STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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| In the Matter of the Petition<br>of<br>**PHILANZ OLDSMOBILE, INC.**<br>for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1982 through May 31, 1985. | : | DECISION<br>DTA NO. 802761 |

Petitioner, Philaux Oldsmobile, Inc., 960 East Ridge Road, Rochester, New York 14621, filed an exception to the determination of the Administrative Law Judge Issued on December 23, 1987 with respect to 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 period June 1, 1982 through May 31, 1985 (File No. 802761). Petitioner appeared by Woods, Oviatt, Gilman, Sturman & Clarke (Thomas M. DiPiazza, Jr., Esq. of counsel). The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

Both parties filed briefs on exception. Oral argument, at the request of the petitioner, was heard on July 14, 1988.

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

## *ISSUES*

I. Whether the Division of Taxation properly determined that vehicles placed in petitioner's company car account were subject to compensating use tax based on their full book value at the time the vehicles were placed in such account.

II. Whether the Division of Taxation properly determined that compensating use tax was due on certain of petitioner's demonstrator vehicles.

## *FINDINGS OF FACT*

We find the facts as stated in the Administrative Law Judge's determination and such facts are incorporated herein by this reference.

During the period at issue, petitioner, Philanz Oldsmobile, Inc., operated an automobile dealership and placed certain of its vehicles in a company car account. While they remained in this account, these vehicles were used by petitioner's employees to transport petitioner's customers to work while the customers' own cars remained at petitioner's premises for maintenance or repair services. Petitioner also kept vehicles in the company car account for use by its parts department.

Petitioner frequently replaced the vehicles in the company car account. Upon doing so, the vehicles which were removed from the account were placed back in inventory for resale.

Petitioner did not dispute that the vehicles placed in the company car account were subject to use tax; rather, its method of computing the amount of tax due on its company car account vehicles is at issue herein.

When petitioner replaced vehicles in the company car account, it determined use tax due on the new vehicle placed in the account by deducting from the book value of that vehicle the

book value of the vehicle being removed from the account and calculating tax due based upon the difference.

On November 20, 1985, following a detailed audit of petitioner's books and records, the Division of Taxation issued to petitioner two notices of determination and demand for payment of sales and use taxes due which, in the aggregate, asserted $14,757.10 in additional tax due for the period June 1, 1982 through May 31, 1985, plus penalty and interest.

On audit, the Division of Taxation determined that with respect to the company car account, use tax was properly calculated based upon the full book value of the vehicle placed into the account, with no allowance made for the value of the vehicle removed from the account. Of the total tax at issue herein, $5,402.36 results from this Division of Taxation determination with respect to vehicles placed in the company car account.

The remaining $9,354.74 of the deficiency herein was premised upon a Division of Taxation determination that certain of petitioner's demonstrator vehicles were occasionally put to personal use by petitioner's employees and therefore subject to use tax. The Division of Taxation computed the tax liability with respect to the demonstrator cars by applying the prevailing tax rate to a monthly depreciation rate of two percent of the vehicle's cost to petitioner. This method of computing use tax liability with respect to demonstrator cars was premised on the Division of Taxation policy as reflected in Technical Services Bureau Memorandum 83(13)S.

Petitioner's employees were allowed to drive the demonstrator cars to and from home each workday. They were not permitted to make any other personal use of the vehicle, nor were any employee family members permitted to drive the vehicles. At all times a sticker setting forth

information regarding the vehicle and also indicating the manufacturer's suggested retail price of the vehicle was affixed to a rear window of each of the cars. Petitioner's employees were encouraged to sell their cars and to take prospective customers for rides in the vehicles at all times, including those times when they were not working at the showroom

***OPINION***

Petitioner contends that it should be allowed a trade-in allowance when replacing vehicles in the company car account. Petitioner argued that its replacing of vehicles in that account was analogous to any other business which traded in a used vehicle and purchased a new vehicle and received credit on its purchase price for the value of the trade-ins.

With respect to the demonstrators, petitioner contended that inasmuch as its sales people were encouraged to sell cars 24 hours a day, no personal use of the demonstrators could or did occur and thus, no use tax should be imposed.

The Division argues no trade-in allowance, and that there was personal use of the demonstrators.

The Administrative Law Judge determined that no trade-in allowance was permitted and that there was personal use of the demonstrators.

We affirm the determination of the Administrative Law Judge in its entirety.

The use of the vehicles placed in petitioner's company car account was a taxable use subject to tax pursuant to section 1110 of the Tax Law, and petitioner was not entitled to a trade-in allowance or credit on the value of the vehicles placed in this account. Tax Law section 1110 allows a for credit for the value of trade-ins but only where there is a sale between two parties and the property is taken as partial compensation (Greco Brothers Amusement Co., Inc. v. Chu,

113 AD2d 622). Here, only one entity was involved and no sale took place. Petitioner simply transferred vehicles from its own inventory into the company car account. The Division therefore properly determined additional tax due herein in respect to the vehicles placed in petitioner's company car account.

The use of the demonstrator vehicles by petitioner's employees to travel to and from work was a personal use of the vehicles by the employees thereby rendering such vehicles subject to compensating use tax (see, 20 NYCRR 531.3[a][2]). The Division of Taxation properly determined that the demonstrator vehicles at issue were subject to compensating use tax and calculated the additional tax due herein with respect to such vehicles in accord with the stated policy of the Division.[1]

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[1] TSB-M-87(2)S substantially restates the policy contained in TSB-M-83(13)S in effect during the period at issue here - June 1, 1982 through May 31, 1985, namely:

1. Vehicles held in inventory exclusively for resale but used for demonstration to prospective customers are not taxable to the dealer if used solely for demonstration;

2. Vehicles held in inventory for resale but used occasionally for business or pleasure by the dealer or one of his officers or employees are characterized as "mixed use vehicles" and subject to use tax, generally at a rate of two percent per month of the dealer's cost, i.e., invoiced cost plus delivery charge. The mixed use vehicle must be held in inventory and be available for resale.

3. A mixed use vehicle may be registered in the dealer's name or used with dealer's plates.

4. A dealer may not seek a trade-in allowance on a mixed use vehicle.

The Division applied the "2% depreciation" method to such vehicles which is computed on an amount equal to the total invoiced cost to the dealer (including delivery) for any vehicle purchased new, and on the purchase price or trade allowance, plus the value of any repairs made to the vehicle when purchased used or taken in trade. The result is that 2% of the cost is taxed each month the vehicle is used by the petitioner. Absent this method, the use tax would be calculated on the full value of invoiced cost to the dealer.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Philanz Oldsmobile, Inc. is in all respects denied;

2. The determination of the Administrative Law Judge is affirmed; and

3. The petition of Philanz Oldsmobile, Inc. is denied and the notices determination dated November 25, 1985, as adjusted by finding of fact "2" of the Administrative Law Judge's determination, are sustained.

Dated: Albany, New York
November 23, 1988

/s/ John P. Dugan
President

/s/ Francis R. Koenig
Commissioner