STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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

Petitioner, Gelco Corporation, filed an exception to the determination of the Administrative Law Judge issued on July 21, 2022. Petitioner appeared by Peter O. Larsen, Esq. and David J. Rosen, Esq. The Division of Taxation appeared by Amanda Hiller, Esq. (Anita Luckina, Esq., of counsel).

Petitioner filed a brief in support of the exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was heard in Albany, New York on June 22, 2023, which date began the six-month period for issuance of this decision.

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

ISSUE

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

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

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

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

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

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

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

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

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

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

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

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

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

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

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

THE DETERMINATION OF THE ADMIINISTRTIVE LAW JUDGE

The Administrative Law Judge began her determination by reviewing the Tax Law provisions pertaining to retail sales and leases of motor vehicles. She next reviewed the Tax

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

Law provisions related to refunds of sales tax and determined that, since petitioner's payment of sales tax in this case was legally due and owing, the Tax Law does not require or allow for the refunds made in this case or the credits that petitioner seeks.

The Administrative Law Judge observed that the New York sales tax is a transaction tax, for which liability occurs at the time of the taxable transaction. She determined that petitioner properly collected and paid the sales tax due at the beginning of the subject leases and that no statutory provision allows petitioner to take credits for sales tax refunds paid to its lessees. The Administrative Law Judge found no merit to petitioner's argument that the Tax Law permits petitioner to reduce the amount of sales tax owed based upon the TRAC lease adjustments made at lease end.

ARGUMENTS ON EXCEPTION

Petitioner argues that the TRAC provision is an integral part of the lease agreements and constituted part of the consideration contracted to be given between petitioner and its lessees. It asserts, therefore, that the lease end adjustments required by the TRAC provision must be included when calculating taxable consideration. It contends that since the TRAC provision adjustments are unknown until lease end, the monthly lease payments were only estimated amounts and in the nature of security deposits, and, therefore, not subject to tax at the inception of the lease. Petitioner argues that its position is supported by the explicit incorporation by reference of the federal tax laws governing TRAC leases into Tax Law § 1111 (i) (B).

Petitioner further asserts that the TRAC provision adjustments were an incentive that is excluded from the sales price subject to tax and, alternatively, that it is entitled to a credit for the sales tax refunded to its lessees because the TRAC provision adjustments were for the return of property and the cancellation of a contract.

Petitioner maintains that the Division has a "blanket prohibition" on sales tax credits or refunds for TRAC adjustment payments that has not been formally promulgated as a regulation pursuant to the State Administrative Procedure Act. As such, petitioner argues that the Division's rule has no binding effect. Finally, petitioner argues that an interpretation of Tax Law § 1111 (i) (B) that requires an imposition of tax on such estimated payments is unreasonable and unfair as the state receives a windfall of sales tax in excess of the amount of tax due on the actual rent paid.

The Division argues that the Administrative Law Judge correctly determined that petitioner is not entitled to credits on its sales tax returns for refunds of sales tax it gave to its motor vehicle lessees because petitioner paid the proper amount of tax at the time of the taxable transaction and there is no authority for a refund or credit of tax under these circumstances. Despite petitioner's assertion to the contrary, the Division contends that the receipts due under the TRAC lease agreements are in fact known for sales tax purposes at lease inception and that petitioner's proposed construction is an unreasonable application of the law.

In response to petitioner's arguments, the Division asserts that there is no authority for a refund or credit of sales tax pursuant to Tax Law §§ 1132 (e) or 1139 in this situation. According to the Division, the sales tax was not "erroneously, illegally or unconstitutionally" paid. Further, the Division alleges that petitioner's argument that it is entitled to a refund or credit of tax because the adjustment to the sale price was made when the property was returned or the contract was cancelled must fail. It asserts that neither the statute, nor the regulations pertaining to refunds and credits by reason of cancelled sales and returned merchandise apply to the circumstances here.

Contrary to petitioner's assertions, the Division argues that neither the plain language of Tax Law § 1111 (i) (B) nor its legislative history supports petitioner's position that the Legislature intended TRAC provision adjustments to be considered when computing the taxable receipts and tax due for commercial fleet leases. The Division maintains that Tax Law § 1111 (i) (B) does not incorporate by reference federal tax law governing TRAC leases. It contends that a plain reading of the statute shows that Tax Law § 1111 (i) (B) only refers to the written certification required by the Internal Revenue Code (IRC).

