Ex. #2].

25. Taxpayer paid the Motor Vehicle Excise Tax upon submission of the application for change of title and registration, contemporaneous with the initial transfer of possession,

regardless of whether the Taxpayer's customer eventually returned the vehicle and unwound the contract. [Administrative File; JSF #4; Affidavit of Michael Crabtree, ¶10, 12].

26. When Taxpayer's customers unwound their contracts, the customer was not directly charged for the Motor Vehicle Excise Tax expense already paid by Taxpayer. [Administrative File; JSF #9; Affidavit of Michael Crabtree, ¶14].

27. When Taxpayer's customers unwound their contracts, the customer was required to execute a "Return Agreement" or a "Rescission Agreement." [Administrative File; JSF #9; Affidavit of Michael Crabtree, ¶13; Taxpayer's MSJ Ex. #2; Taxpayer's MSJ Ex. #4 (Exhibit C)].

28. When Taxpayer's customers returned the vehicles, Taxpayer charged the customer amounts related to the customer's use of the vehicle and any damage to the vehicle. These amounts, if any, were deducted from the amount of the customer's down payment and any payments made against the retail installment agreement. A sampling of three months revealed that in transactions occurring in July 2015 and March through April of 2018, the eleven customers who returned vehicles and entered into rescission agreements paid Taxpayer a total of $13,151.54, yet after recategorizing the customers' down payments to categories such as "return fee", "mileage fee", and "retention of all amounts paid", the Taxpayer issued only two refunds to two customers for $600.00 each. [Administrative File; JSF #8; Department's MSJ Exhibit B (Michael Crabtree's Response to Department's Request for Production and Interrogatories #3)].

29. During the timeframe at issue, 175 instances occurred in which Taxpayer's customers returned vehicles after the Taxpayer had paid the Motor Vehicle Excise Tax upon transfer of possession of the vehicle. The total paid by Taxpayer in these 175 instances was

$69,213.66. [Administrative File; JSF #10; Affidavit of Michael Crabtree, ¶15; Taxpayer's MSJ Ex. #4].

30. There were no instances in which buyers returned vehicles within the five-day allowance written into the contract. [Administrative File; Taxpayer's MSJ Ex.#4].

31. There were thirty-two vehicles that buyers returned after the five-day allowance, but within thirty days or fewer were as follows:

a. 1G1ZC5EU1CF276205, 19 days;

b. JTEGD20V850081410, 11 days;

c. 1C3CCBAB5CN256551, 20 days;

d. 1GCDT14E088132287, 9 days;

e. 5NMSH13E68H213027, 13 days;

f. 1G1JC5SH2D4176602, 16 days;

g. 5NPDH4AE3CH134388, 11 days;

h. 3C4PDCAB6DT699860, 20 days;

i. 2G1WB5EK9A1191735, 12 days;

j. 1D8GT28K38W181595; 24 days;

k. 1C3CCBBG8DN658849, 11 days;

l. 3C3CFFBRODT624355, 22 days

m. JM1DE1KZ600170065, 15 days;

n. JM1DE1KZ6D0170065, 17 days;

o. 2CNALDEW2A6219871, 20 days;

p. 5XVZGDAB9BG001428, 10 days;

q. 1J4GS48K36C202757, 21 days;

r. 104PT6GX6BW576397, 18 days;

s. 5FNYF28537B031638, 12 days;

t. 1C3CDFBB4FD227314, 30 days;

u. 1G1PC5SH6B7231591, 24 days;

v. JHMCP26418C016327, 25 days;

w. JHMCP26418C016327, 13 days;

x. 2CNALBEWXA6202952, 22 days;

y. KMHTC6AD9CU054110, 12 days;

z. 2CNALBEWXA6202952, 23 days;

aa. 1GNMCAE35 AR21 5346, 21 days;

bb. 1ZVBP8AM5D5221376, 10 days;

cc. 1C4NJCBB1ED892987, 9 days;

dd. 1G4GE5ED2BF357023, 21 days

ee. 3FA6POG71ER331482, 13 days

ff. KNADM4A3XH6005377, 13 days. [Administrative File; Taxpayer's MSJ Ex. #4].

32. The remainder of the vehicles that buyers returned were returned after thirty days had passed from date the initial transaction had taken place. [Administrative File; Taxpayer's MSJ Ex. #4].

33. There were twelve instances in which the vehicle was returned more than one hundred days after the initial transaction. The vehicle (KL1TD5DEOBB1203660) returned the latest was returned 277 days after the initial transaction had taken place. [Administrative File; Taxpayer's MSJ Ex. #4].

34. The Department's Motor Vehicle Division issued certificates of title in all the 175 instances which comprise the substance of Taxpayer's claim. [Administrative File; Stipulation as to Motor Vehicle Excise Taxes Paid and Titles Issued].

