

ST 01-32  
 Tax Type: Sales Tax  
 Issue: Tangible Personal Property for Rental Purposes

STATE OF ILLINOIS  
 DEPARTMENT OF REVENUE  
 OFFICE OF ADMINISTRATIVE HEARINGS  
 SPRINGFIELD, ILLINOIS

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<b>THE DEPARTMENT OF REVENUE          OF THE STATE OF ILLINOIS</b>	)		
	)	<b>Docket #</b>	<b>99-ST-0000</b>
v.	)	<b>IBT #</b>	<b>0000-0000</b>
	)	<b>NTL #</b>	<b>00 0000000000000000</b>
	)		<b>00 0000000000000000</b>
<b>ABC CHEVROLET, INC. Taxpayer</b>	)	<b>Barbara S. Rowe</b>	
	)	<b>Administrative Law Judge</b>	

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**RECOMMENDATION FOR DISPOSITION**

Appearances: Mr. Todd M. Turner, Sorling, Northrup, Hanna, Cullen & Cochran, Ltd. for ABC Chevrolet, Inc.; Mr. Charles Hickman, Special Assistant Attorney General for the Illinois Department of Revenue.

Synopsis:

This matter arose on the timely protest of ABC Chevrolet, Inc. (hereinafter referred to as the "Taxpayer") to Audit Corrections and/or Determinations of Tax Due issued by the Illinois Department of Revenue (hereinafter referred to as the "Department") for automobile renter's taxes due. The liability established was for the period of January 1, 1990 through December 31, 1997. The basis of the liability was for revenue received from automobile manufacturers, insurance companies, and customers for cars loaned/rented to the taxpayer's customers when repair work was being done on the customer's vehicles.

The issues in this matter are:

- 1) whether the taxpayer is in the business of renting automobiles, and;
- 2) whether the sums of money received by the taxpayer from the automobile manufacturer, insurance companies, and customers were taxable under the Automobile Renting Occupation and Use Tax Act (hereinafter referred to as the "ART"). After reviewing the record, it is recommended that the liability in question be upheld in its entirety.

**FINDINGS OF FACT:**

1. The *prima facie* case of the Department was established by the admission into evidence of Audit Corrections and/or Determinations of Tax Due issued to the taxpayer on July 14, 1998, in the amount of \$9,873.00 including tax and penalties. The liability established was for ART for the period of January 1, 1990 through December 31, 1997. (Dept. Ex. No. 1; Tr. p. 47)

2. The taxpayer operates a General Motors Chevrolet automobile dealership in Anywhere, Illinois. (Tr. pp. 9, 48-49)

3. The taxpayer was the subject of a field audit for Retailers' Occupation Tax. The auditor determined that the taxpayer was also liable for ART on amounts received for the use of specified automobiles (hereinafter referred to as the taxpayer's "Fleet"). A customer drives a fleet vehicle when the customer's automobile is in the taxpayer's service department for repair work. The costs of the repair work are either covered under a warranty or not. The fleet consisted of one car in 1990; two cars in 1991 and 1992; six cars in 1993; and seven cars from 1994 through 1997. (Dept. Ex. No. 2; Tr. pp. 10, 19)

4. The auditor chose two sample months for analysis of receipts received for the use of the fleet cars. Those months were March 1995 and November 1996. During those periods, the fleet vehicles were used by the taxpayer's customers an average of 9.63 days per month. The auditor used those figures to project the taxpayer's liability for the entire audit period. The taxpayer was given credit for tax paid in error. The auditor then allocated the amount of automobile rental tax per-vehicle due for the audit period. (Dept. Ex. Nos. 1, 2; Tr. pp. 18-19, 232-245)

5. In September or October 1993, Chevrolet/Geo announced the Courtesy Transportation Program (hereinafter referred to as the "CTP") for 1994 automobiles and future model years. (Respondent's Ex. Nos. 1, 13; Tr. pp. 63, 207) The CTP applies to all Chevrolet and General Motors (hereinafter referred to as "GM") dealers. (Tr. p. 55)

6. The program authorizes the dealer to provide a car to a customer whose automobile must be left overnight in the dealer's service department to complete warranty repairs. GM will reimburse the dealer for providing the alternate transportation up to \$30.00 per day for actual costs for the alternate

transportation, excluding fuel. (Respondent's Ex. No. 1; Tr. pp. 62-63, 103, 115-116, 170)

