05-1786
SALES TAX
SIGNED: 03-05-2009
COMMISSIONERS: P. HENDRICKSON, R. JOHNSON, M. JOHNSON, D. DIXON
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

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| PETITIONER,<br><br>Petitioner,<br><br>v.<br><br>TAXPAYER SERVICES DIVISION OF THE UTAH STATE TAX COMMISSION,<br><br>Respondent. | **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION**<br><br>Appeal No. 05-1768<br><br>Account No. #####<br><br>Tax Type: Sales Tax Refund<br><br>Judge: Chapman |

**Presiding:**
R. Bruce Johnson, Commissioner
Kerry R. Chapman, Administrative Law Judge

**Appearances:**
For Petitioner: PETITIONER REP., Representative
For Respondent: RESPONDENT REP., Assistant Attorney General

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on January 28, 2009.

On February 5, 2009, Taxpayer Services Division ("Division") submitted its Opposition to Formal Hearing Exhibit, in which it objected to an exhibit that PETITIONER ("Petitioner" or "PETITIONER") submitted at the Formal Hearing and that the Commission marked as Exhibit P-1.[1] The Division objected to the Commission receiving the document because PETITIONER had not submitted it to

1 The exhibit consists of forty pages that are numbered Page 1 of 46 through Page 40 of 46. Pages 41 through 46 of the document, if they exist, were not submitted at the Formal Hearing.

the Division to review prior to the hearing. PETITIONER stated that although Exhibit P-1 was in a different format, it contained the same information that PETITIONER had previously provided in another document during the appeals process. At the Formal Hearing, the Commission received Exhibit P-1, but informed the Division that it could file a motion to exclude the exhibit if the previously submitted document did not contain the same information.

The only similar document provided by PETITIONER during the appeals process is Attachment 3 to the Petitioner's Motion for Summary Judgment dated July 20, 2007 ("Attachment 3"). This document, however, consists of only ten pages,[2] whereas Exhibit P-1 consists of 40 pages. Furthermore, Attachment 3 only contains information about repossessions with a "charge off date" in 2003. Exhibit P-1 contains information about repossessions with charge off dates not only in 2003, but also in 2002. It is apparent that Exhibit P-1 contains information that is not included in Attachment 3 and that was not exchanged with the Division prior to the Formal Hearing. As a result, the Commission grants the Division's Opposition to Formal Hearing Exhibit and will not consider Exhibit P-1 as evidence for purposes of this decision.

Based upon the remaining evidence and testimony presented, the Tax Commission hereby makes its:

## FINDINGS OF FACT

1. At issue is a Utah sales and use tax refund request made by PETITIONER.

2. The refund request concerns sales tax paid on motor vehicles that PETITIONER repossessed between January 1, 2002 and August 28, 2003.

3. PETITIONER REP., who represents PETITIONER, also testified on PETITIONER's behalf. PETITIONER REP. explained that PETITIONER was in the business of acquiring and carrying dealer-financed loans from motor vehicle dealers. PETITIONER asserts that most of the loans that

PETITIONER acquired were non-recourse loans for which the dealer assigned all rights to PETITIONER, with PETITIONER assuming risks of collections without recourse to the dealer.[3]

4. The dealers who sold the repossessed vehicles at issue, not PETITIONER, collected and remitted sales tax on the vehicles to Utah.

5. PETITIONER has no evidence to show that any of the dealers that sold the vehicles at issue are out of business.

6. PETITIONER does not have a power of attorney or other documentation to show that the dealers who sold the repossessed vehicles authorized PETITIONER to request a refund of sales tax on their behalves.

7. On May 12, 2005, PETITIONER REP. submitted a letter to the Division, in which he stated that the PETITIONER "has engaged me to examine their sales tax refund claims from repossession credits and ensure that they are the maximum allowed by law" and in which he asked the Division to "give us access to the repossession credit filings that [PETITIONER] has made in the past."[4] Included with this letter was a USTC Form TC-98 (Application to Extend Time to File a Claim for Refund) ("Form TC-98"), in which PETITIONER REP. requested an extension to file a claim for refund for repossessions that occurred between April 1, 2002 and March 31, 2005.

