STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **CLM ASSOCIATES, LLC** 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 September 1, 2004 through August 31, 2010.	: : : : : :	DETERMINATION DTA NO. 826735

Petitioner, CLM Associates, LLC, 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 September 1, 2004 through August 31, 2010.

A hearing was held before Herbert M. Friedman, Jr., Administrative Law Judge, in New York, New York, on March 28, 2016 at 10:30 A.M., and continued on March 29, 2016 at 9:15 A.M., with all briefs to be submitted by September 9, 2016, which date began the six-month period for the issuance of this determination. Petitioner appeared by Arent Fox LLP (Julius A. Rousseau III, Esq., Russell P. McRory, Esq., and Michael P. McMahan, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Osborne K. Jack, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly determined that the transfer of titles to motor vehicles from various dealerships to petitioner constituted sales subject to sales taxes pursuant to Tax Law § 1105(a).

II. Whether petitioner has demonstrated that it is entitled to credit for sales or use taxes previously paid.

FINDINGS OF FACT

1. Petitioner, CLM Associates, LLC, at all relevant times, was a single-member limited liability company located in Mount Kisco, New York, and wholly owned by the TPC Collection LLC (Premier).

2. Premier was an automotive sales and service group comprised of petitioner and eleven dealerships, each of which was also a single-member limited liability company wholly owned by Premier. The dealerships sold various makes of vehicles, including Land Rover, Volkswagen, Jaguar and Volvo.

3. Premier itself was owned by five individual members.

4. Petitioner and the other dealerships were disregarded entities and filed no income tax returns of their own. Instead, Premier filed single unified income tax returns for the group.

5. Premier's dealerships offered loaner cars (loaners) to its customers receiving service in accordance with the requirements of their respective manufacturers. These loaners, which arrived at the dealerships as new cars, were required by New York State law to be "hard-plated," meaning they needed to have a title and a permanent (non-dealer) license plate. Once titled, the loaners became used cars. Prior to 2002, each loaner was titled to the individual dealership that used it. At that time, petitioner was a licensed dealership.

6. Sometime in 2002, Premier restructured its business model. Petitioner ceased to be a licensed dealership, relinquished its dealership license, and instead became the administrative entity for the entire Premier group.

7. At any point during the relevant period, petitioner had approximately 30 employees who served various functions for the Premier group including accounting, human resources, records retention, information technology and marketing. Petitioner had its own office, which was located at one of Premier's dealerships.

8. As part of Premier's restructuring, it was decided that all loaners would be titled and insured in petitioner's name rather than that of the individual dealerships. The purposes for the restructuring were to centralize the loaner program, to facilitate the management of expenses, and to limit the potential liability of any one dealership. Premier's principals had a particular concern with the effects of New York's vicarious liability law (Vehicle and Traffic Law § 388). Sean Coughlin, president, chief operating officer, and a member of Premier, expounded on this latter point during his testimony:

> "[w]ell, if there was an accident that happened and one store couldn't afford to pay or it didn't have enough insurance to pay that accident, we could spread that liability around to a different dealership, so we wouldn't have to bankrupt one of them."

9. In order to effectuate each transaction, an invoice or bill of sale was created by the dealership listing petitioner as the purchaser of the particular loaner. Often, sales tax was reflected on the bill of sale, but never actually paid by petitioner.

10. The New York State Department of Motor Vehicles Form MV-50 (Retail Certificate of Sale), filed by the dealerships for each of the loaners, identified petitioner as the purchaser. The titles to the loaners were subsequently issued to petitioner.

11. The loaners that were titled to petitioner, as well as the actual titles themselves, remained in the possession of the dealership that used the particular loaners. Petitioner itself did not use the loaners.