7. The CTP was designed to be used as a tool to assist dealers in improving service customer satisfaction and developed for the sole purpose of providing alternative transportation to Chevrolet/Geo owners who present their vehicle to a Chevrolet dealer for warranty repairs. (Respondent Ex. No. 1; Tr. pp. 61, 167-168) The CTP is designed to help market and sell new vehicles for GM. (Tr. p. 72) The CTP is necessary to permit GM to effectively compete against its rivals. (Tr. pp. 90, 167) The CTP has not substantially changed since its inception. (Tr. p. 206)

8. The CTP is only invoked when a customer has a warrantable complaint. (Tr. p. 166)

### **WARRANTY PROGRAM**

9. GM offers a factory warranty on all its new cars. The warranty is "bumper-to-bumper" for 36 months or 36,000 miles. In addition, the Roadside Assistance and Courtesy Transportation Programs are part of the sales package and mentioned in the warranty book the customer receives. A warranty always goes along with the purchase of a new vehicle. The price of the new car includes the purchase price for the warranty. (Respondent's Ex. Nos. 4, 7; Tr. pp. 56-57, 59, 67)

10. The taxpayer's sales force is required to make the customer aware of the warranty, Roadside Assistance Program, and CTP upon delivery of the new vehicle. The customer signs a document that the programs were explained to them. Signs explaining the programs are on display in the showroom. (Respondent Ex. Nos. 2, 3 & 15; Tr. pp. 68, 221-222)

11. The CTP is not part of the "Bumper to Bumper New Vehicle Limited Warranty." (Respondent's Ex. Nos. 4 p. 8-8, Ex. No. 13; Tr. p. 174)

12. GM is not contractually obligated to provide courtesy transportation to its customers. (Tr. pp. 164-167, 192)

13. The GM Service Policies and Procedures Manual - "Chevrolet" section states that Courtesy Transportation is not part of or included in the coverage provided by the vehicle-limited warranty. Chevrolet reserves the right to modify or discontinue Courtesy Transportation at any time. (Respondent Ex. No. 1; Tr. p. 93)

14. If GM provides this program for a vehicle sold by the dealer, the dealer service

management is the entity responsible for the administration of CTP transportation arrangements. Claim amounts reflect all actual costs. (Respondent's Ex. No. 4 p. 8-8)

15. The customer is obligated to check with the dealer to ascertain whether GM has made this program available for a particular vehicle. (Respondent Ex. No. 7 p. 27)

16. If the program is available, a portion of the GM Service Policies and Procedures Manual, given to the dealers by Chevrolet Motor Division of General Motors Corporation, goes on to state, in pertinent part:

**COURTESY TRANSPORTATION SERVICES INCLUDE:**

- Same Day Repairs-

For one-way shuttle transportation, up to 10 miles, Chevrolet/Geo will reimburse the Dealer, up to \$5.00 per day, for each customer who is provided shuttle service.

- Overnight Repairs -

If it has been determined, for whatever reason, that an eligible customer's vehicle must be left overnight to complete requested warranty repairs, Chevrolet/Geo will reimburse the Dealer for providing a rental or loaner as alternate transportation; actual costs, including taxes, insurance and mileage, excluding fuel, up to \$30 per day. This also includes public transportation such as cab fare, bus fare, etc. A customer may also be reimbursed for rides provided by another individual, up to \$10 for fuel expense.

Reminder: Dealer Service Management is responsible for determining the appropriate offering for Courtesy Transportation, keeping in mind that it is to be used as a tool to improve customer service satisfaction \* \* \*  
(Respondent's Ex. No. 1; Tr. pp. 59-60)

17. GM/Chevrolet reserves the right to make any changes or discontinue the CTP at any time without notification. GM has never discontinued the CTP. The disclaimer language found in the owner's manuals regarding discontinuance of the program has remained the same since the inception of the CTP. (Respondent's Ex. No. 4 p. 8-8; Tr. pp. 146, 175-176)

18. Both the Roadside Assistance and CTP are explained in the General Motors Services Policies and Procedures Manual given to its dealers as well as to service managers. In relevant part, the information about the CTP states:

**b. Courtesy Transportation Programs  
(All Divisions)**

Courtesy Transportation is a total customer satisfaction program to minimize a customer's inconvenience when an eligible GM vehicle requires repairs under the Bumper-to-Bumper warranty coverage period. Alternatives available to assist a customer include shuttle, dealer pick up or drop off, overnight loaner vehicle when necessary, and transportation reimbursement for utilization of a taxi, bus, or fuel. The following policies apply for all GM passenger car and light duty trucks: \* \* \*

## **2. Loaner or Overnight Vehicle Rental Policies:**

\* \* \*

- For eligible passenger car and light duty truck owners (except Cadillac), the customer is eligible to receive a loaner or overnight rental vehicle any time an eligible vehicle is brought in for repair and the nature of that repair requires more than one business day.

\* \* \*

- GM Divisions will reimburse the Dealer for providing courtesy transportation overnight loaners or rentals at actual cost, up to \$30.00 per day.

\* \* \*

- Some car rental companies offer insurance on rental vehicles for an additional cost. Owners should be advised to refer to their automobile insurance policy, as it may provide coverage for rental vehicles. State, provincial and local taxes and insurance, when included in the rental agreement are included in the reimbursement amount up to the daily maximum. Fuel expense is not a covered program feature.

- Vehicles may be obtained from any source (dealer owner, auction, off lease, rental car companies), however some divisions may have preferred providers. When a like divisional vehicle is not available (e.g. Buick for Buick owner), every effort should be made to provide a GM vehicle for courtesy transportation.

- Any dealer agreement with the rental companies that provide rebates or other discounts should be applied to eligible Courtesy Transportation claims.

- In instances when a customer is unable to rent a vehicle due to age or lack of credit card, GM Division will reimburse up to \$30.00 per day for whatever documented transportation was used (e.g. cab receipt or fuel receipt from friend or family.)

\* \* \*

## **3. Administrative Processing / Claim Submission**

- Dealership should make all decisions for customer rental vehicles. All rentals made by rental agencies should be billed directly to the dealership. If an owner rents and pays for a rental vehicle that can be supported by a warranty repair, the customer should be issued a check by the dealership.

- Dealer should submit Courtesy Transportation claims for reimbursement through the warranty system using complaint code MJ and trouble code 98. All claims should be submitted as a net item for the dollar amount,

\* \* \*

**NOTE:** the Courtesy Transportation Claim must be submitted on the same repair order as the warranty repair.

\* \* \*

## **5. R. O. Documentation**

- Record on the R.O. the reason for courtesy transportation, the type provided

and service management approval. When providing reimbursement for other approved expenses under the courtesy transportation guidelines, cross-reference the reimbursement check number, date, and amount on the repair order.

- Overnight - copy of rental agreement or other receipt (i.e. cab, service station receipt for gasoline) documenting the transportation expense should be attached to the warranty copy of the repair order.

**NOTE:** Roadside Assistance and Courtesy Transportation programs are not part of or included in the coverage provided by the New Vehicle Limited Warranty. The Divisions reserve the right to modify or discontinue Roadside Assistance and Courtesy Transportation programs at any time. (Respondent's Ex. No. 8; Tr. pp. 112-119)

19. The taxpayer has a fleet of vehicles that it owns, and designates for the CTP. (Tr. p. 64)

20. Prior to the inception of the CTP, the taxpayer had one "loaner/rental" car used in its fleet.

Once the CTP was instituted, the number of cars in the taxpayer's fleet rose to seven. (Dept. Ex. No. 2; Tr. pp. 96-97)

21. The customer does not pay the taxpayer for the use of the fleet car used in conjunction with the CTP. The customer expects the car to be provided free of charge. (Tr. pp. 64-65)

22. For the taxpayer's fleet automobiles used for the CTP, GM reimburses the taxpayer up to \$30.00 per day. (Tr. pp. 49-50)

23. If the repair is not covered under a warranty, the customer pays the rental charge. (Tr. p. 22)

24. When the taxpayer sells a customer a car, it is bound to the promises made in the owner's manual and warranty books. (Tr. p. 73)

25. GM is contractually bound, when the dealer sells a new vehicle, to perform on its bumper-to-bumper warranty. That is stated in the warranty and owner's manual. (Respondent's Ex. No. 7; Tr. pp. 57-58)