8. On May 16, 2005, the Division notified PETITIONER REP. that "[r]epossession credits are only allowed to the selling dealer" and that "[t]he statute for a repossession credit starts on the date of the repossession."[5] The Division informed PETITIONER REP. that Utah Code Ann. §59-12-110(2)(c) only

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2 The ten pages are numbered Page 46 of 88 through page 55 of 88.
3 Petitioner's Memorandum of Authorities, Formal Hearing.
4 Exhibit 3 of the Division's Opposition to Petitioner's Motion for Summary Judgment (Division's "Opposition to Motion").
5 Exhibit 4 of the Division's Opposition to Motion.

authorizes an extension if the three-year period under Section 59-12-110(2)(b) has not expired. The Division further informed PETITIONER REP. that the three-year period to claim a refund for repossessions that occurred prior to May 12, 2002 has already expired when PETITIONER REP. submitted his May 12, 2005 extension request. As a result, the Division gave PETITIONER REP. 10 days to amend the extension request to exclude any repossession transactions dated prior to May 12, 2002 and informed him that, "[o]therwise, we must deny your request."

9. On May 26, 2005, PETITIONER REP. sent an amended Form TC-98 to the Division, on which he changed the starting date of the tax period for which he sought an extension from April 1, 2002 to May 12, 2002.[6]

10. On May 27, 2005, the Division sent PETITIONER REP. a written acknowledgement, informing him that it had approved a 90-day extension to file a refund claim for repossessions that occurred on or after May 12, 2005.[7] The acknowledgment included the second page of the amended Form TC-98 that PETITIONER REP. filed, on which a Division employee approved the extension and indicated that it would expire on August 10, 2005. This page also included "Instructions to Claim a Refund," which stated that "[t]his application is NOT your Claim for Refund – it is only an application to receive an extension of time to file a claim for refund. All refund claims must be filed on or before the extension expiration date and include the information listed below."

11. On October 31, 2005, PETITIONER REP. sent the Division another Form TC-98, on which he requested an extension to file a claim for refund for repossessions that occurred between May 1, 2002 and September 30, 2005.[8] On this Form TC-98, PETITIONER REP. explained that he was requesting an additional extension of time to file PETITIONER's claim because the Division had appealed the August 15,

6 Exhibit 5 of the Division's Opposition to Motion.
7 Exhibits 5 and 6 of the Division's Opposition to Motion.

2005 Initial Order that the Commission issued in another appeal before the Commission, specifically *Appeal No. 05-0307*.[9]

12. On November 28, 2005, the Division sent a letter to PETITIONER REP. informing him that the original 90-day extension, which it had granted in May 2005, had expired on August 11, 2005.[10] The Division explained that because PETITIONER had not filed a claim prior to the extension expiration, any claim for refund for a repossession that occurred prior to October 31, 2002 was past the statute of limitations. As a result, the Division concluded that it could not grant the new extension request for periods prior to October 31, 2002, pursuant to Section 59-12-110(2).

13. On December 20, 2005, PETITIONER submitted its Petition for Redetermination, in which it asked the Commission to reconsider the Division's actions.

14. This matter previously came before the Commission on October 17, 2007 for a hearing on PETITIONER's Motion for Summary Judgment. On December 11, 2007, the Commission issued an Order Denying Petitioner's Motion for Summary Judgment, in which the Commission issued the following rulings:

> . . . the Commission finds as a matter of law:
> 1) that . . . the Petitioner, as the assignee of non-recourse, dealer-financed loans from dealers still in business, may not receive a sales tax credit or refund on a repossession unless the dealer requests the credit or refund and passes it on to the Petitioner or the Petitioner receives and submits authorization, such as a power of attorney, from the dealer to act on its behalf;
> 2) that the Petitioner, as a financial institution, may not claim a credit or refund for the repossessions at issue on the date its annual sales tax return or the dealers' monthly sales tax returns were due, but must request a credit or refund for a

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8 Exhibit 7 of the Division's Opposition to Motion.

9 The Commission issued its Final Decision in *Appeal No. 05-0307* on April 21, 2006. The decision in *Appeal No. 05-0307* addressed the calculation of a repossession refund, but did not address the matters that the Commission addresses in this appeal.

10 Exhibit 8 of the Division's Opposition to Motion.

> repossession within three years of the date of the repossession for the request to be considered timely; and
> 3) that the Petitioner's credit or refund claims for repossessions that occurred prior to October 31, 2002 are barred pursuant to Section 59-12-110(2).