12. Upon petitioner's obtaining title to a particular loaner, the vehicle would go into petitioner's booked inventory, and a payable would be entered on petitioner's general ledger. Likewise, the dealership's booked inventory was reduced, and a receivable would be created for each transaction and entered on the particular dealership's books. No funds were provided by petitioner to the dealership, however. Typically, a loaner was eventually taken out of service and sold to an individual customer as a used vehicle. At that time, the title would be signed on behalf of petitioner by an employee at the particular dealership selling the vehicle, and the aforementioned book entries would be reversed.

13. Petitioner and the dealerships were joint and several obligors on the master floor plan lines of credit for the loaners. The dealerships and Premier guaranteed petitioner's performance of its obligations under the floor plan agreements.

14. Expenses associated with the loaners were directed to the respective dealerships by petitioner. For instance, the interest expense on the floor plan financing on the loaners was billed by the lender directly to petitioner, who then in turn allocated the expense to the respective dealers that possessed the loaners. Similarly, administrative fees for registering titles and deductibles from insured loaner claims, although incurred by petitioner, were allocated by Premier to the dealerships that were in possession of the loaners. Meanwhile, petitioner's operating expenses, including payroll, and insurance premiums for the loaners, were allocated to the dealerships based upon a formula derived from the amount of full-time employees at each dealership. Ultimately, the aforementioned expenses were paid out of one master checking account owned by Premier.

15. Petitioner and Premier's dealership group were insured through master multi-level policies covering the whole group. The liability limits on these policies were $6,300,000.00 per

accident for the years 2004 and 2005, and were increased to $26,000,000.00 per accident for the years 2006 through 2010. Between 2004 and 2010, neither petitioner nor the Premier dealership group faced a claim that exceeded its insurance coverage.

16. Petitioner did not have its own checking account during the relevant period.

17. Petitioner did not file any sales tax returns or remit sales tax for the audit period.

18. While performing an audit on another related entity, the Division discovered petitioner's numerous loaner transactions. As a result, on September 27, 2010, the Division commenced a sales and use tax audit of petitioner for the period September 1, 2004 through August 31, 2010 (audit period) and requested books and records.[1] The records provided by petitioner were deemed adequate by the Division in order to perform a direct audit. Given the voluminous nature of the records, however, petitioner and the Division agreed to a test period audit method election.

19. The Division selected 2009 as the year for its test period, with application of a straight-line method over the other years of the audit period. Petitioner did not object to the use of the year 2009 as the test period or use of the straight-line method.

20. In performance of its audit, the Division examined all transactions in 2009 involving the loaners. The transactions were reflected by bills of sale (or invoices) and the general ledgers. When reviewing the bills of sale, each of which evidenced a purchase price for the loaner, the Division noticed that some showed sales tax due, while others either had the tax entered and erased or not listed at all. Under each circumstance, no sales tax was paid by petitioner on the transaction.

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[1] The Division's auditor testified that the audit only went back to 2004, rather than the date of Premier's restructuring, as a typical unregistered vendor audit would only involve the prior six years.

21. After completing its review, the Division determined that the transfer of the loaners to petitioner constituted taxable sales of tangible personal property without any exemption. The Division concluded that the benefits gained by the dealerships, as well as the liabilities undertaken by petitioner upon transfer of the loaners, constituted the necessary consideration.

22. In reaching its conclusion, the Division also gave petitioner credit for vehicles that were traded in (trade-ins) by petitioner as part of the transaction.[2] The Division found it difficult in many cases, however, to identify a particular vehicle that was directly traded for a new loaner. The invoices used by the dealerships provided for a description of any trade-in and a line item for the value of a trade-in when calculating the taxable sales price. Credit was given by the Division for trade-ins that plainly appeared on the bills of sale or invoices, as was the general practice. Additionally, credit was given for trade-ins that may not have appeared on the bills of sale but had some sort of other evidence (such as a separate note) of the trade, as long as it occurred on the same day as the transaction. Finally, petitioner provided the Division with a list of all claimed trade-ins, whenever they may have occurred and whether documented or not, and the Division gave credit for those that occurred on the same day as the loaner acquisition.