26. When the taxpayer files a claim with GM for warranty repair and labor, if CTP service was provided, the expenses for the transportation would be listed in a separate line on the form submitted to GM. The reimbursement for the CTP, warranty repair, and labor transactions are received at the same time and handled in the same manner. There is no mark-up included in the costs of the transportation for the CTP. The payment for the CTP is received after the fleet vehicle has been used. (Tr. pp. 74-75, 118-119,

149, 168, 212-215)

27. The taxpayer is required to perform the CTP as GM specifies in the policies and procedures manual. The policies and procedures manual states that vehicles used for the CTP may be obtained from any source including dealer owned, auction, off lease, and rental car companies. The manual also cautions that owners of the cars being repaired should refer to their automobile insurance policy as it may provide coverage for rental vehicles. (Respondent Ex. No. 8; Tr. p. 78)

28. GM tracks the amount of money and the type of warranty repairs that the dealers perform. GM issues a warranty analysis report to its dealers that compares the costs of warranty repairs done by its dealers. The report also includes comparison information about the costs of the Courtesy Transportation and Roadside Service Programs. GM monitors and tracks those costs. GM audits and counsels a dealer that has consistently higher costs than its peers. (Respondent's Ex. Nos. 10, 12; Tr. pp. 128-129, 133-135, 164, 171-172, 178, 188)

29. GM also monitors customer satisfaction. (Respondent's Ex. No. 14; Tr. pp. 216-219)

30. The taxpayer paid Retailers' Occupation Tax on the fleet vehicles used in the CTP. The auditor determined that tax was paid in error and gave the taxpayers a credit for those amounts paid. (Dept. Ex. No. 2 p. 5; Tr. pp. 24-25)

### **RENTAL**

31. The taxpayer never registered to pay tax under ART because it did not think it was in the rental business. (Tr. p. 55)

32. The taxpayer does not carry standard car renter's insurance. The taxpayer's insurance policy will only cover the fleet car if it temporarily replaces the customer's automobile. (Respondent's Exhibit 6; Tr. pp. 83-86, 151, 153)

33. The taxpayer has never held itself out as being in the business of renting automobiles. The taxpayer does not advertise that it is in the rental business. (Tr. pp. 81-82, 223)

34. If questioned, the taxpayer's employees are instructed to tell a person wishing to rent an automobile that Enterprise Leasing is located across the street from the taxpayer's business or that Hertz and Avis are available at the airport. (Tr. pp. 81-82)

35. The taxpayer does not have employees dedicated to the renting of automobiles. (Tr. p. 82)

36. The rental business accounts for a small percentage of the taxpayer's total income. The primary sources of the taxpayer's income are from sales of cars, parts, and service. (Tr. pp. 82-83, 88)

37. The taxpayer also receives reimbursements from insurance companies when an automobile is in the taxpayer's service department for repairs and a fleet car is needed. (Tr. p. 83)

38. As part of the documentary packet submitted to GM for reimbursement for parts, labor, and the costs for the CTP is the taxpayer's Car Rental Agreement. The agreement is executed by the owner of the car being serviced and contains a disclaimer for insurance purposes. The back of the document states that it is a "Standard Rental Agreement." (Respondent's Ex. No. 9)

39. There is a separate line item on the repair order, which is also part of the documentary packet submitted to GM that lists the "ABC Chevrolet Rental" information and costs. (Respondent Ex. No. 9; Tr. p. 123)

40. GM spent 3.5 billion dollars on warranty repairs in 2000. It spent close to \$80 million on the CTP. (Respondent Ex. No. 12; Tr. p. 188)

41. The taxpayer also has customers who pay for the use of the fleet vehicles, either themselves or through insurance companies, because either their vehicle is out of warranty or the warranty work will not take overnight to repair. (Tr. pp. 145-146, 154-155, 226-227)

### **CONCLUSIONS OF LAW:**

The Automobile Renting Occupation and Use Tax Act, 35 **ILCS** 155/1 *et. seq.* imposes a tax on persons engaged in this State in the business of renting automobiles, at the rate of 5% of the gross receipts received from such business. (35 **ILCS** 155/3)

The taxpayer argues that it is not liable under this act because it is not in the business of renting automobiles. In the alternative, it argues that the money received from GM, the customers, and the insurance companies is reimbursement under the warranty program and therefore not taxable.

