STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| **DAIMLERCHRYSLER MOTORS CORPORATION** | : | DETERMINATION<br>DTA NO. 819699 |
| 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 January 1, 1996 through December 31, 2002. | : | |

Petitioner, DaimlerChrysler Motors Corporation, 1000 Chrysler Drive, Auburn Hills, Michigan 48326, 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 period January 1, 1996 through December 31, 2002.

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on June 14, 2004 at 10:30 A.M., with all briefs to be submitted by December 23, 2004, which date began the six-month period for the issuance of this determination. Petitioner appeared by The Rose Law Firm, PLLC (Keith B. Rose, Esq., of counsel). The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Jennifer L. Baldwin, Esq., of counsel).

***ISSUE***

Whether the Division of Taxation properly denied petitioner's claim for refund of sales and use taxes arising in connection with petitioner's provision of replacement vehicles to consumers pursuant to General Business Law § 198-a (also known as New York State's Lemon Law).

## *FINDINGS OF FACT*

1. By letter dated February 5, 2002, DaimlerChrysler Motors Corporation ("petitioner") filed two applications for credit or refund of sales and use tax (forms AU-11) seeking a refund in the amount of $1,635.73 for the period January 1, 1996 through March 31, 1998 and a refund in the amount of $38,210.79 for the period April 1, 1998 through December 31, 2002. The total amount sought by the refund claims was $39,846.52. Each application contained the following explanation:

> DaimlerChrysler requests a refund of sales tax that it refunded to consumers on the repurchase of defective motor vehicles pursuant to the New York Lemon Law, General Business Law Section 198-a. Section 198-a(c)(2) states that lemon law refunds 'shall be accompanied by the proper application for credit or refund of state and local sales taxes as published by the department of taxation and finance and by a notice that the sales tax paid on the purchase price, lease price or portion thereof being refunded is refundable by the commissioner of taxation and finance . . . .' The enclosed schedule represents vehicles that were repurchased by DaimlerChrysler from the consumer, and that were defective and failed to meet the manufacturer's warranty. In each case, the entire amount of the purchase price and sales tax was refunded to the automobile dealership, which in turn refunded these amounts to the consumer by issuing the consumer a new replacement vehicle.

2. On June 14, 2002, the Division of Taxation ("Division") denied, in full, petitioner's claim for refund stating, in pertinent part, as follows:

> The person who is eligible to claim a refund or credit of New York State Sales and Use Tax is the purchaser of qualifying tangible personal property or services or the vendor of the tangible personal property or services, after reimbursement of the tax to its customer(s). Since you neither paid tax as a purchaser nor remitted tax as a vendor, your refund application is denied.

3. At the hearing held in this matter, the parties stipulated that the amount of sales tax paid to New York State in each of the 21 transactions referenced in petitioner's refund claim was as follows:

| CONSUMER'S NAME | TAX ON ORIGINAL PURCHASE | TAX ON REPLACEMENT VEHICLE |
|---|---|---|
| Hershman | $928.73 | $,1,764.65 |
| Vetrero | $2,024.70 | $2,113.31 |
| Casaburi | $2,595.29 | $2,487.71 |
| Raab | $1,782.33 | $1,782.33 |
| Lopez | -0- | -0- |
| Simon | $2,241.00 | -0- |
| McAnany | $490.41 | -0- |
| Murphy | $2,165.94 | $2,218.57 |
| Tripodi | $969.57 | $1,332.45 |
| Magee | $925.26 | $925.26 |
| Atena | $2,838.83 | $2,793.94 |
| Marco | $3,061.99 | $2,702.79 |
| Lisogorsky | $1,265.65 | $1,265.65 |
| DeMarco | $1,996.50 | $2,240.29 |
| Diaz | $2,603.62 | $2,331.45 |
| Beers | $2,385.11 | $2,637.95 |
| Constanzo | $2,215.50 | $2,389.60 |
| Ciufo | $2,398.55 | $2,406.95 |
| Bernard | $1,892.26 | $2,133.24 |
| Drayage | $1,420.98 | $1,372.88 |
| Davison | $1,015.00 | $2,175.60 |
| **TOTAL** | $37,217.22 | $37,074.62 |