23. The Division applied all transactions involving the loaners acquired by petitioner in 2009, and extrapolated the results over each quarter of the audit period. For the first year of the audit period (September 1, 2004 through August 31, 2005), the Division did not allow for a trade-in credit where there was no evidence that a loaner had been previously taxed or traded-in. The rationale for this method was that the first loaners acquired in the test period had not been previously taxed or purchased by petitioner. Once transferred to petitioner, they became eligible

[2] Typically, these trade-ins were older loaners returned by petitioner to the particular dealership.

to be traded in for new loaners and, once traded back to the dealerships, they were deemed taxed and the appropriate credit given. For years two through six of the audit period (September 1, 2005 through August 31, 2010), the Division gave a trade-in credit for any vehicle that was proven to have been traded to the dealership on the same day as petitioner's acquisition of a loaner. After applying a credit, the difference in value between the loaner acquired by petitioner and the trade-in constituted the amount subject to sales tax.[3]

24. At the conclusion of the audit, the Division issued a Notice of Determination, dated June 5, 2013, to petitioner, asserting $1,137,835.16 in sales tax and $701,752.35 in interest based on a finding of liability for the audit period. When broken down, the tax due for each quarter in the first year, i.e., September 1, 2004 through August 31, 2005, was $68,570.89. The tax due for each quarter in the second through sixth year, i.e., September 1, 2005 through August 31, 2010, was $43,177.58. The discrepancy was attributed to the unavailability of trade-in credits during the first year of the audit period (***see*** Finding of Fact 23).

25. In general, during the relevant period, a dealer could compute the state and local use tax on "mixed use" vehicles (mixed use tax). Among other situations, mixed use tax was due on vehicles held in a dealer's inventory for resale but loaned to a customer while their vehicle was under repair. The mixed use tax was applicable to vehicles titled and used by the dealer for six months or less with no mileage restriction, or between six months and one year with a 15,000-mile restriction (***see*** TSB-M-02[3]S).

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[3] On occasion, the trade-in had a higher value than the loaner being acquired by petitioner. In that event, according to the Division, no sales tax was due on the transaction.

26. In certain instances with the loaners in the instant case, the dealerships paid a mixed-use tax, and not sales tax, during the audit period in the belief that was the proper tax to be paid under the circumstances despite the fact that the loaners were titled to petitioner.

27. The dealerships anticipated exceeding the mixed use standards (***see*** Finding of Fact 25) for several of the loaners in their possession (long term loaners). As a result, sales tax, and not use tax, was paid. At hearing, petitioner presented invoices and payment records for sales tax paid by the dealerships on long term loaners, which, although titled to petitioner, were possessed by a particular dealership. In total, sales tax totaling $70,774.00 was paid by the dealerships on behalf of petitioner during the audit period for 31 long term loaners.

28. The Division's auditor testified at hearing. In his testimony, he conceded that although petitioner should have paid the sales tax on the long term loaners when titled in its name, "probably it would be fine" if the dealerships paid the tax instead.

29. At hearing, petitioner presented the testimony of John Lucarelli, a Certified Public Accountant hired by petitioner in 2014 to review and assist it with the Division's audit.

30. Mr. Lucarelli reviewed and analyzed the Division's workpapers and determination. In response, he found that several adjustments to the Division's audit results were warranted. In addition, he presented his own spreadsheets and conclusions with substitute audit results.

31. Mr. Lucarelli's critique of the audit consisted of three categories of adjustments. First, he gave petitioner credit for all claimed trade-ins involved in the loaner transactions, regardless of the number of intervening days between the sale of the loaner and the trade. That adjustment caused a reduction of $584,660.94 in petitioner's total tax due. Second, Mr. Lucarelli reduced the Division's calculation of total tax due by the purported amount of mixed use tax paid by the dealerships during the audit period, or $186,288.73. Third, Mr. Lucarelli further reduced the

Division’s tax calculation by the amount of sales tax paid by the dealerships on the long term loaners during the audit period, or $70,774.00. In total, Mr. Lucarelli calculated that if the transfers to petitioner constituted taxable retail sales, as the Division maintained, the true amount of sales tax owed was $327,598.21 after the above adjustments, and not the $1,137,835.16 reflected in the Notice of Determination.