## DISCUSSION

**Summary Judgment Standard**

Although the Rules of Civil Procedure for the District Courts do not apply in tax protest hearings under the Administrative Hearings Office Act, the Hearing Officer may refer to them for guidance. Rule 1-056 NMRA establishes that summary judgment is only appropriate when there is no dispute of material fact and the moving party is entitled to a judgment as a matter of law. *See Roth v. Thompson*, 1992-NMSC-011, ¶17, 113 N.M. 331, 825 P.2d 1241. Summary judgment is a drastic remedy that should be exercised with extreme caution. *See Cebolleta Land Grant ex rel. Bd. of Trs. of the Cebolleta Land Grant v. Romero*, 1982-NMSC-043, ¶3, 98 N.M. 1, 644 P.2d 515. *See Enduro Operating LLC v. Echo Prod.*, 2017-NMCA-018, ¶11, 388 P.3d 990. Summary judgment is reserved only for instances where there is no genuine dispute of fact and the law compels a judgment. *See Great W. Constr. Co. v. N. C. Ribble Co.*, 1967-NMSC-085, ¶13, 77 N.M. 725, 427 P.2d 246. Trials are preferred over the granting of summary judgment. *See Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶8, 148 N.M. 713, 242 P.3d 280. When the factual record is insufficiently developed or where further factual resolution is necessary, summary judgement is inappropriate. *See Nat'l Excess Ins. Co. v. Bingham*, 1987-NMCA-109, ¶13, 106 N.M. 325, 742 P.2d 537. When there is the slightest doubt about whether a material dispute of fact exists, summary judgment is inappropriate. *See Las Cruces Country Club, Inc. v. City of Las Cruces*, 1970-NMSC-016, ¶3, 81 N.M. 387, 467 P.2d 403. The burden is on the movant to prove no issues of material fact, and once the movant has made a prima facie

case, the burden shifts to the non-moving party to prove the existence of a material fact. *Goodman v. Brock*, 1972-NMSC-043, ¶ 6-11, 83 N.M. 789, 498 P.2d 676.

In this instance, parties agreed on the salient facts of the matter. Because the facts were not contested, the Hearing Officer may grant summary judgment as a matter of the application of law either in favor of the Taxpayer or the Department, despite the fact that the Department had not made a written counter-motion for summary judgment. *See Martinez v. Logsdon*, 1986-NMSC-056, ¶12, 104 N.M. 479, 723 P.2d 248 (even if the nonmoving party does not file their own motion for summary judgment, summary judgment may be granted to the nonmoving party if there is no genuine dispute of fact, they are entitled to judgment as a matter of law, and the moving party was generally on notice of the nonmoving party's counter-claim in its response to the moving party's summary judgment pleading.). The parties were on notice of the Department's counter-motion for summary judgment in its favor by the filing of the Department's "Additional Support from the Department in Favor of Motion for Summary Judgment" on August 10, 2020.

**Motor Vehicle Excise Tax**

The pertinent statutory law in this case is the Motor Vehicle Excise Tax, which is a tax on the sale of any motor vehicle within the state, subject to limited exceptions.

The tax statute at issue reads:

> An excise tax, subject to the credit provided by Section 7-14-7.l, is imposed upon the sale in this state of every vehicle, except as otherwise provided in Section 7-14-7.1 NMSA 1978 and manufactured homes, required under the Motor Vehicle Code to be registered in this state. To prevent evasion of the excise tax imposed by the Motor Vehicle Excise Tax Act and the duty to collect it, it is presumed that the issuance of every original and subsequent certificate of title for vehicles of a type required to be registered under the provisions of the Motor Vehicle Code

> constitutes a sale for tax purposes, unless specifically exempted by the Motor Vehicle Excise Tax Act or unless there is shown proof satisfactory to the department that the vehicle for which the certificate of title is sought came into the possession of the applicant as a voluntary transfer without consideration or as a transfer by operation of law. The excise tax imposed by this section shall be known as the "motor vehicle excise tax." NMSA 1978, Section 7-14-3.

Because the parties stipulated that motor vehicle certificates of title were issued in each of the 175 transactions at issue, a presumption exists that "a sale for tax purposes" occurred for each transaction. The Taxpayer correctly argues here that the presumption is rebuttable. *See Nat'l Potash Co. v. Property Tax Div.*, 1984-NMCA-055, ¶ 13, 101 N.M. 404, 683 P.2d 521. Under the rationale used for other presumptions under the Tax Administration Act, the burden falls on the Taxpayer to present some countervailing evidence or legal argument to show that they are entitled the refund of taxes paid. *See N.M. Taxation & Revenue Dep't v. Casias Trucking*, 2014-NMCA-099, ¶8, 336 P.3d 436; s*ee also MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 2003-NMCA-021, ¶13, 133 N.M. 217, 62 P.3d 308; s*ee also Wing Pawn Shop v. N.M. Tax. & Rev. Dep't*, 1991-NMCA-024, ¶16, 111 N.M. 735, 809 P.2d 649. There is no factual contention in this instance, as facts have been stipulated.