4. In its brief, the Division asserts that petitioner's original claim for refund was a request for refund of the sales tax paid on the purchases of the original motor vehicles which amounts were paid by the consumers and that it cannot now change the basis of its claim by seeking a refund of the sales tax paid on the replacement vehicles. A review of the petition (with attachments) reveals that petitioner's original claims for refund (***see***, Finding of Fact "1") apparently sought a refund of sales tax allegedly refunded by petitioner to consumers on its repurchase of defective motor vehicles pursuant to General Business Law § 198-a, also known as the New York State Lemon Law (hereinafter "Lemon Law"). The claims for refund stated that petitioner refunded to its franchised motor vehicle dealers the entire amount of the purchase price along with the sales tax imposed thereon and that the dealers then refunded these amounts to the consumer by issuing the consumer a new replacement vehicle. However, at the hearing and in its briefs submitted in connection therewith, petitioner asserts that it was charged and paid sales tax on the full purchase price of the vehicles which it purchased from its dealers on behalf of the consumers (who had purchased defective motor vehicles) and who had elected, under the Lemon Law, to receive a comparable replacement vehicle in lieu of a refund of the full purchase price.

5. Attached to the petition filed in this matter is a schedule of each of the customers whose transactions are at issue. This schedule lists, among other things, the sales tax paid on the original vehicles, the sales paid on the replacement vehicles and sales tax on usage. It appears that the original amount sought in the refund claim was the sales tax on the original purchases ($41,472.83) minus sales tax on usage ($1,626.31), or $39,846.52. Whether this was a calculation error is unclear. However, since the parties agreed at the hearing that the issue before the Division of Tax Appeals was whether petitioner is entitled to a refund of sales tax

incurred as a result of providing replacement motor vehicles to consumers pursuant to General Business Law § 198-a and since this was the issue addressed by both parties in their briefs, this shall be the issue addressed herein. Accordingly, while there was a reduction for sales tax on usage in the original amount of the refund claimed, this amount shall be disregarded for purposes of this proceeding since it is unclear what this amount represents. Since the parties have agreed as to the amount of sales tax paid on the replacement vehicles, i.e., $37,074.62 (***see***, Finding of Fact "3"), that shall be deemed the amount of the refund claim at issue.

6. Pursuant to the aforesaid stipulation, the parties agreed that the sales taxes on the original vehicle purchases were paid by the retail consumers listed thereon.

7. Petitioner is a motor vehicle manufacturer duly authorized to transact business in the State of New York and, as such, provided written limited warranties with respect to the vehicles which it manufactured. Petitioner manufactures the Dodge, Chrysler and Jeep brands.

Petitioner, as a motor vehicle franchisor, sells the vehicles which it manufactures to those who, by contract, are franchised motor vehicle dealers. The franchised motor vehicle dealers then sell the vehicles, at retail, to consumers. At the time of the retail sale, the retail purchaser of the vehicle remits to the dealer the sales tax imposed upon the sale by the New York State Tax Law.

8. The Lemon Law provides a remedy for the purchasers/consumers of seriously defective new motor vehicles. The Lemon Law provides that if a motor vehicle manufacturer or its authorized dealer is unable to repair a serious defect in the motor vehicle after a reasonable opportunity to do so, the manufacturer must refund to the consumer the full purchase price of the vehicle which the consumer paid to the dealer in return for receiving possession of the defective vehicle. In the alternative, the consumer may elect to have the manufacturer replace the

defective vehicle with a comparable motor vehicle. The Lemon Law requires that in the case of issuance of a refund to the consumer, the manufacturer must include a proper application for credit or refund of state and local sales taxes as published by the New York State Department of Taxation and Finance and a notice that the sales tax paid is refundable by the Commissioner of Taxation and Finance in accordance with Tax Law § 1139(f). The transactions at issue in this proceeding all involve instances where petitioner provided comparable or replacement vehicles to consumers in lieu of a refund of the purchase price.