32. Mr. Lucarelli examined all 159 transactions reviewed by the Division. There was no dispute that 21 of them did not involve a trade-in and, thus, were fully taxed. He also agreed that 64 others were likewise treated as the first car in and fully taxed.

33. Additionally, Mr. Lucarelli presented his own alternative method of calculation of the sales tax owed by petitioner based on its records. Under his method, he ascertained the highest number of loaners at each dealership during any December in the audit period (with the belief that December was a representative month), multiplied that figure by the average loaner value, and then by the applicable sales tax rate to arrive at sales tax owed of $361,809.23. After application of mixed use and sales tax previously paid, and credit for all trade-ins, Mr. Lucarelli concluded that the net sales tax owed by petitioner under his methodology was $114,818.10.

34. Petitioner was neither a governmental entity nor an exempt organization pursuant to Tax Law § 1116.

35. Shortly after the audit period, Premier again changed its business model and the titles of the loaners were no longer transferred to petitioner. Instead, the individual dealerships retained the titles to the loaners.

36. Petitioner submitted with its brief proposed findings of fact 1 through 81 and proposed conclusions of law 1 through 15 pursuant to State Administrative Procedure Act (SAPA)

§ 307(1). Petitioner's proposed findings of fact 1 through 4, 6 through 17, 19 through 26, 28 through 32, 35 through 41, 44, 49 through 53, 56, 57, 60 through 65, 68, 70 and 76 are accepted and incorporated into the Findings of Fact set forth above. Proposed findings on fact 5, 18, 43, 45 through 48, 54, 55, are rejected as not completely consistent with the evidence in the record. Proposed finding of fact 25 is blank, and therefore does not state a proposed fact. In addition, petitioner's proposed findings of fact 27, 33, 34, 42, 58, 59, 66, 67, 69, 71 through 74, 75, 77, 78, 79, 80 and 81 are conclusions of law and need not be ruled on pursuant to SAPA. Likewise, proposed conclusions of law 1 through 15 need not be ruled upon for the same reason.

SUMMARY OF THE PARTIES' POSITIONS

37. Petitioner argues that its owes no sales tax whatsoever as the transfers in question do not constitute sales under the law. It claims that there was no consideration given for receiving nominal title to the loaners. Alternatively, petitioner maintains that if there is sales tax due, the Division miscalculated the proper amount because it did not give credit for trade-ins that did not occur on the same day or sales and use taxes paid by the dealerships.

38. The Division contends that petitioner's purchases of the loaners were subject to sales tax under the Tax Law and regulations as there was consideration passed to the seller. Additionally, the Division argues that petitioner failed to meet its burden to demonstrate that the audit methodology was unreasonable. Finally, it disputes that petitioner is entitled to credit for sales and use taxes previously paid by the dealerships.

CONCLUSIONS OF LAW

A. The first issue that must be decided is whether the transfer of titles of the loaners to petitioner constituted taxable retail sales pursuant to Tax Law § 1105(a). A "retail sale" is "[a] sale of tangible personal property to any person for any purpose, other than . . . for resale as such

. . .” (Tax Law § 1101[b][4][i][A]). The term “sale” is defined by Tax Law § 1101(b)(5) as “[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 . . . .” Tax Law § 1132(c)(1) sets forth a presumption that all sales receipts for tangible personal property are subject to tax “until the contrary is established,” and sets the burden of proving the contrary upon the vendor or its customer (20 NYCRR 532.4[a][1]; [b][1]).

B. Petitioner does not dispute that the titles to the vehicles in question were transferred to it. Instead, petitioner’s contention is that sales did not occur pursuant to the statute as there was no consideration for the transfers. 20 NYCRR 526.7(b) provides that “[t]he term *consideration* includes monetary consideration, exchange, barter, the rendering of any service, or any agreement therefor. *Monetary consideration* includes assumption of liabilities, fees, rentals, royalties or any other charge that a purchaser, lessee or licensee is required to pay.” Furthermore, under circumstances similar to the present case, the Tax Appeals Tribunal has also applied the common law definition of consideration, which is “some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other (citations omitted)” (***Matter of Hygrade Casket Corporation***, Tax Appeals Tribunal, December 16, 1993). Applying these principles to the case at bar, it must be concluded that petitioner provided consideration in return for the titles. By acquiring title to a loaner, petitioner undertook its accompanying liability and allowed the dealerships the significant benefit of spreading any severe loss rather than suffering a direct catastrophic financial loss. Petitioner also assumed responsibility as a joint and several obligor on the floor plan financing for the loaners. Moreover, consolidation of the titles under one owner made them easier to manage, thereby easing the dealerships' burden. In sum, petitioner assumed responsibilities that it did not previously have, while the dealerships gained benefits, both hallmarks of consideration. As a result, the transfers of the titles in question were taxable retail sales under Tax Law § 1105(a).

C. The conclusion that the transactions at issue are taxable sales is further bolstered by the accounting entries for the transfers on the books of petitioner and the dealerships. The Tax Appeals Tribunal has found that similar accounting entries, even among related entities, were sufficient evidence of the consideration necessary to meet the definition of a sale under Tax Law § 1105(b)(5) (***see Matter of Hygrade Casket Corporation***).

> "The transfer of value (i.e., the shifting of assets and/or the creation of liabilities), which is often the consideration in a contract, is difficult to discern under this scenario because, in substance, the value that is 'transferred' merely passes from one pocket of the parent to the other. Thus, we acknowledge that the classification of such transfers as 'consideration' or 'detriments' in this context is purely formalistic when viewing the corporations as a single economic unit, but one that is required under the statute, the regulations and the case law in applying the sales tax" (***Matter of Hygrade Casket Corporation***, citing ***Matter of 107 Delaware Assocs. v. New York State Tax Commn.***, 64 NY2d 935 [1985]; ***Matter of Motion Marketing Assocs.***, Tax Appeals Tribunal, July 23, 1992; ***Matter of Tops, Inc.***, Tax Appeals Tribunal, November 22, 1989).

D. Petitioner's arguments against the taxability of the transactions are not persuasive. First, petitioner maintains that since the dealerships were the entities actually in possession and control of the loaner, they remained fully liable for negligent deaths or injuries as "owners" under Vehicle and Traffic Law §§ 128 and 388. Consequently, according to petitioner, the dealerships did not shed responsibility and, thus, the requisite consideration is missing. A full reading of those statutes, however, evinces that petitioner, upon becoming titleholder to the loaners, was jointly and severally liable for such losses. The assumption of such liability, in fact, served as the primary reason for the transactions at issue. Petitioner's ancillary argument that it lacked the financial capabilities to pay such a loss, while debatable on this record, is of no moment. By petitioner assuming responsibility as an owner, which clearly benefitted the dealerships, it provided the consideration required by the statute.

E. Petitioner further contends that the substance of the transactions did not change the true financial responsibilities of the organization given the common ownership of the group by Premier. This position contradicts the factual record and is not supported by case law. "For the purpose of sales tax liability, petitioner is bound by the form it has chosen" (***Matter of Tops, Inc.***, citing ***107 Delaware Associates v. State Tax Commn.*** 99 AD2d 29 [3d Dept 1984], ***revd on dissenting opn below*** 64 NY2d 935 [1985]; ***Matter of Greco Bros. Amusement Co. v. Chu***, 113 AD2d 622 [3d Dept 1986]). Petitioner and Premier elected to conduct business in a certain manner and, in so doing, chose to transfer titles to the loaners to petitioner in return for several significant benefits to Premier and the dealerships, including control over the allocation of actual and potential losses. Indeed, titling the loaners in petitioner's name potentially shielded other members of the Premier group from various types of liability. Petitioner may not disregard this self-created arrangement to avoid sales tax disadvantages resulting therefrom.

F. Petitioner also asserts that it lacked notice of the sales tax ramifications of transfers of the loaners and relies on an advisory opinion in support of its position (***Browning-Ferris Industries, Inc.***, Advisory Opinion, January 9, 1986, TSB-A-86[4]S). Of course, it must initially be noted that advisory opinions are non-binding (***see Matter of Finance Corp. v. Tax Commn.***, 117 AD2d 103 [1986] [held that advisory opinions are binding only upon parties who requested the opinion]; ***Matter of Building Contractors Assoc. v. Tully***, 65 AD2d 199 [1978] [administrative guidelines held non-binding]). However, "an advisory opinion may lend some guidance to a similarly situated taxpayer" (***Matter of DZ Bank***, Tax Appeals Tribunal, May 11, 2009). The cited advisory opinion states that if the transfer of tangible personal property between related corporations is done as a legitimate contribution to capital without consideration, such will not be deemed a retail sale. In the instant case, however, there were several benefits to the dealerships, and numerous undertakings by petitioner by virtue of the transfers, thereby creating consideration. Meanwhile, petitioner's assertion that it lacked notice of its sales tax obligations ignores the existing statutory and regulatory provisions of Article 28. To the extent that there was any ambiguity or question with regard to the taxability of the arrangement, the record lacks any evidence of petitioner's request for its own advisory opinion on the issue. Hence, this argument, and the cited advisory opinion offered by petitioner, are not persuasive.

G. In the alternative, petitioner argues that if the transactions at issue were taxable sales, numerous adjustments to the Division's determination are warranted. As a threshold matter, it must be noted that Tax Law § 1138(a)(1) provides, in relevant part, that if a sales tax return is not filed, "or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined [by the Division of Taxation] from such information as may be available. If necessary, the tax may be estimated on the basis of external indices . . . ." (Tax Law § 1138[a][1]). Here, petitioner's records were deemed adequate by the Division for performance of a direct audit. A taxpayer who maintains and makes available complete and adequate records may nonetheless consent to the Division's use of indirect auditing methodologies, including the test period method (***see e.g. Matter of 21 Club, Inc.***, Tax Appeals Tribunal, September 4, 2008). Under these circumstances, the Division is required to select an audit methodology reasonably calculated to reflect the tax due. The burden then rests upon the taxpayer to demonstrate that the audit methodology or the amount of the assessment was erroneous (***see Matter of Your Own Choice, Inc.***, Tax Appeals Tribunal, February 20, 2003).

H. In the case at bar, given the voluminous amount of records, petitioner agreed to the test period (the year 2009) and method chosen by the Division. Nevertheless, petitioner proposes several adjustments to the Division's calculation. First, petitioner maintains that the Division erroneously allowed only trade-ins that occurred on the same day as a particular transaction, while arbitrarily ignoring trade-ins that did not meet this standard. This proposed adjustment, however, is unwarranted based on the record presented. The sale of each loaner to petitioner was documented by an invoice or bill of sale. On that invoice was a section specifically provided for the entry of information concerning a trade-in as part of the transaction. It was this document that was specifically designed to record the existence and value of a trade-in and it was incumbent upon petitioner to complete and provide this form of proof to substantiate its claim to a credit (***see*** Tax Law § 1135[a][1]). The problem for petitioner on this issue is not the time between a sale and purported trade-in, but substantiation of a specific trade of one loaner directly for another. Petitioner simply did not provide the invoices that would support the claimed trade-ins. Rather than unduly limit the amount of allowable trade-ins, as argued by petitioner, the Division generously and reasonably allowed petitioner credit for those trade-ins that could be demonstrated were made in the same day as the sale of the loaner, regardless of formal documentation. This approach is hardly arbitrary and, in fact, inures to the benefit of petitioner. Without the requisite proof of specific identifiable trade-ins, the Division's approach must be sustained.