In 1993 General Motors instituted the Courtesy Transportation Program for the 1994 Chevrolet automobiles. The program states that General Motor's dealers should make all decisions for customer

rental vehicles. The program is available for a customer who has an automobile in for overnight warranty repair work. The program guarantees that a car will be available for the customer. General Motors states in its literature that the program is separate from the new car warranty sold with the automobile. The dealer responsible for providing the car may supply a car from its inventory or may arrange with a rental agency to supply the car. The dealer is reimbursed up to \$30.00 per-day by General Motors for the costs incurred.

### **RENTAL**

The taxpayer asserts that it is in the business of selling and servicing cars and is not, like Avis, Enterprise, and Hertz, in the business of renting cars. The taxpayer admits that it does provide vehicles to its customers for compensation, but states that is not the same as being in the rental business. It also asserts that the transfer of its vehicles is not supported by "valuable consideration" as required by the ART. "Renting" is defined in the ART as "any transfer of the possession or right to possession of an automobile to a user for a valuable consideration for a period of one year or less." 35 ILCS 155/2.

Under the Customer Transportation Program the dealer makes all decisions for customer rental vehicles. The dealer can procure the car from a number of sources, including, from a rental agency. When the car is obtained from a rental agency, the dealer pays the agency for the customer's use of the car and then is reimbursed by GM for those expenses, up to \$30.00 per day. Under this scenario, there is no question but that the dealer is the rentee of the car, and the rentor, agency, is liable for the ART.<sup>1</sup> Since the dealer does not own the vehicle, the dealer is the rentee of the automobile who then supplies the rented automobile to its customer and is not liable for ART. In this scenario, the rentor would be liable for the payment of ART on the rental of the car.

In the alternative, the dealer can provide the car, which is the arrangement that this taxpayer chose. The dealer is paid up to \$30.00 per day by General Motors for the use of its car by the customer. By providing the automobile and receiving compensation for that use, the dealer becomes the rentor of the vehicle.

The Customer Transportation Program guarantees that the taxpayer will provide a replacement

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<sup>1</sup> The taxpayer is compensated for the use of its cars, and admits that a rental situation exists if tangible personal property is provided to someone on a short-term basis for compensation. Tr. pp. 141-143.

vehicle, either one of its own or those of another provider, when the customer's vehicle is in for overnight warranty repair work. The taxpayer saw an opportunity to provide transportation and be compensated for it. The taxpayer designated seven cars for the program. Taxpayer's customers, who are issued one of those seven cars, execute a contract entitled "Car Rental Agreement". The agreement explains that the taxpayer does not carry rental insurance. The back of the agreement is entitled "Standard Rental Agreement".

Because the taxpayer enters into that agreement, it represents that it will rent automobiles. That agreement is part of the documentation submitted to GM for reimbursement. The service invoice sent to GM has a line specifically designated for the taxpayer's rental car reimbursement. The ART does not contain any requirement that an entity must have car rental business as its primary revenue source. Therefore, although the majority of the income of the taxpayer is from sales and service of automobiles, that does not preclude the taxpayer from being in the rental business as well, and responsible for the payment of ART. *See Tri-America Oil Company v. Department of Revenue*, 102 Ill.2d 234 (1984) (Taxpayer was held liable for Retailers' Occupation Tax for its retail business even though it was a wholesaler.)

In order for a customer to obtain the use of a fleet vehicle, the customer must have a car in the taxpayer's shop for service. The fleet vehicle is provided when a car is in for overnight-warranty work, in which case the reimbursement is from GM, or for non-warranty work, in which case either an insurance company or a customer pays for the repair and the use of the fleet vehicle. The limitation that only customers with cars in for service can obtain a fleet vehicle is set by the taxpayer as a limitation on its own business. Similarly, the act does not require that an entity advertise in order to be considered in a business; nor do employees have to be designated for that particular area of the business. While a taxpayer is free to organize its affairs as it chooses, once having done so, it must accept the tax consequences of its choice, whether contemplated or not, and it may not enjoy the benefit of some other route it might have chosen to follow but did not. *Commissioner v. National Alfalfa Dehydrating*, 417 U.S. 134, 148-49 (1974) *citing Higgins v. Smith*, 380 U.S. 473, 477 (1940). *See also Rockwood Holding Company v. Department of Revenue*, 312 Ill.App.3d 1120 (1<sup>st</sup> Dist. March 24, 2000).

The taxpayer executes a contract with its customer entitled a car rental agreement. By the plain

language of the document it is a rental situation. Courts have construed contracts so as to avoid absurd results. Rubin v. Laser, 301 Ill.App.3d 60, 68 (1998). Either GM, an insurance company, or the customer reimburses the taxpayer for the use of taxpayer's vehicle. The taxpayer dedicates seven cars to fleet use by taxpayer's customers when their cars are in for service. The taxpayer is reimbursed for the use of those cars. Taxpayer's behavior, actions, and documents show it is in the rental business.

The taxpayer next asserts that legislative intent and discussion show that the costs related to the vehicles in question are not the intended reason or the subject of ART. In support of the assertion, it goes to the legislative discussions regarding the initial imposition of ART and determines that the reasoning and application of the tax concerned non-Illinois citizens who fly into O'Hare Airport and want to rent a car. (82 Gen. Ass. 66 Legis. Day, Comments of Representative Piel, June 18, 1981) While taxing car rentals and allowing a Retailers' Occupation Tax and Use Tax exemption on the acquisition of the rental car may have the effect of transferring a significant burden to out-of-state residents, interpreting the statute in the manner the taxpayer suggests would discriminate against out-of-state renters and violate the Commerce Clause of the United States<sup>2</sup> and the uniformity requirement in the Illinois Constitution<sup>3</sup>. Therefore, I do not agree with the taxpayer's assertion.

The taxpayer further argues that the vehicle transactions cannot be considered to be rental transactions because they are not habitual as required by the act. However, not only does the act not require habitual rentals, but, the average of 10 days a month usage of each vehicle certainly does not indicate isolated or occasional rental transactions.

Under ART a tax is imposed on the gross receipts received by a person engaged in Illinois in the business of renting automobiles. Gross receipts are defined in the ART as follows:

'Gross receipts' from the renting of tangible personal property or 'rent' means the total rental price or leasing price. In the case of rental transactions in which the consideration is paid to the rentor on an installment basis, the amounts of such payments shall be included by the rentor in gross receipts or rent only as and when payments are received by the rentor. 35 **ILCS** 155/2.

In 1999, Public Act 91-0193 (SB 0132) amended the ART to add an additional definition,

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<sup>2</sup> U.S. Const. art. 1, § 8.

<sup>3</sup> Ill. Const. art. IX, § 2

effective July 20, 1999. The additional definition states:

'Gross receipts' does not include receipts received by an automobile dealer from a manufacturer or service contract provider for the use of an automobile by a person while that person's automobile is being repaired by that automobile dealer and the repair is made pursuant to a manufacturer's warranty or service contract where a manufacturer or service contract provider reimburses that automobile dealer pursuant to a manufacturer's warranty or a service contract and the reimbursement is merely made to recover the costs of operating the automobile as a loaner vehicle. 35 ILCS 155/2.

The taxpayer asserts that this definition was intended to be declarative of existing law. In support of this the taxpayer relies on the transcript of the Senate legislative debate in which the sponsor of the bill, Senator Lauzen, states that the bill clears up some ambiguity in the sales tax law. (91<sup>st</sup> Gen. Ass. Senate Transcript, Comments of Senator Lauzen, 27<sup>th</sup> Legis. Day, March 25, 1999). However, prior to Senator Lauzen's comments, Senate Amendment No. 1 to SB 0132 was passed. The amendment deletes the language that "The provisions of this amendatory Act of the 91<sup>st</sup> General Assembly are declarative of existing law and are not a new enactment." That amendment was adopted at the second reading of the bill. (91<sup>st</sup> Gen. Ass. Senate Transcript, 23<sup>rd</sup> Legis. Day, March 19, 1999) By specifically deleting that provision, the legislature agrees that it is a new law. In The Village of Wilsonville et al. v. SCA Service, Inc., 86 Ill.2d 1 (1981) the Illinois Supreme Court reiterated one of the long standing rules of statutory construction that "Without an express statutory provision stating an act is to have retroactive effect, it can only be applied prospectively." *Id.* at 18. I therefore find that Public Act 91-0193, effective July 20, 1999, is a statutory amendment to be applied prospectively and it is not relevant for the time period 1990 through 1997.

## **WARRANTY**

The taxpayer also asserts that the payments are not taxable under ART because the taxpayer and GM use the program to entice buyers to purchase Chevrolet vehicles, and the original purchase price includes the CTP. If that scenario were true, the payment of Retailers' Occupation Tax by the buyer of the vehicle would include the cost of the program and would mean that ART is inapplicable to the taxpayer herein because there would be double taxation.

I do not agree with the taxpayer. GM, in its dealer information, repeatedly and specifically states

that the program is separate from the warranty. That information is not just given to the dealer, but is also transmitted to the customer. GM, in its dealer information, lists the costs of the warranty program separately from the costs of the CTP. Thus, if the program is provided, it is done as a courtesy to the buyers. GM is not contractually obligated to provide the courtesy transportation, while it is contractually obligated to provide service and repairs under the warranty. While the customer may expect that it will not be necessary to pay for the fleet vehicle when the customer's car is in for service, the dealer is, in fact, paid an additional sum for the use of that car. As GM states, those payments are a separate transaction from the warranty itself.

Furthermore, the imposition of this tax is not negated because the rentee of the car is also the taxpayer's customer, and the payor of the rental price is GM. The word "rentee" is defined in ART at 35 ILCS 155/2. It states:

'Rentee' means any user to whom the possession, or the right to possession, of an automobile is transferred for a valuable consideration for a period of one year or less, whether paid for by the 'rentee' or by someone else. (emphasis added).

Therefore the payment of the valuable consideration by a third party does not negate the imposition of the tax.

In spite of the clear language of the statute, the taxpayer raises the additional argument that because GM and insurance companies are responsible for the payments as third parties, rather than the customer, the payments are included in the warranty package. In Dow Chemical Co. v. DOR, 26 Ill.2d 283, 287 (1962), the Illinois Supreme Court stated "What is determinative is the actual nature of the transaction. The taxpayer's method of billing is relevant because it affords some indication as to the way the taxpayer regarded the transaction. But it is not conclusive. Neither taxability nor nontaxability can depend, in the last analysis, upon the method of billing employed by the taxpayer." This is of particular application in this matter because the statute specifically provides for the event of third parties paying the rental receipts and GM's own literature disclaims any connection between the car warranty and this courtesy program. Therefore, there is no automatic conclusion that just because a third party pays the rent, that the payments are included in the warranty package. By statute, the fact that a person (i.e. manufacturer) other than the

car owner is tendering the consideration to the rentor (i.e. the dealer) does not change the fact that the dealer is receiving "gross receipts" that are subject to, in this case, the ART.

The taxpayer next asserts that the payments from GM are reimbursements for actual costs incurred by the dealer and are not rental payments. The language that taxes the gross receipts by ART contains no provision for a deduction for the rentor's costs of doing business prior to the imposition of the tax. The act imposes a tax of 5% on the gross receipts received by the rentor from the occupation of automobile rental.

Even if taxpayer's assertion had any legal validity, the taxpayer offered no evidence, books, or records to support its assertion regarding its costs. The taxpayer has a duty to maintain books and records required by the statutes and the Department's regulations. Once the Department establishes the *prima facie* case, the burden shifts to the taxpayer to overcome it by producing competent evidence identified by its books and records showing that the Department's returns are incorrect. A.R. Barnes & Co. v. Department of Revenue, 173 Ill.App.3d 826 (1<sup>st</sup>. Dist 1988). The taxpayer has failed to show that the payments were reimbursements for actual costs incurred or that this assertion has legal validity.

Finally, the taxpayer asserts that the payments should be taxed in the same manner as the Department taxes replacement parts and service under a manufacturer's warranty program. Since the Department does not tax replacement parts and service offered under a manufacturer's warranty program, because those parts and services are part of the warranty purchased and paid for with the car<sup>4</sup> (see ST 00-0001 PLR, a private letter ruling issued by the Department), the taxpayer attempts to again raise the assertion, discussed above, that the program is part of the warranty program. As discussed, that argument fails this taxpayer.

For the aforementioned reasons, it is recommended that the liability in question be upheld in its entirety.

Respectfully Submitted:

Date: October 26, 2001

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Barbara S. Rowe  
Administrative Law Judge

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<sup>4</sup> Tr. pp. 42-43