9. For each of the 21 transactions at issue herein (***see***, Finding of Fact "3"), petitioner submitted a sales invoice for the original vehicle purchased by the customer as well as the sales invoice for the replacement vehicle. In both instances, sales tax at the appropriate rate was charged thereon. In addition to the sales invoices for both the original and replacement vehicles and certain other documentation relating to the transactions, petitioner also submitted copies of checks from petitioner to the franchised dealer in payment for the replacement vehicles. The payment by petitioner to the franchised dealer included the sales tax computed at the appropriate rate. Petitioner, as its manner of compliance with the provisions of the Lemon Law, "purchased" for each consumer a replacement vehicle from one of its franchised dealers and exchanged the replacement vehicle for the defective one. On each such purchase, petitioner was charged and paid sales tax on the full purchase price of the replacement vehicle.

10. As a part of petitioner's settlement with the consumers whose original vehicle was replaced by a new or replacement vehicle, each consumer was required to sign a Release Agreement which stated, in part, that such consumer would:

> agree to indemnify and hold the above parties harmless from all further claims, costs or expenses relating to this claim. I expressly agree that the only consideration I will receive is listed above and that DaimlerChrysler

> Corporation had made no other promises to me. I accept the consideration listed above as full satisfaction of this claim.

***SUMMARY OF THE PARTIES' POSITIONS***

11. Petitioner asserts the following:

a. Petitioner erroneously was charged and erroneously paid sales tax on replacement vehicles which it provided to its customers pursuant to the Lemon Law;

b. To the extent that Tax Law § 1139(f) is read as giving a consumer who receives a "comparable replacement vehicle" pursuant to the Lemon Law the right to a refund of sales tax paid by the consumer on the sale of the defective vehicle, such right was equitably assigned by each consumer to petitioner. Therefore, it is petitioner, not the individual consumer who is entitled to a refund of sales tax. By virtue of the releases signed by the consumers, such consumers agreed not to make a claim for the sales tax, having assigned that right to petitioner;

c. Since petitioner paid the full amount of sales tax on the replacement vehicle rather than simply the tax based upon the difference in value between the original and the replacement vehicles, petitioner overpaid the tax and is entitled to a refund thereon; and

d. To deny petitioner "vendor" status yet require it to perform the replacement obligations of a vendor without its benefits violates the equal protection clauses of the New York and United States constitutions. To the extent that the Tax Law is construed as denying a manufacturer who is obligated to perform a like-kind exchange under General Business Law § 198-a the same treatment as an automobile dealer who is obligated to perform like-kind exchanges under General Business Law § 198-b, it impermissibly discriminates.

12. In response, the Division contends:

a. Tax Law § 1139(f) does not apply to the transactions at issue; it applies only to situations where the consumer elects a refund of the purchase price;

b. Tax Law § 1139(a) does not afford petitioner the relief that it requests; it is neither a customer nor a vendor;

c. Sales tax is due on the sales of both the original and replacement vehicles;

d. Since Tax Law § 1139(f) does not provide for a refund of sales tax to a consumer who elects a comparable replacement vehicle in lieu of a refund, petitioner is not entitled to a refund of sales tax as an assignee. The consumer has nothing to assign and nothing in the releases executed by the consumers indicates an intention on the part of the consumer to assign any right to a refund to petitioner; and

e. The Tax Law provisions at issue do not violate the equal protection clauses of either the New York State or U.S. constitutions.

## *CONCLUSIONS OF LAW*

A. General Business Law § 198-a provides, in pertinent part, as follows:

> If, within the period specified in subdivision (b) of this section, the manufacturer or its agents or authorized dealers are unable to repair or correct any defect or condition which substantially impairs the value of the motor vehicle to the consumer after a reasonable number of attempts, the manufacturer, at the option of a consumer, shall replace the motor vehicle with a comparable motor vehicle, or accept return of the vehicle from the consumer and refund to the consumer the full purchase price or, if applicable, the lease price and any trade-in allowance plus fees and charges (General Business Law § 198-a[c][1]).