I. Petitioner also seeks a credit for use tax paid by the dealerships on their use of the loaners. This stance ignores the distinction between the sales tax and use tax. The sales tax is a transaction tax, and petitioner, as the purchaser of the loaners, became liable for sales tax as each of the sales occurred (***see*** Tax Law § 1105). The Tax Appeals Tribunal in ***Matter of BAP Appliance Corp.*** (June 29, 1989) noted as follows:

> "The sales tax is a transaction tax; liability for the tax occurs when the transaction takes place. Generally, the taxed transaction consists of the transfer of title or possession of property or the rendition of services in exchange for consideration, and the vendor collects the tax from the customer when the transaction occurs. The time or method of payment is immaterial since the tax becomes due at the time of the transfer of property or rendition of services (***see generally***, 20 NYCRR 525.2)."

Despite petitioner's failure to pay sales tax to the dealerships as each of the sales occurred, it nonetheless remained liable for the unpaid sales tax pursuant to Tax Law § 1133(b). Meanwhile, Tax Law § 1110(a) states that, except to the extent that property has been subject to the sales tax, a use tax is imposed on every person for use within the state of tangible personal property purchased at retail. Tax Law §§ 1105 and 1110 evince a clear direction that, under the circumstances presented here, sales tax was due at the time petitioner purchased the loaners and that the use tax is inapplicable. Likewise, the dealerships' payment of use tax does not entitle petitioner, a different taxpayer under Article 28, to receive a credit or refund for unpaid sales tax in the first instance on its purchase of the loaners under what is essentially an improper equitable recoupment claim (***see Matter of Lipner***, Tax Appeals Tribunal, May 13, 2004; ***see also Matter of WIXT-TV***, Tax Appeals Tribunal, August 2, 1990).[4]

J. Petitioner is correct, however, that an adjustment is warranted for the documented sales tax paid on the purchases of the long term loaners. Petitioner has demonstrated that sales tax in the amount of $70,774.00 was paid on long term loaners sold to it during the audit period. In addition, as the Division's auditor conceded at hearing, the properly substantiated sales tax

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[4] Whether the dealerships themselves are entitled to a refund for use tax paid is not for determination here.

payments on the loaners, even if remitted by the dealerships as is customary in the business, is consistent with Article 28, and should be credited (***see Ames Volkswagen, Ltd. v. State Tax Commn***, 47 NY2d 345 [1979]). As a result, the Division is directed to adjust the Notice of Determination to accurately reflect the payment of $70,774.00 in sales tax and apply the correct amount of interest.

K. At hearing, petitioner also presented Mr. Lucarelli's alternative calculation of tax due using his separate methodology (***see*** Finding of Fact 33). Petitioner, however, cannot invalidate the Division's audit simply by offering its own estimate of tax liability as a substitute for the Division's (***see Matter of 33 Virginia Place***, Tax Appeals Tribunal, December 23, 2009; ***Matter of Albanese Ready Mix***, Tax Appeals Tribunal, June 15, 1989; ***Matter of Sol Wahba, Inc. v. New York State Tax Commn.***, 127 AD2d 943 [1987]). Thus, the results of Mr. Lucarelli's separate substitute audit must be disregarded.

L. The petition of CLM Associates, LLC is granted to the extent indicated in Conclusion of Law J; the Division of Taxation is hereby directed to modify the Notice of Determination issued June 5, 2013 accordingly; and, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York
February 23, 2017

/s/ Herbert M. Friedman, Jr.
ADMINISTRATIVE LAW JUDGE