The Division also points out that Tax Law § 1111 (i) (B) was recently amended to specifically allow a sales tax credit for lease end adjustments on TRAC leases on or after June 1, 2022. The Division argues that the amendment was enacted because the Tax Law did not allow such treatment previously.

OPINION

We affirm the determination of the Administrative Law Judge.

Tax Law § 1105 (a) imposes tax on the receipts of retail sales of tangible personal property. Among the transactions considered a "sale" are "[a]ny transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume . . . conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor . . ." (***see*** Tax Law § 1101 [b] [5]). "Receipt" generally means the amount of the sale price of any property and the charge for any service taxable under article 28 (Tax Law § 1101 [b] [3]).

Sales tax is a "transaction tax" with the liability for the tax occurring at the time of the transaction (20 NYCRR 525.2 [a] [2]) (***see Matter of Prima Asphalt Concrete*** (Tax Appeals Tribunal, February 9, 2017, ***confirmed*** 162 AD3d 1281 [3d Dept 2018], ***lv denied*** 32 NY3d 914

[2019] [Tribunal rejected petitioner's attempt to retroactively reduce its taxable receipts to reflect a subsequent volume discount]; ***Matter of D.J.H. Constr. v Chu***, 145 AD2d 716 [3d Dept 1988]). The tax becomes due at the time of transfer to or possession of (or both) tangible personal property (20 NYCRR 525.2 [a] [2]).

Tax Law § 1132 (c) creates a presumption that all receipts for property or services subject to tax under subdivisions (a) through (d) of Tax Law § 1105 are subject to tax and the burden of proving the contrary is borne by the person required to collect the tax or its customer (***Matter of Wegmans Food Mkts., Inc. v Tax Appeals Trib. of State of N.Y.***, 33 NY3d 587, 594 [2019]; 20 NYCRR 532.4 [a] [1]; [b] [1]).

Tax Law § 1111 (i) provides special rules for computing receipts and consideration with respect to leases of motor vehicles. Tax Law § 1111 (i) (B), specifically, pertains to commercial fleet vehicle leases and provides as follows:

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

The Division contends that this section requires that tax be paid on the receipts for the first 32 months at the inception of a qualified commercial lease, including a lease with a TRAC provision. Petitioner argues, initially, that no tax is owed at the inception of a lease that includes a TRAC provision because the monthly payments made by lessees are only estimated amounts and, therefore, are not taxable. It contends that a taxable transaction does not occur until a leased vehicle is returned and any TRAC adjustments are included in the final computation of total rent due for the lease. It asserts that the TRAC provision, itself, is consideration and that the taxable receipts must take into account the amount of any TRAC adjustments.

As the present dispute is a matter of statutory interpretation, the purpose of our review is to ascertain and give effect to the discernible intent of the Legislature (***see Matter of 1605 Book Ctr. v Tax Appeals Trib. of State of N.Y.***, 83 NY2d 240, 244-45 [1994], ***cert denied*** 513 US 811 [1994]). The unambiguous language of a tax statute should be interpreted in accordance with its plain meaning (***New York State Assn. of Counties v Axelrod***, 213 AD2d 18, 24 [3d Dept 1995], ***lv dismissed*** 87 NY2d 918 [1996]). This is because "[t]he statutory text is the clearest indicator of legislative intent" (***Matter of DaimlerChrysler Corp. v Spitzer***, 7 NY3d 653, 660 [2006]). A statute must be construed as a whole and its various sections must be considered together and with reference to each other (***see People v Mobil Oil Corp.***, 48 NY2d 192, 199 [1979]; McKinney's Cons Laws of NY, Book 1, Statutes § 97).

A review of Tax Law § 1111 (i) (B) demonstrates that it unambiguously requires that tax be paid on, at a minimum, the first 32 months of lease payments of an indefinite term commercial fleet lease. Tax Law § 1111 (i) (A) clearly sets forth that said tax is due as of the date of the first payment under such lease, or the date of registration with the commissioner of

motor vehicles, whichever is earlier. Contrary to the arguments made by petitioner, we see no indication in the words of the statute that lease agreements containing TRAC provisions are excluded from these requirements or that lease end adjustments may serve to reduce the receipts or consideration given for the first 32 months of a lease subject to Tax Law § 1111 (i) (B).

In reviewing a statute to determine the intention of the Legislature, we are mindful that the absence of facial ambiguity is not necessarily conclusive and that "[s]ound principles of statutory interpretation generally require examination of a statute's legislative history and context to determine its meaning and scope" (***New York State Bankers Assn. v Albright***, 38 NY2d 430, 434 [1975]). A review of the legislative history of Tax Law § 1111 (i) shows that in 1990, the Legislature adopted Tax Law § 1111 (i) (A), which provides special rules to accelerate the sales and compensating use tax payable on leases of motor vehicles. The reason for that change was to achieve parity in the sales tax treatment of motor vehicle leases and sales of motor vehicles and to generate immediate sales tax dollars upon the execution of a motor vehicle lease based upon the total rental payments, rather than receiving sales tax with the periodic rental payments made throughout the term of the lease (***see*** Sponsor's Memo, L 1992, ch 20, § 4). Apparently, the statute presented some confusion as to the proper amount of tax to be collected on long term commercial fleet leases that allow an indeterminate number of lease renewals. In response, the Legislature adopted Tax Law § 1111 (i) (B) in 1992. With this provision, the Legislature was specific in *deeming receipts paid* for a minimum of 32 months and setting forth the specific requirement that tax on those receipts is due at the inception of the lease. We find no indication in the legislative history that the Legislature intended to postpone the payment of sales tax until the end of the lease or allow lease end adjustments to be excluded from the receipts deemed to have been paid or given under TRAC leases.

Accordingly, petitioner's contention that the taxable transaction occurs at the end of the lease term when the TRAC provision adjustments are made cannot be squared with the statutory language and the clear intention of the Legislature to seek accelerated sales tax payments on motor vehicle leases subject to Tax Law § 1111 (i).

We also find no merit to petitioner's argument that the reference to IRC (26 USC) § 7701 (h) (2) (C) (i) in Tax Law § 1111 (i) (B) alters the transaction date of commercial fleet leases and requires that a TRAC provision adjustment must be factored into the consideration given or contracted to be given under such leases. The reference to the federal statute pertains only to the requirement that more than 50 percent of the use of the leased vehicle is to be in a trade or business of the lessee and provides no direction as to the calculation of taxable receipts for leases subject to Tax Law § 1111 (i) (B) or the timing of such tax payments.

We also disagree with petitioner's argument that the TRAC provision adjustment should be treated as an incentive that is excluded from the sales price subject to tax. While discounts may, in fact, serve to reduce the sales price of tangible personal property (***see*** 20 NYCRR 526.5 [c] [3]), generally, sales tax is due in full at the time of transfer of title to or possession of (or both) the property and is not necessarily tied to the ultimate net price paid by the consumer ***(see Matter of Prima Asphalt Concrete*** 162 AD2d at 1283***)***. Here, of course, the TRAC provision adjustments are not known or made until the end of the lease term, while the transfer of possession of the leased vehicles occurs at the inception of the lease. Further, as noted, the Legislature was quite specific as to when the tax is due for leases subject to Tax Law § 1111 (i).

We turn now to the question of whether petitioner may take a credit for refunds of sales tax it issued to its lessees for the TRAC provision adjustments. Sales tax may be refunded in limited circumstances only. A taxpayer may obtain a refund of sales tax "erroneously, illegally

or unconstitutionally collected or paid" (Tax Law § 1139 [a]). Such taxpayer bears the burden of proof to establish entitlement to the claimed refunds (20 NYCRR 3000.15 [d] [5]); ***see Matter of Gallagher***, Tax Appeals Tribunal, October 23, 2003).

This Tribunal has upheld the Division's regulatory limitation on refunds and credits in similar circumstances to the matter at hand in several cases that pertain to personal motor vehicle leases subject to Tax Law § 1111 (i) (A). In ***Matter of Moerdler*** (Tax Appeals Tribunal, April 26, 2001, ***confirmed*** 298 AD2d 7789 [3d Dept 2002]), no refund or credit was allowed the taxpayer whose automobile was stolen only four months into the lease period. In ***Matter of Torquato*** (Tax Appeals Tribunal, October 12, 2000), no refund or credit was allowed the taxpayer who moved to California and registered her automobile in that state ten months into the lease period. In these decisions, the Tribunal concluded that, in the circumstances where the lessor collected and the taxpayer paid the sales tax in the manner prescribed by Tax Law § 1111 (i) (A), such accelerated payment of tax on future payments under a car lease was not erroneously, illegally or unconstitutionally collected or paid pursuant to Tax Law § 1139 [a] and refunds were not allowed (***Matter of Thomas Gallagher***).

Petitioner argues, however, that the instant matter is distinguishable from previous refund cases decided by the Tribunal in that the credit sought here derives from the calculation of rent according to the terms of the lease agreements, rather than refunds claimed due to extrinsic factors. Petitioner urges that the conclusion of the subject leases was in the nature of a cancellation of a contract and return of merchandise and, as such, it is entitled to the relief afforded under Tax Law § 1132 (e). While we agree that the factual circumstances here differ from those in the noted refund cases, we cannot agree that Tax Law § 1132 (e) provides the relief sought by petitioner. Tax Law § 1132 (e) provides for the exclusion from taxable receipts

amounts representing sales where a contract of sale has been cancelled or the property returned. We find no evidence in the record to support the conclusion that the subject lease agreements were cancelled. To the contrary, the evidence shows that the subject leases expired pursuant to their own terms and the motor vehicles were returned at the end of the leases pursuant to those terms (***see*** finding of fact 5). There is no evidence that the required payments under the leases were not made or that lessees did not enjoy the use of the leased vehicles such that the lease agreements could be considered cancelled (***see Matter of Miehle***, Tax Appeals Tribunal, August 24, 2000 [motor vehicle lease agreement was not cancelled where neither party was returned to its original position]).

We note also that the Legislature did act subsequently during the 2022 legislative session to amend Tax Law § 1111 (i) (B) to specifically allow sales tax refunds and credits for lease end adjustments on TRAC leases (***see*** L 2022, ch 87, § 1). The added language of that section now provides:

> "If at the termination of a lease described in subparagraph one of this paragraph the lessor refunds a portion of the receipt or consideration to the lessee as required by a terminal rental adjustment clause of such lease, either: (i) the lessee may claim a refund or credit for the sales tax it paid on such refunded receipt or consideration: or (ii) the lessor may claim a refund or credit of the sales tax paid by the lessee on such refunded receipt or consideration if it has demonstrated to the satisfaction of the commissioner that it first refunded such tax to the lessee . . . ."

The amendment was effective for any consideration refunded on or after June 1, 2022.

The fact that the Legislature expanded the statute to specifically include a right to refund or credit for TRAC provision adjustments made at the end of a commercial fleet vehicle lease strongly supports our conclusion that such refunds and credits were not permitted by the version of the statute in effect during the period under review (***see Matter of Stein***, 131 AD2d 68, 72 [2d Dept 1987], ***appeal dismissed*** 72 NY2d 840 [1988] [by enacting an amendment of a statute, the

Legislature is deemed to have intended a material change in the law]; ***see also*** McKinney's Cons Laws of NY, Book 1, Statutes § 193).

Based upon the foregoing, we conclude that petitioner has failed to meet its burden to demonstrate its entitlement to the claimed credits.

We have considered petitioner's remaining arguments and find them to be without merit.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Gelco Corporation is denied;

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

3. The petition of Gelco Corporation is denied; and

4. The notice of determination, dated February 23, 2017, as adjusted pursuant to finding of fact 11, is sustained.

DATED: Albany, New York
December 21, 2023

/s/ Anthony Giardina
Anthony Giardina
President

/s/ Cynthia M. Monaco
Cynthia M. Monaco
Commissioner

/s/ Kevin A. Cahill
Kevin A. Cahill
Commissioner