As it pertains to the sales taxes paid on the purchase of the original vehicle when the consumer elects to return the vehicle to the manufacturer and be refunded the full purchase price (or lease price and any trade-in allowance) plus fees and charges, General Business Law § 198-a(c)(2) provides:

> Refunds shall be accompanied by the proper application for credit or refund of state and local sales taxes as published by the department of taxation and finance and by a notice that the sales tax paid on the purchase price, lease price or portion thereof being refunded is refundable by the commissioner of taxation and finance in accordance with the provisions of subdivision (f) of section eleven hundred thirty-nine of the tax law.[1]

B. At the same time that chapter 145 of the Laws of 1986 amended the Lemon Law to remove the requirement that manufacturers refund the sales tax when the consumer returned a motor vehicle to the manufacturer and elected to receive a refund of the purchase price (rather than to receive a comparable motor vehicle from the manufacturer), a new subdivision (f) was added to Tax Law § 1139 which provides as follows:

> Where a consumer returns a motor vehicle to and receives a refund of the full purchase price, capitalized cost or a portion thereof from the manufacturer in accordance with the provisions of section one hundred ninety-eight-a or subdivision five of section three hundred ninety-six-p of the general business law, the commissioner of taxation and finance shall refund to such consumer any tax paid by the consumer on the amount of the purchase price, capitalized costs and fees and charges refunded by the manufacturer which is not in excess of the receipts and proportionate to the receipts subject to tax.

C. The transactions which are the subject of this proceeding involve instances where the consumer elected to receive a replacement vehicle in lieu of a refund of the full purchase price of the original motor vehicle. It is clear from a reading of Tax Law § 1139(f) that such subdivision applies only "[w]here a consumer returns a motor vehicle to and receives a refund of the full purchase price." The statute makes no mention of a refund of sales tax in cases where the consumer opts for a replacement vehicle rather than a full refund of the purchase price of the original vehicle. As noted by the Tax Appeals Tribunal in ***Matter of Shorter*** (Tax Appeals

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[1] Prior to September 1, 1983, General Business Law § 198-a(c) required the manufacturer to refund, along with the full purchase price, all sales tax paid thereon by the consumer. Chapter 145 of the Laws of 1986 amended the Lemon Law to provide that manufacturers were no longer required to refund the sales tax.

Tribunal, July 31, 1997), "It is an axiom of statutory construction that legislative intent is to be ascertained from the language used and, that where the words of a statute are clear and unambiguous, they should be literally construed (citations omitted)."

In ***Matter of Helmsley Enterprises, Inc.*** (Tax Appeals Tribunal, June 20, 1991), the Tribunal stated:

> As a general rule, the maxim *expressio unius est exclusio alterius* is applied in interpreting statutes, so that where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded (McKinney's Cons. Laws of NY, Book 1, Statutes, § 240; ***see***, ***Merkling v. Ford Motor Co.*** ,251 App Div 89, 296 NYS 393, 398; ***Deth v. Castimore***, 245 App Div 156, 281 NYS 114, 120).

Accordingly, since Tax Law § 1139(f) is silent with respect to the sales tax in situations where the consumer elects to have the manufacturer provide a replacement vehicle, it must be found that the statute is inapplicable to the transactions at issue herein.

D. Even assuming, *arguendo*, that Tax Law § 1139(f) was applicable to instances where the consumer elects to have the manufacturer provide a replacement vehicle rather than opting for a full refund of the purchase price of the original vehicle, it is clear that petitioner, as the manufacturer, has no standing to claim a refund of the sales tax paid on the original vehicle. The sponsors of the legislative bill (1986 NY Assembly - Senate Bill A 7081-B, S 5943-B), in the memorandum in support thereof, noted that "[s]ince manufacturers do not collect sales taxes and have no claim for credits from the state, refunds of sales tax should be made by the state who is the final collector of such tax." (Bill Jacket, L 1986, ch 145, at 7.)