As to legal argument, the parties raised several, centered on statutory interpretation and on the existence of a "sale." The Taxpayer argued that the excise tax is "imposed upon the *sale* in this state of every vehicle" and therefore the state legislature contemplated that a "sale" is the taxable event, and in these instances where the vehicle was returned, that no "sale" occurred. Section 7-14-3 (italics added). Taxpayer argued that when the sales were terminated and the vehicles returned to Taxpayer, the "sale" had undergone a rescission, placing the parties in a "status quo ante," and therefore no "sale" took place and taxes paid on the sale ought to be refunded. Taxpayer argued that the same way a patron of a Wal-Mart store may get a full refund

for the purchase price and tax paid when returning an item such as a toaster purchased from Wal-Mart, the Taxpayer is entitled to the refund of taxes paid.[1]

The Department argued that the "sale" of the vehicle was complete when the customer received initial possession of the vehicle. The Department further argued that the Taxpayer as the applicant for change in title paid the tax when it applied for the issuance of the certificate of title, and at the application the tax is due. The pertinent law upon which the Department's contention is based reads:

> The tax shall be paid to the department by the applicant for the certificate of title at the time of application for issuance of the certificate. NMSA 1978, Section 7-14-5.

Both the Taxpayer and the Department briefed and argued the case adequately to make clear the issues and the applicable law.

**Statutory interpretation of the taxable event.**

Taxpayer argued that the legislative intent of the statute, with evidence of legislative history largely undisputed by the Department, was to tax the "sale" of a motor vehicle, rather than the application for or issuance of a certificate of title. Taxpayer is correct in this regard. The interpretation of statutes begins with the plain meaning of the language employed, must be consistent with legislative intent, and an interpretation must not render a statute's application absurd, unreasonable or unjust. *See In re Portal*, 2002-NMSC-011, ¶ 5, 132 N.M. 171, 45 P.3d 891.

It is a canon of statutory construction in New Mexico to adhere to the plain wording of a statute except if there is ambiguity, error, an absurdity, or a conflict among statutory provisions. *See Regents of the Univ. of New Mexico v. New Mexico Fed'n of Teachers,* 1998-NMSC-020,

[1] As a side note, the CRS-1 return form used for monthly reporting of gross receipts taxes contains a column for total deductions, which include refunded returns. *See* NMSA 1978, Section 7-9-67 (1994); *see also* Regulation 3.2.227.10 NMAC (6/14/01).

¶28, 125 N.M. 401. Only if the plain language interpretation would lead to an absurd result not in accord with the legislative intent and purpose is it necessary to look beyond the plain meaning of the statute. *See Bishop v. Evangelical Good Samaritan Soc'y*, 2009-NMSC-036, ¶11, 146 N.M. 473. When applying the plain meaning rule, the statutes should be read in harmony with the provisions of the remaining statute or statutes dealing with the same subject matter. *See State v. Trujillo*, 2009-NMSC-012, ¶22, 146 N.M. 14; *see also Hayes v. Hagemeier*, 1963-NMSC-095, ¶9, 75 N.M. 70 ("All legislation is to be construed in connection with the general body of law.").

The legislative history beginning in 1935 with the Emergency School Tax Act, 1935 N.M. Laws, ch. 143, Section 201(d) required a tax on the sale of "new or second-hand automobiles, trucks or tractors." Returns were not included in the gross proceeds of sales, when "the full sale price of property returned is refunded either in cash or by credit, nor the sale of any article accepted as part payment on any new article sold and when the full sale price of the new article is included in the "gross receipts" of the taxpayer." *See* 1935 N.M. Laws ch. 143, Section 103(e). Then, in 1955, the legislature adopted a replacement statute, which separated the taxation of motor vehicles from the gross receipts tax and placed an excise tax on "the issuance of every original and subsequent certificate of title for vehicles." *See* 1955 N.M. Laws, ch. 247, Section 3 (a). Notably, there was no allowance for returned and refunded vehicles within the 1955 statute.

Then, in 1988, the Motor Vehicle Excise Tax Act was enacted which changed the taxable event from the issuance of a certificate of title back to the sale of a vehicle. *See* NMSA 1978, Section 7-14-3 (1988). The language of consequence during the timeframes at issue in the protest is the same as that enacted in 1988, though the rate of taxation has changed. *See* NMSA 1978, Section 7-14-3 (1991); *see also* NMSA 1978, Section 7-14-4 (2019). However, again

notable is the absence of a provision like the provision in the 1935 law, that creates a deduction or allowance for returned and refunded sales transactions. It is upon the sale of motor vehicles that the Motor Vehicle Excise tax is imposed, not on the issuance of a certificate of title.