14. At the Formal Hearing, PETITIONER asks the Commission to review the legal conclusions that it reached in its Order Denying Petitioner's Motion for Summary Judgment. PETITIONER specifically asks the Commission to find that: 1) a financial institution, such as PETITIONER, that acquired non-recourse, dealer-financed loans may request and receive sales tax refunds in regards to repossessed vehicles, even though the dealers who sold the vehicles are still in business and the financial institution has not received powers of attorney or other documentation authorizing it to request a refund on the dealers' behalves; and 2) that PETITIONER's refund request is timely for repossessions occurring as early as January 1, 2002.

APPLICABLE LAW

1. During the period at issue, UCA §59-12-107(7)[11] (2003) provided for a credit of sales tax concerning repossessions, as follows:

> Credit is allowed for prepaid taxes and for taxes paid on that portion of an account determined to be worthless and actually charged off for income tax purposes or on the portion of the purchase price remaining unpaid at the time of a repossession made under the terms of a conditional sales contract.

2. Also during the period at issue, Utah Admin. Rule R865-19S-20 ("Rule 20")[12] provided guidelines concerning the credit or refund of sales tax on repossession, as follows in pertinent part:

> C. Justified adjustments may be made and credit allowed for cash discounts, returned goods, bad debts, and repossessions that result from sales upon which the tax has been reported and paid in full by retailers to the Tax Commission.
> . . . .

11 Until July 1, 2001, subsection 107(7) was codified as subsection 107(8). As a result, some of the older cases and rulings discussed in the decision refer to this provision as subsection 107(8). Subsequent to the audit period, the subsection was deleted. The current repossession credit provisions are found in UCA §59-12-104.3.

12 When UCA §59-12-104.3 became effective on July 1, 2005, all references to the repossession credit were removed from Rule 20.

> 5. c) The credit for repossession shall be reported on the dealer's or vendor's sales tax return with an attached schedule showing computations and appropriate adjustments for any tax rate changes between the date of sale and the date of repossession.
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> 6. Credit for tax on repossessions is allowed only to the selling dealer or vendor.
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> a) This does not preclude arrangements between the dealer or vendor and third party financial institutions wherein sales tax credits for repossessions by financial institutions may be taken by the dealer or vendor who will in turn reimburse the financial institution.
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> b) In the event the applicable vehicle dealer is no longer in business, and there are no outstanding delinquent taxes, the third party financial institution may apply directly to the Tax Commission for a refund of the tax in the amount that would have been credited to the dealer.

3. UCA §59-12-110(2) (2005) provides for the credit or refund of sales tax, as follows in pertinent part:

> . . . .
> (2) (a) If a taxpayer pays a tax, penalty, or interest more than once or the commission erroneously receives, collects, or computes any tax, penalty, or interest, including an overpayment described in Subsection (1)(c), the commission shall:
>
> (i) credit the amount of tax, penalty, or interest paid by the taxpayer against any amounts of tax, penalties, or interest the taxpayer owes; and
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> (ii) refund any balance to the taxpayer or the taxpayer's successors, administrators, executors, or assigns.
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> (b) Except as provided in Subsections (2)(c) and (d) or Section 19-2-124, a taxpayer shall file a claim with the commission to obtain a refund or credit under this Subsection (2) within three years from the day on which the taxpayer overpaid the tax, penalty, or interest.
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> (c) . . . , the commission shall extend the period for a taxpayer to file a claim under Subsection (2)(b) if:
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> (i) the three-year period under Subsection (2)(b) has not expired; and
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> (ii) the commission and the taxpayer sign a written agreement:
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> (A) authorizing the extension; and
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> (B) providing for the length of the extension.
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> . . . .

## DISCUSSION

PETITIONER acquired non-recourse, dealer-financed loans on vehicles that it later repossessed. PETITIONER asks the Commission to refund a portion of the sales tax that the Utah dealers

collected and remitted on these vehicles. There is no evidence to show that any of the dealers who sold the vehicles at issue in this appeal are out of business. Furthermore, there is no evidence to show that the dealers have authorized PETITIONER to request and receive a refund of sales tax on their behalves. Under these circumstances, the Commission found in its Order Denying Petitioner's Motion for Summary Judgment that Utah law does not allow PETITIONER to receive a refund or credit of sales tax on the repossessions. However, at the Formal Hearing, PETITIONER asked the Commission to reconsider its prior legal ruling.