Petitioner, in its brief, contends that it has been equitably assigned any right to a refund of sales tax by the consumer. One of the bases upon which petitioner asserts that it was assigned this right is the Release Agreement (***see***, Finding of Fact "10") between petitioner and each

consumer. Nothing in this agreement assigns to petitioner any right to a refund of sales tax which might be due to the consumer. Petitioner's brief asserts that "[t]o the extent Tax Law § 1139(f) is read as giving a consumer who receives a 'comparable replacement vehicle' pursuant to GBL § 198-a the right to a refund of sales tax paid by the consumer on the sale of the defective vehicle, such right was equitably assigned by each consumer to DaimlerChrysler Corporation herein." As noted in Conclusion of Law "C", Tax Law § 1139(f) is inapplicable to instances where the consumer elects to receive a comparable replacement vehicle. Since the statute provides no right to a refund of sales tax to a consumer who chooses a replacement vehicle in lieu of a refund, no right can be assigned to petitioner. Petitioner's argument is, therefore, without merit.

E. Tax Law § 1139(a) provides, in relevant part, as follows:

> In the manner provided in this section the tax commission shall refund or credit any tax, penalty or interest erroneously, illegally or unconstitutionally collected or paid if application therefor shall be filed with the tax commission (i) in the case of tax paid by the applicant to a person required to collect tax, within three years after the date when the tax was payable by such person to the tax commission as provided in section eleven hundred thirty-seven, or (ii) in the case of a tax, penalty or interest paid by the applicant to the tax commission, within three years after the date when such amount was payable under this article, or (iii) in the case of a tax due from the seller, transferor or assignor and paid by the applicant to the tax commission where the applicant is a purchaser, transferee or assignee liable for such tax pursuant to the provisions of subdivision (c) of section eleven hundred forty-one of this chapter, within two years after giving of notice by the tax commission to such purchaser, transferee or assignee of the total amount of any tax or taxes which the state claims to be due from the seller, transferor or assignor.

F. In its brief, petitioner admits that its paying the dealership the full price of the replacement vehicle *and the corresponding sales tax* was for the convenience of the consumer, i.e., rather than require the consumer to incur the out-of-pocket expense necessary to pay for the sales tax on the replacement vehicle, petitioner assumed that obligation and paid the sales tax on

the consumer's behalf. It must initially be noted that petitioner's argument is flawed when it asserts that it performed a service for the consumer by paying the sales tax. This is true because the Lemon Law requires the manufacturer (petitioner), at the option of the consumer, to replace the defective motor vehicle with a comparable motor vehicle. The statute does not require the consumer to purchase another vehicle and, therefore, the consumer is not obligated to pay sales tax on the replacement vehicle.

In its brief, petitioner, citing Vehicle and Traffic Law § 463(2)(y), correctly asserts that it is prohibited from selling or offering to sell or lease a motor vehicle to anyone other than a franchised motor vehicle dealer in the State. Accordingly, while the Lemon Law requires the manufacturer (petitioner), at the option of the consumer, to replace the defective motor vehicle with a comparable motor vehicle, the manufacturer (petitioner) is obligated to somehow obtain the replacement vehicle and furnish it to the consumer. While the Lemon Law does not specify exactly how the manufacturer is to obtain the replacement vehicle, in the present matter, petitioner admittedly purchased for each consumer a replacement vehicle from one of its franchised dealers. The sale by the franchised dealer to petitioner was a retail sale which, like the sale by the franchised dealer of the original vehicle to the consumer, was subject to the imposition of sales tax.

While petitioner, as part of its evidence submitted in support of the petition, produced invoices from the franchised dealers to the consumers for the replacement vehicles which indicated thereon that sales tax was charged to the consumers on these replacement vehicles, such evidence also includes copies of checks from petitioner to the dealers for payment of the replacement vehicles and the sales tax due thereon. It seems clear that sales tax was not imposed upon the replacement vehicles twice, i.e., both the consumer and petitioner did not pay the tax.

If the tax was, in fact, charged to the consumer, it is the consumer who would be entitled to a refund of the tax under Tax Law § 1139(a) for erroneously having paid sales tax upon the sale of the vehicle by the franchised dealer to petitioner. Petitioner did not erroneously pay sales tax when it purchased the replacement vehicle; Tax Law § 1101(b)(4) defines a "retail sale" as "[a] sale of tangible personal property to any person for any purpose." While the statute provides certain exceptions thereto, none is applicable in this matter.