**Motor vehicle sales and the presumption of a sale.**

Sales is an area of law over which much has been legislated and many disputes have arisen leading to a great deal of common law. Because motor vehicles are a big-ticket item, sales of motor vehicles generally involve contracts, security of collateral, titles, insurance, extended warranty contracts, and installment payment arrangements between the buyer, the seller and a financing agent such as a bank, a credit union or a finance company. In a case in which a purchase takes place under an installment contract, the buyer and the seller/finance agent both wish to record the title of the motor vehicle (1) to perfect buyer's possessory and equity interests, (2) to perfect the seller's/finance agent's security interest (lien), and (3) to insulate the seller/finance agent from liability in case of accident. Simply put, the issuance of a title benefits both buyer and seller/finance agent. In this instance, the seller/finance agent Taxpayer took on the responsibility for applying for the change in title and paying the Motor Vehicle Excise Tax upfront to reflect the new ownership and received the benefit of the legally secured interest.

The word "sale" is not defined in the Motor Vehicle Code. *See* NMSA 1978, Section 66-1-4.16. Likewise, the word "sale" is not defined by the Tax Administration Act. *See* NMSA 1978, Section 7-1-3. Within the body of law that encompasses the Tax Administration Act, the closest we have to a definition of "sale" is the definition contained in the Gross Receipts and Compensating Tax Act, when it defines "buying or selling." *See* NMSA 1978, Section 7-9-3 (A) ("'buying' or 'selling' means a transfer of property for consideration or the performance of a service for consideration.").

Consumer sales are governed by the Uniform Commercial Code (UCC). It is generally accepted that family use motor vehicles are durable consumer goods, and their sales are subject to the provisions of the UCC. *See Richardson Ford Sales, Inc. v Johnson*, 1984-NMCA-007, ¶3, 100 N.M. 779, 676 P.2d 1344; *see also Jim v. CIT Financial Services Corp.*, 1975-NMSC-019, ¶1, 87 N.M. 362, 533 P.2d 751. Taxpayer encouraged the application of Article 2 of the Uniform Commercial Code (UCC), codified within New Mexico Statutes at NMSA 1978, Section 55-2-1 through 55-2-725. The UCC defines a "sale" as "the passing of title from the seller to the buyer for a price." NMSA 1978, Section 55-2-106 (1). In the same section, the UCC defines a "present sale" as "a sale which is accomplished by the making of a contract." The UCC definition of a sale is reasonable in the context of contract, yet New Mexico courts are hesitant to apply the UCC definition of sale across the board in tax cases. *See Transamerica Leasing Corp. v. Bureau of Revenue*, 1969-NMCA-011, ¶ 33, 80 N.M. 48, 450 P.2d 934 (addressing whether a lease agreement was actually a security agreement for compensating tax assessment, favorable view of UCC definition); *see also Dell Catalog Sales L.P. v. NM Taxation & Revenue Dep't*, 2009-NMCA-001, ¶¶26-38, 145 N.M. 419, 199 P.3d 863 (disfavored view of definition of a sale under the UCC, as self-limited to the "private law" between contracting parties, not intended for state taxation purposes). The rationale provided by the *Dell Catalog Sales* court is adopted here. For this reason, the definition of "selling" under the Gross Receipts and Compensating Tax Act is the more reasonable in the state taxation context.

When a motor vehicle transaction takes place, the contract between the buyer and seller is negotiated and consideration[2] is exchanged (typically this is a car exchanged for a contract and a

[2] "Consideration" is defined under the Gross Receipts and Compensating Tax Act regulations as "any benefit, interest, gain or advantage to one party, usually the seller, or any detriment, forbearance, prejudice, inconvenience, disadvantage, loss of responsibility, act or service given, suffered, or undertaken by the other party, usually the buyer." Regulation 3.2.1.7 (B) NMAC (12/14/2012).

down payment or trade-in). Under the definition of "buying or selling" under the Gross Receipts and Compensating Tax Act, the exchange of the vehicle as described in the preceding sentence is a sale. *See* NMSA 1978, Section 7-9-3 (A) ("'buying' or 'selling' means a transfer of property for consideration).

It was upon the original transfer of possession of the motor vehicle that the seller/finance agent, Taxpayer, made an application for change of title and paid the Motor Vehicle Excise Tax. *See* NMSA 1978, Section 7-14-5. Upon receipt of the application, the Department issued a new or subsequent certificate of title, placing upon the formal document the name of the buyer, the name of the seller, and the lienholder(s) among other relevant information about the subject motor vehicle. The process typically takes less than thirty days from receipt of the application for change of title and registration to the issuance of the new certificate of title and registration. *See* MVD Application for Vehicle Title and Registration (available online at http://realfile.tax.newmexico.gov/mvd10002.pdf (last visited 11/18/2020)); *see also* NM Temporary Retail Permit issued by a dealer (available online at http://mvd.newmexico.gov/Manuals/Pages/Vehicles%202E.htm (last visited 11/19/2020)). In fact, the law requires that the application for a change of title take place within thirty days. *See* NMSA 1978, Section 66-3-103(B) (1989) ("Failure to apply for transfer of registration and issuance of a new certificate of title within thirty days from the date of transfer subjects the transferee to a penalty of twenty dollars ($20.00).").