Section 59-12-107(7) provides for a sales tax "credit" for repossessions. PETITIONER argues that it should be entitled to receive a sales tax refund for repossessed vehicles because Section 59-12-107(7) does not expressly forbid a dealer's assignee from receiving the credit and because Section 59-12-110(2)(a)(ii) expressly provides for sales tax to be refunded to "the taxpayer or the taxpayer's successor's administrators, executors, or **assigns**" (emphasis added). PETITIONER also argues that general principles of contract law concerning assignments do not restrict a financial institution from receiving a refund of the sales tax under the circumstances. The Commission, however, does not believe that Utah law provides for PETITIONER to receive a refund or credit under the circumstances present in this case.

First, Section 59-12-107(7), a provision that is *specific* to repossessions, provides only for a credit, while Section 59-12-110(2)(a), which is a general statute, provides for both credits and refunds.[13] The dealers, not PETITIONER, collected and remitted sales tax on the vehicles at issue. The Commission believes that the Legislature specifically provided for credits, not refunds, in Section 59-12-107(7) so that a dealer who reported and remitted the sales tax would make adjustments for repossessions on an ongoing basis on its next sales tax return, thereby reducing its liability on its next periodic report.

13 *See Hercules v. Utah State Tax Comm'n*, 21 P.3d 231 (Utah Ct. App. 2000) at fn. 3, where the Court points out that when "two provisions address the same subject matter and one provision is general while the other is specific, the specific provision controls" (citing *Dairyland Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 882 P.2d 1143 (Utah 1994).

The Commission also notes that Subsection 59-12-110(2)(a)(i) allows a taxpayer to take a credit. In Subsection 59-12-110(2)(a)(ii), however, the Legislature expressly provided that refunds could be taken by a taxpayer's "successors, administrators, executors, or assigns." It did not, however, provide that a taxpayer's successors, administrators, executors, or assigns could take the credit referred to in Subsection 59-12-110(2)(a)(i). The Commission believes that when Sections 59-12-107(7) and 59-12-110(2)(a) are read as a whole, the Legislature intended for a dealer that collected and remitted sales tax and that is still in business and able to make adjustments on an ongoing basis to take a credit on its next tax return for repossessions.[14]

The Commission also believes that Rule 20 is consistent with these statutes. Rule 20(C) provides that the "[c]redit for tax on repossessions is allowed only to the selling dealer or vendor." The rule further clarifies that for repossessions made by financial institutions, the sales tax credit must be taken by a dealer if the dealer is still in business, but may be taken by the financial institution if the dealer is not in business and has no outstanding tax liability. Although PETITIONER argues otherwise, the Commission believes that Rule 20 is in concert not only with Section 59-12-107(7), but also Section 59-12-110(2)(a).

Furthermore, in *Pioneer Credit Union v. Taxpayer Services Division*, Third Judicial District Court, Case No. 020909140 (November 20, 2003), a Utah court found that all provisions of Rule 20(C) are in harmony with Section 59-12-107(8) and should be given effect when determining whether a financial

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14 The Commission notes that courts in other states have addressed repossessions where an assignee that did not collect and remit sales tax on a transaction sought a refund or credit of the tax associated with that transaction. *See In re Appeal of Ford Motor Credit Co*., 69 P.3d 612 (Kan. 2003), in which the Kansas Supreme Court found that an assignee of non-recourse, dealer-financed motor vehicle loans was not entitled to receive a sales tax credit or refund on vehicles that it repossessed; *and In the Matter of General Electric Capital Corp. v. New York State Div. Of Tax Appeals*, 810 N.E.2d 864 (N.Y. App. Ct. 2004), in which the New York court found, that an assignee was not entitled to a refund of sales tax, in part, because it did not have taxable receipts and did not collect and remit the sales tax to the state.

*Compare with Puget Sound Nat'l Bank v. Dept. of Revenue*, 123 Wash. 2d 284 (Wash. 1994), in which the Washington Supreme Court found that a financial institution that purchased non-recourse loans from dealers was entitled to receive a sales tax credit or refund upon repossession, in part, because the financial institution was required to collect and remit sales tax with each installment payment received on the loan.

institution is entitled to a credit or refund for repossessions.[15] For these reasons, the Commission finds PETITIONER's arguments that Rule 20(C) is inconsistent with general contract law and Section 59-12-110(2) to be unpersuasive.

PETITIONER argues, however, that the Commission "amended" Rule 20(C) in *Utah State Tax Commission Private Letter Ruling No. 92-016DJ* (July 10, 1992), in which the Commission addressed "what a financial institution must do to qualify for a refund when a repossession occurs." PETITIONER, however, reads one paragraph on the ruling alone, arguing that this paragraph 3. of the ruling "amends" Rule 20(C) and allows a financial institution who acquires non-recourse motor vehicle loans to directly receive a refund for repossessions. First, if a private letter ruling were to conflict with state law, including an administrative rule, the Commission believes that the conflicting portion of the ruling would be invalid. However, the Commission does not find the ruling to be inconsistent with Rule 20(C). When the ruling is read as a whole, the Commission believes it clearly provides that where a dealer is still in business, a financial institution that acquires a non-recourse, dealer-financed loan must, upon repossession, involve the dealer in order to receive a credit or refund of sales tax.[16]

For the reasons described above, the Commission finds that PETITIONER is not entitled to a credit or refund of any of the repossessions at issue. Accordingly, it is not critical for the Commission to decide whether PETITIONER's refund request was timely for all of the listed repossessions. Nevertheless, the

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15 In *Pioneer Credit Union*, the Third District Court determined that a financial institution that originated motor vehicle loans could not receive credits or refunds for repossessions, if the dealer was still in business. Even though the financial institution in that case, unlike the Petitioner, originated and did not acquire the loans at issue, the Commission believes that the Court's ruling concerning the legality of Rule 20(C) is, nevertheless, applicable to this case.

16 This conclusion also comports with USTC Tax Bulletin 11-91, which provides that "[o]n non-recourse financed repossessions, financial institutions may arrange with the selling vendor for the selling vendor to take a credit and forward the funds to the financial institution."

Commission reconfirms its ruling concerning the timeliness of PETITIONER's refund request, as found in the Commission's Order Denying Petitioner's Motion for Summary Judgment. In that order, the Commission found that a refund for a repossession must be may made within three years of the date of the repossession and that PETITIONER's refund request was untimely for all repossessions occurring prior to October 31, 2002. No party has contradicted the facts upon which the Commission relied to make this ruling or has convinced the Commission that its legal conclusions were incorrect.

## CONCLUSIONS OF LAW

1. PETITIONER, as the assignee of non-recourse, dealer-financed loans, may not receive sales tax credits or refunds on the repossessions at issue because there is no evidence to suggest that any of the dealers are out of business and because the dealers have not given authorization, such as a power of attorney, for PETITIONER to request a credit or refund on their behalves.

2. Even if the dealers had authorized PETITIONER to act of their behalves, PETITIONER's refund request was untimely for any repossession that occurred prior to October 31, 2002.

## DECISION AND ORDER

Based upon the foregoing, the Commission sustains the Division's action to deny PETITIONER's refund request. PETITIONER's appeal is denied. It is so ordered.

DATED this _____ day of _____, 2009.

_____
Kerry R. Chapman
Administrative Law Judge

Appeal No. 05-1768

BY ORDER OF THE UTAH STATE TAX COMMISSION.

The Commission has reviewed this case and the undersigned concur in this decision.

DATED this _____ day of _____, 2009.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
Commissioner

**NOTICE OF APPEAL RIGHTS:** You have twenty (20) days after the date of this order to file a Request for Reconsideration with the Tax Commission Appeals Unit pursuant to Utah Code Ann. §63G-4-302. A Request for Reconsideration must allege newly discovered evidence or a mistake of law or fact. If you do not file a Request for Reconsideration with the Commission, this order constitutes final agency action. You have thirty (30) days after the date of this order to pursue judicial review of this order in accordance with Utah Code Ann. §§59-1-601 and 63G-4-401 et. seq. Failure to pay any remaining balance resulting from this order within thirty (30) days from the date of this order may result in a late payment penalty.

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