In its brief, petitioner states that "the application of the tax statute results in payment by a manufacturer of sales tax when providing a 'like-kind' exchange but no such sales tax liability by the dealer/vendor when doing likewise." While petitioner's argument that the statute caused an unconstitutional payment of sales tax by petitioner as the manufacturer merits consideration (this issue is addressed in Conclusion of Law "H"), clearly, its contention that it *erroneously* paid full sales tax on the vehicles purchased to consummate the like-kind exchange is without merit since it, too, acknowledges that application of the Lemon Law statute leads to this result. Whether petitioner is correct that the application of the Lemon Law requires it to *purchase* replacement vehicles is subject to question; however, by its choosing to comply with the statute in this manner and purchasing vehicles from its franchised dealers, petitioner did not erroneously pay sales tax on these purchases since, as heretofore noted, petitioner and the dealers entered into retail sales which were properly subject to tax.

G. Petitioner also contends that each of the 21 transactions at issue is an "exchange" for purposes of the Lemon Law, i.e., a new vehicle replaces or is exchanged for the consumer's original vehicle, and that even if the exchanges were deemed to be sales, the amount of tax due would be the difference between the value of the two vehicles because petitioner received the returned vehicle solely for purposes of resale. Petitioner's argument is without merit.

20 NYCRR 534.6(b)(2) provides:

> Exchange of merchandise. If a purchaser returns defective merchandise to his vendor, and in connection with such return, new merchandise is furnished, the purchaser is required to pay the tax only on the cost of the new article less the allowance for merchandise returned.

This regulation is inapplicable to the present matter, however, because the new merchandise (the replacement vehicle) was not provided to the purchaser by the original vendor. The manufacturer (petitioner) purchased the replacement vehicle from one of its franchised dealers; the purchaser did not exchange the defective merchandise with his vendor (the franchised dealer) for new merchandise provided by the vendor.

As the Division, in its brief, correctly notes, "[a]mong the transactions included in the words, *sale, selling or purchase* are exchanges . . . ." (20 NYCRR 526.7[a][2].) 20 NYCRR 526.7(d), in example 1 therein, states that where A and B exchange automobiles, the exchange is a sale under the Tax Law and each party is liable for the payment of sales tax which is measured by the current market value of the automobile received.

In the matter at issue herein, the consumer paid sales tax on the purchase of the original vehicle. Pursuant to the Lemon Law, where the consumer elects to have the original (defective) vehicle replaced with a comparable vehicle, such consumer is not obligated to pay sales tax again on the replacement vehicle. If the consumer was required to again pay sales tax on the replacement vehicle, the provisions of 20 NYCRR 534.6(b)(2) would be applicable. However, it is petitioner, the party who by virtue of the provisions of the Lemon Law is required to obtain and furnish the replacement vehicle to the consumer, who must bear the sales tax burden on the replacement vehicle. Accordingly, petitioner is not entitled to an allowance for the cost of the original vehicle.

H. Finally, petitioner contends that to deny petitioner "vendor" status yet require it to perform the replacement obligations of a vendor without the corresponding benefits violates the equal protection clauses of the New York State and the United States constitutions. Petitioner asserts that the Tax Law impermissibly discriminates against manufacturers such as DaimlerChrysler by denying a manufacturer who is obligated to perform a like-kind exchange under the Lemon Law the same treatment as an automobile dealer who is obligated to perform like-kind exchanges under General Business Law § 198-b. Petitioner states that the Tax Law differentiates between automobile manufacturers who are statutorily obligated under the Lemon Law to act as *de facto* vendors and automobile dealers acting as vendors because the application of the statutes results in payment by a manufacturer of sales tax when providing like-kind exchanges but no such sales tax liability by the dealer/vendor when doing likewise.