Here, the Taxpayer applied for the issuance of new certificates of title upon the transfer of possession of 175 used vehicles. The Taxpayer paid the Motor Vehicle Excise Tax on the basis of contracts which obligated buyer and seller. The Department then issued certificates of

title reflecting the new vehicle ownership and the lienholder's interest for the benefit of both parties to the transaction, buyer and seller/finance agent.

Whether a taxable sale occurred was the issue laid out in *Garfield Mines Ltd. v. O'Cheskey*, 1973-NMCA-128, 85 N.M. 547, 514 P.2d 304. In that case, the purchaser bought a helicopter and paid only the down payment of $10,000. The helicopter was delivered to the purchaser and used in New Mexico. A promissory note entitled the seller to the sum of $213,230, secured by the helicopter as collateral. The taxpayer in that case claimed no compensating tax was due because the helicopter was returned or repossessed and the balance of the promissory note was unpaid. The Court reasoned that the taxpayer's argument that no sale took place was without merit because "[t]he purchase agreement was not an executory document[3] and failure to make any of the subsequent payments after the deposit did not render it executory. But a sale once complete in law does not change to or become some other sort of transaction because the purchaser later fails or refuses to pay as agreed." *Id.* ¶ 5 (internal citations and quotation marks omitted). While the tax program and the position of the *Garfield Mines* taxpayer are dissimilar to those at issue, the taxable "sale" of the helicopter was adjudicated to have been complete upon payment of a deposit, possession of the vehicle, and contracting to pay any outstanding balance.

The position of the Department was that the sale was complete at the time of the initial transfer. The Department's position is in accord with the reasoning of the *Garfield Mines* case above. The facts presented show parties entered into sales contracts, exchanged consideration, and upon issuance of the certificate of title the sale for tax purposes was presumed complete.

[3] An "executory contract" is defined as "[a] contract that remains wholly unperformed or for which there remains something still to be done on both sides, often as a component of a larger transaction…" Black's Law Dictionary (Seventh Ed. 1999).

"To prevent evasion of the excise tax…, it is presumed that the issuance of every original and subsequent certificate of title for vehicles … constitutes a sale for tax purposes, unless specifically exempted … or unless there is shown proof satisfactory to the department that the vehicle for which the certificate of title is sought came into the possession of the applicant as a voluntary transfer without consideration or as a transfer by operation of law." Section 7-14-3 (ellipses added).

The Taxpayer acknowledged that there was a presumption that the sale was complete and did not argue that the contracts were not intended to transfer a motor vehicle for a price, but argued that upon rescission, no sale occurred, which Taxpayer argued was enough to rebut the presumption. The Taxpayer's sales contracts allowed the buyer to return the vehicle for any or no reason within a fixed amount of time (five days), or later for cause, and allowed the seller to repossess the vehicle if the buyer defaulted. Ultimately, although facts are vague as to how many were voluntary returns because of buyer's remorse, unforeseen mechanical issues, or involuntary repossessions, each return shared the common basic facts: purchasers returned the vehicles and entered into further contracts to unwind the original contract and refund or recategorize the purchase price or a portion thereof for the purpose of applying the same down payment or trade-in to the purchase of a different vehicle. The unwinding of the original contract was termed a "rescission" within the second contract.

**Is rescission a method of rebutting the presumption of a taxable sale?**

The Taxpayer argued that because the "sale" is the taxable event, a rescission of the sale would lead to no incidence of tax, the same way a retailer would be entitled to a credit against gross receipts tax already paid when a buyer returns a product such as a toaster. The Department argued that the only means of rebutting the presumption are those outlined in the statute, i.e.,

transactions "specifically exempted" or with "proof satisfactory to the department that the vehicle for which the certificate of title is sought came into the possession of the applicant as a voluntary transfer without consideration or as a transfer by operation of law." Section 7-14-3. Those transactions "specifically exempted" are outlined in NMSA 1978, Section 7-14-6 (2007) and none apply here. Taxpayer did not argue "voluntary transfer" or "transfer by operation of law" and rests its argument solely on the incidence of taxable sale.

In other areas of taxation, notably, the Gross Receipts and Compensating Tax Act provides a method for reducing the tax to account for refunds. *See* NMSA 1978, Section 7-9-67 (1994) ("Refunds and allowances made to buyers…by a person reporting gross receipts tax on an accrual basis may be deducted from gross receipts."); *see also* Regulation 3.2.227.10 NMAC (6/14/01). To deny the Taxpayer the opportunity to rebut the presumption of a sale would not be in accordance with established precedent. *See Nat'l Potash Co. v. Property Tax Div.*, 1984-NMCA-055, ¶ 13; see also *Dell Catalog Sales L.P. v. NM Taxation & Revenue Dep't*, 2009-NMCA-001 (Taxpayer challenged existence of sales in New Mexico); *see also Kmart Corporation v. NM Taxation & Revenue Dep't*, 200-NMSC-006, 139 N.M. 172, 131 P.3d 22 (Taxpayer challenged the taxation of the sale of a franchise outside of New Mexico); *see also Wing Pawn Shop v. Taxation & Revenue Dep't for the State of N.M.*, 1991-NMCA-024, 111 N.M. 735, 809 P.2d 649 (taxpayer challenged whether receipts from sales of pawned merchandise should be deductible as interest from the pawned collateral "loan."). To take the Department's hard-line position and deny the Taxpayer the opportunity to rebut the presumption of a sale that attached when the Department issued certificates of title is contrary to customary treatment of taxpayers.

**Rescission of a sales contract.**

New Mexico law recognizes two types of contract rescission: mutual rescission and equitable rescission. Mutual rescission comes about when parties, without court intervention, agree to make each other whole by returning to "status quo ante" or the position before the contract. *See Young v. Lee*, 1943-NMSC-017, 47 N.M. 120, 138 P.2d 259. By contrast, equitable rescission, not at issue here, is "an equitable remedy which seeks to restore the status quo ante." *Ledbetter v. Webb*, 1985-NMSC-112, ¶ 15, 103 N.M. 597, 711 P.2d 874. Yet, contracting to call an unwound contract a "rescission" does not oblige the Department (which was never a party to the contract) or this tribunal to taking the same perspective as the parties to the contract. *See Quantum Corp. v. State Taxation & Revenue Dep't*, 1998-NMCA-050, ¶ 12, 125 N.M. 49, 956 P.2d 848 ("Under general law, the character of the instrument is not controlled by its form, but from the intention of the parties as shown by the contents of the instrument.") (quotation marks and citations omitted); *see also Shaeffer v. Kelton*, 1980-NMSC-117 ¶ 8, 95 N.M. 182, 619 P.2d 1226. The Department and the Taxpayer acknowledged in the Joint Stipulation of Facts that "[w]hen the Customers returned the vehicles, the sales of the vehicles were contractually and legally rescinded." This acknowledgement is pertinent but not dispositive as to the outcome of the case. *See Dell Catalog Sales L.P.*, 2009-NMCA-001, ¶¶26-38 ("[T]he UCC is not intended to override governmental or public determinations of what constitutes a sale."). The rescission contract between the contracting parties (Customer and Drivetime) would be upheld in a trial court if there arose a dispute between them, as parties right to contract is up to the contracting parties, free from state impairment. *See* USCA Const. Art. I, Section 10.

The question then turns to whether by entering the second contract which cancelled the first contract, the Taxpayer was able to avoid the tax already paid and due. The business intent of the second contract is clearly to retain a customer's loyalty and to avoid unnecessary conflict

or litigation. It may be inferred that because all of the returns were beyond the five-day no-cause timeframe contained in the initial contract, that the implied warranty of merchantability played a role in the returns (for an unknown mechanical defect of some sort). There is another mutual purpose behind the second contract, which is to retain income, on the part of the Taxpayer, and to apply payments made to a second vehicle purchase, on the part of the customer. The record contains examples of payments applied to the subsequent purchase loan. The record also contains examples of payments made on the first contract reclassified as amounts due for mileage fees, return fees, and retention of all amounts paid. Notably absent from the second contracts are some discussions of payments for liability insurance (made by customers), or excise taxes (paid by the Taxpayer), except as to "ancillary products (vehicle service contract, GPS, GAP coverage)," both of which are also a form of consideration (and a significant departure from the toaster example). On some transactions, it appears Taxpayer kept a portion of the original down payments and reclassified them as costs and fees. *See Lyon v. Bertram*, 61 U.S. 149 (1857) (a purchaser having accepted a portion of cargo cannot put the seller in status quo ante). Although Taxpayer's request for a tax refund indicates some thought went into the tax consequences of the second contract, the rescission contract is not a sham, since the contract itself does not appear to be motivated solely by tax concerns. *See Commissioner of Internal Revenue v. Brown*, 380 U.S. 563, 85 S.Ct. 1162 (1965); *see also Boone v. U.S.*, 470 F.2d 232 (1972) ("We are mindful that transactions motivated solely and entirely by tax considerations and which are likely devoid of substantial business justifications are shams."). While the customers' purchase money and installment payments were applied elsewhere, the shifting of liability and the entirety of the consideration could not be reversed, leaving parties not entirely in a status quo ante.

Comparing excise taxes on motor vehicles to property taxes on real estate gives some degree of clarity. In the context of home loans, the Truth in Lending Act (Reg. Z) and the Consumer Credit Protection Act provide a three-day grace period during which a remorseful buyer may rescind a home loan contract. *See* 15 U.S.C.A. §1635(a) ("obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction"); *see also* 12 C.F.R. §226.23 (a)(3). The same acts provide a three-year right of rescission if the required disclosures are not delivered to the buyer. *See* 15 U.S.C.A. §1635(f) ("obligor's right of rescission shall expire three years after the date of consummation of the transaction"). Considering the hypothetical of a home buyer providing notice of rescission at the beginning of the second year, the first year of loan payments would be refunded, however, property tax and insurance would have been paid by the escrow agent and are not refundable, or if refunded, are borne by the party at fault (the lender is at fault for not providing the disclosures required by law). However, if the home buyer makes the rescission within the three-day no-fault period, the sale is cancelled and no insurance or property tax payments would have been sent out. Had the legislature intended to provide a rescission or return provision in the Motor Vehicle Excise Tax Act, it would have, as it did in the above-cited 1935 Emergency School Tax Act and as it did in the Gross Receipts and Compensating Tax Act. *See* NMSA 1978, Section 7-9-67.

The mutual rescissions between contracting parties to the sale of a motor vehicle are not binding on the Department. While the "sale" is the taxable event as noted above, and sales in common law can be rescinded between the parties to the contract, a true rescission is not the case here. *See* NMSA 1978, Section 55-2-703 (f) (allowing for cancellation of a sale). Since the definition of a sale used here is the definition of "selling" under the Gross Receipts and Compensating Tax Act, the price is not the controlling factor, but the consideration. Since

consideration, in the form of a contract was exchanged, and liability passed to the customer for the time whether for nine days (the earliest return) or two hundred seventy-seven days (the latest return), the contract was in effect, and consideration exchanged. If the legislature had intended that the validity of the excise tax on every motor vehicle sale hinged on the terms of the contract for sale, or subsequent contract to rescind the sale – sometimes days, sometimes months later – then the Department's ability to collect and retain tax payments would be subject to the vagaries of contract formulation among parties. A goal of tax legislation is to ensure some degree of certainty and uniformity. *See generally Kilmer v. Goodwin*, 2004-NMCA-122, ¶ 16, 136 N.M. 440, 99 P.3d 690 (time constraints within the statue protect "the Department's ability to stabilize and predict, with some degree of certainty, the funds it collects and manages."). Because the legislature used the "sale for tax purposes" language, the limitation "for tax purposes" appears to be a means of protecting the Department from being subject to the vagaries of contract formulation among parties. There is further evidence that a sale must be presumed complete, within the Motor Vehicle Code, requiring the application for issuance of a certificate title within thirty days of the sale. Because the rescissions did not take place in accordance with the original contract (within five days), and because the parties could not be placed in a status quo ante, and because the Department issued certificates of title in each of the transactions at issue, the sales transactions between Taxpayer and its customers were taxable under the Motor Vehicle Excise Tax Act.

As an aside, while not at issue here, after the vehicles were returned, the second transfer of title back to Taxpayer from the customer who returned the vehicle should not be subject to further Motor Vehicle Excise Tax, since it was the Taxpayer's vehicle at the outset.

Under New Mexico's self-reporting tax system, "every person is charged with the reasonable duty to ascertain the possible tax consequences" of his or her actions. *Tiffany Construction Co. v. Bureau of Revenue*, 1976-NMCA-127, ¶5, 90 N.M. 16. When the Taxpayer set the process in motion by applying for a change of title and registration, it should have been aware of the likely consequence that the Department would issue a certificate of title. None of the sales were to NATO forces or governmental entities, and none were gifts or transfers without consideration, hence none of the enumerated exceptions apply. *See* NMSA 1978, Section 7-14-6; *see also* Section 7-14-3; *see also* Regulation 3.11.4.7 NMAC (2/13/09), Regulation 3.11.4.9 NMAC (12/14/00), Regulation 3.11.4.10 NMAC (12/14/00), Regulation 3.11.4.11 NMAC (12/14/00), Regulation 3.11.4.15 NMAC (12/14/00).

Having reviewed the documents contained in the administrative record, the Hearing Officer is persuaded that the factual record is sufficiently developed and the record entitles the Department to summary judgment, as there are no material facts at issue, and the law requires judgment in favor of the Department. The Taxpayer's Motion for Summary Judgment is **DENIED** and the Department's Motion should be, and hereby is **GRANTED**.

## CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest of the Department's denial of refund letter dated October 15, 2018, and jurisdiction lies over the parties and the subject matter of this protest. *See* NMSA 1978, Section 7-1-24; *see also* NMSA 1978, Section 7-1-26; *see also* NMSA 1978, Section 7-14-9, Section 7-14-9.1.

B. A telephonic scheduling hearing was timely set and held within 90-days of the Department's request for hearing on the protest under NMSA 1978, Section 7-1B-8 (2019).

C. The sole issue at protest was the denial of refund for Motor Vehicle Excise Taxes paid pursuant to NMSA 1978, Section 7-14-3 (1991).

D. The Department's denial of refund is viewed under a lens of a presumption of correctness, therefore it is Taxpayer's burden to establish that it was entitled to the claims for refund. *See* Regulation 3.1.8.10 NMAC (08/30/2001); *see also Corr. Corp. of Am. of Tenn. v. State*, 2007-NMCA-148, ¶17 & ¶29, 142 N.M. 779, 170 P.3d 1017; *see also* NMSA 1978, § 7-1-17 (C) (2007).

E. A further presumption was created that a sale for tax purposes was complete when the Department issued certificates of title for each of the vehicles sold. *See* NMSA 1978, Section 7-14-3 (1991); *see also* NMSA 1978, Section 7-14-5.

F. Sales occurred when the seller and customer entered into the retail purchase agreement (sales contract) whereby customer paid a down payment and possession of the vehicle was transferred. *See* NMSA 1978, Section 7-9-3 (A) ("'buying' or 'selling' means a transfer of property for consideration"); *see also Garfield Mines Ltd. v. O'Cheskey*, 1973-NMCA-128, 85 N.M. 547, 514 P.2d 304.

G. Sales were cancelled between the two parties to the contract, customer and seller/finance agent Taxpayer, upon entry into a second contract entitled "Return Agreement" or a "Rescission Agreement." *See* NMSA 1978, Section 55-2-106 (1); *see also* NMSA 1978, Section 55-2-703 (f). However, the "private law" of the contract between the customer and seller/finance agent does not bind the Department. *See Dell Catalog Sales L.P. v. NM Taxation & Revenue Dep't*, 2009-NMCA-001, ¶¶26-38, 145 N.M.419, 199 P.3d 863.

H. While Taxpayer and Taxpayer's customer were able to agree on the reclassification of the price paid on the original vehicle sale contract, Taxpayer was unable to prove an absence of

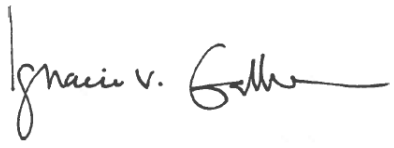
consideration. *See* NMSA 1978, Section 7-9-3 (A); *see also Garfield Mines Ltd. v. O'Cheskey*, 1973-NMCA-128, 85 N.M. 547, 514 P.2d 304.

I. Taxpayer did not successfully rebut the presumption that sales or sales for tax purposes occurred by proving that a rescission contracted bound the Department. *See* NMSA 1978, Section 7-14-3 (1991).

J. The Department is entitled to Summary Judgment because there exist no issues of material fact, and that under the facts as alleged the Department is entitled to Judgment in its favor. *See Roth v. Thompson*, 1992-NMSC-011, ¶17, 113 N.M. 331, 825 P.2d 1241; *see also Martinez v. Logsdon*, 1986-NMSC-056, ¶12, 104 N.M. 479, 723 P.2d 248.

For the foregoing reasons, the Taxpayer's protest **IS DENIED**. **IT IS ORDERED** that the Department's denial of Taxpayer's request for refund was proper and no refund is due.

DATED: May 10, 2021.



Ignacio V. Gallegos
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**NOTICE OF RIGHT TO APPEAL**

Pursuant to NMSA 1978, Section 7-1-25 (2015), the parties have the right to appeal this decision by *filing a notice of appeal with the New Mexico Court of Appeals* within 30 days of the date shown above. If an appeal is not timely filed with the Court of Appeals within 30 days, this Decision and Order will become final. Rule of Appellate Procedure 12-601 NMRA articulates

the requirements of perfecting an appeal of an administrative decision with the Court of Appeals. Either party filing an appeal shall file a courtesy copy of the appeal with the Administrative Hearings Office contemporaneous with the Court of Appeals filing so that the Administrative Hearings Office may begin preparing the record proper. The parties will each be provided with a copy of the record proper at the time of the filing of the record proper with the Court of Appeals, which occurs within 14 days of the Administrative Hearings Office receipt of the docketing statement from the appealing party. *See* Rule 12-209 NMRA.

**CERTIFICATE OF SERVICE**

On May 10, 2021, a copy of the foregoing Decision and Order was submitted to the parties listed below in the following manner:

*Email and First Class Mail* *Email and Interdepartmental Mail*

INTENTIONALLY BLANK

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