It must be noted that while the Division of Tax Appeals lacks jurisdiction to determine the constitutionality of a statute on its face (***Matter of Allied Grocers Cooperative***, Tax Appeals Tribunal, November 30, 1989, ***confirmed*** 162 AD2d 791, 557 NYS2d 707), the Division of Tax Appeals does have jurisdiction to determine the constitutionality of a statute as it is applied to a particular taxpayer (***Matter of David Hazan, Inc.***, Tax Appeals Tribunal, April 21, 1988, ***confirmed*** 152 AD2d 765, 543 NYS2d 545, ***affd*** 75 NY2d 989, 557 NYS2d 306). In the present matter, as previously noted, petitioner contends that the Tax Law impermissibly discriminates against manufacturers by requiring them to pay sales tax when providing replacement vehicles to consumers under the provisions of the Lemon Law (General Business Law § 198-a), while not requiring dealers to pay tax when providing replacement vehicles to consumers upon their purchase or lease of a used motor vehicle which is defective as provided in the used car Lemon Law (General Business Law § 198-b). Since petitioner is asserting that the

applicable statutes are unconstitutional as applied to a particular class of taxpayers, i.e., automobile manufacturers, it is hereby found that the Division of Tax Appeals has jurisdiction over the issue and petitioner's assertions will, therefore, be addressed herein.

General Business Law § 198-b relates to the sale or lease of *used* motor vehicles and contains somewhat similar Lemon Law provisions with respect to used motor vehicles. The applicable portion of the statute is General Business Law § 198-b(c)(1) which provides, in relevant part, as follows:

> If the dealer or his agent fails to correct a malfunction or defect as required by the warranty specified in this section which substantially impairs the value of the used motor vehicle to the consumer after a reasonable period of time, the dealer shall accept return of the used motor vehicle from the consumer and refund to the consumer the full purchase price, or in the case of a lease contract all payments made under the contract, including sales or compensating use tax . . . . Alternatively, the dealer may elect to offer to replace the used motor vehicle with a comparably priced vehicle, with such adjustment in price as the parties may agree to. The consumer shall not be obligated to accept a replacement vehicle, but may instead elect to receive the refund provided under this section.

As petitioner correctly notes in its brief, citing ***Nordlinger v. Hahn*** ( 505 US 1, 120 L Ed 1), the equal protection clauses of both the United States and the New York State Constitutions do not forbid classifications, but simply keep governmental decision makers from treating differently persons who are in all relevant respects alike. The U.S. Supreme Court stated in the ***Nordlinger*** decision that:

> As a general rule, 'legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.' ***McGowan v. Maryland***, 366 US 420, 425-426, 6 L Ed2d 393, 81 S Ct 1101 (1961). Accordingly, this Court's cases are clear that, unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate interest (citations omitted).

Citing, in its brief, ***Board of Education v. Nyquist*** (94 Misc 2d 466, 408 NYS2d 606), petitioner asserts that New York's Equal Protection Clause (NY Const, art I, § 11) affords the same protection as the Fourteenth Amendment of the U.S. Constitution, thereby permitting the State to legislate different kinds of treatment to different classes of persons provided the classification is not arbitrary, but made on a reasonable basis so that all those in similar circumstances are treated alike.

A reading of the two statutes at issue, General Business Law §§ 198-a and 198-b, reveals no mention of the payment of sales tax when the manufacturer or dealer, at the option of the consumer, provides a replacement vehicle to the consumer in lieu of a full refund. Both statutes address only the instance where the consumer elects to receive a full refund of the purchase price. Where a full refund is elected by the consumer on the purchase of a new motor vehicle, General Business Law § 198-a(c)(2) provides that the refund shall be accompanied by the proper application for credit or refund of sales tax and by a notice that the sales tax paid by the consumer is refundable by the Commissioner of Taxation and Finance in accordance with the provisions of Tax Law § 1139(f). As previously noted (***see***, Conclusion of Law "A"), prior to September 1, 1983, the statute required the manufacturer to refund, along with the full purchase price, all sales tax paid by the consumer. However, since manufacturers do not collect sales tax and have no claim for credits from the State, the Legislature amended the statute to provide that refunds of sales tax should be made by the State since it is the one who collects the tax (***see***, Conclusion of Law "D").

In the case of a refund on the purchase of a used motor vehicle from a dealer, General Business Law § 198-b(c)(1) requires the dealer to refund the purchase price, plus all sales and use taxes. Certainly, there is a rational basis for the distinction between the two statutes since it

was the terms of the dealer's warranty which the vehicle failed to meet, and it was the dealer who collected the tax from the consumer upon the purchase of the used motor vehicle. In the case of the used motor vehicle, the manufacturer is not a party to the transaction in any way. The warranty which is the subject of the statute is between the dealer and the consumer (***see***, General Business Law § 198-b[a][4]; [b]). Where the consumer opts for a replacement vehicle, the provisions of 20 NYCRR 534.6(b)(2) would apply (***see***, Conclusion of Law "F") and the only sales tax due would be owed by the consumer if, and only if, the cost of the replacement vehicle exceeded the cost of the original vehicle, and then the tax would be due only upon the difference in the cost between the two.

In the case of a new vehicle, the Lemon Law requires the manufacturer to provide the refund (or the replacement vehicle) since it is the terms of the manufacturer's warranty which the defective vehicle has failed to meet. However, unlike the used vehicle purchase, the party liable under the warranty in a new vehicle purchase (the manufacturer) did not collect the sales tax initially and, therefore, should not have to refund the tax.

Both statutes, General Business Law §§ 198-a and 198-b, are silent as to the incidence of sales tax liability when the consumer opts for a replacement vehicle from the manufacturer (to replace the new vehicle) or from the dealer (to replace the used vehicle) and this is where petitioner alleges unconstitutional discrimination against manufacturers.

With respect to new motor vehicles, the applicable statutes, General Business Law § 198-a and Tax Law § 1139(f) are silent as to the incidence of sales tax in situations where the consumer opts for a replacement vehicle in lieu of a full refund of the purchase price. This is true because it is unlikely that it was anticipated that the manufacturer would *purchase* a replacement vehicle and then provide it to the consumer. While, as petitioner correctly notes,

Vehicle and Traffic Law § 463(2)(y) prohibits a manufacturer from selling or offering to sell or lease a motor vehicle to anyone other than a franchised motor vehicle in the State, there is no prohibition on a manufacturer *giving* a motor vehicle to anyone. It seems doubtful that the Legislature, when drafting the Lemon Law and then making subsequent amendments to the Lemon Law and to the Tax Law to deal with refunds of sales tax, anticipated that the manufacturer would elect to purchase the replacement vehicle for the consumer. The Lemon Law simply states that "the manufacturer, at the option of a consumer, shall replace the motor vehicle with a comparable motor vehicle" (General Business Law § 198-a[c][1]). It is this petitioner who elected to purchase the vehicles from its franchised dealers rather than simply to provide comparable vehicles to the consumers by means of a direct gift (through the franchised dealer, if so desired). Since petitioner chose to purchase the replacement vehicles from the dealers, such purchases were properly subject to sales tax as a retail sale.

It is clear, therefore, that there was no unconstitutional classification or treatment of motor vehicle manufacturers in the enactment of the Lemon Law (and the Tax Law). While it is true, as petitioner alleges, that a used car dealer does not have to pay sales tax on a replacement vehicle furnished to a consumer, neither the Lemon Law nor the Tax Law requires a manufacturer to pay sales tax when it provides a new vehicle to a consumer unless the manner in which it acquires the replacement vehicle is one which is subject to tax. A direct purchase of a replacement vehicle from a franchised dealer by a manufacturer is a retail sale which is subject to tax. Petitioner, of its own volition, structured the transactions in such a way as to subject them to the imposition of sales tax, and accordingly, neither the Lemon Law nor the Tax Law were applied in a discriminatory manner to petitioner or any similarly situated taxpayers. Petitioner's constitutional challenge is, therefore, rejected in its entirety.

I. The petition of DaimlerChrysler Motors Corporation for a refund of sales and use taxes is denied.

DATED: Troy, New York
June 16, 2005

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE