THE COMMONWEALTH OF MASSACHUSETTS
Appellate Tax Board
100 Cambridge Street
Suite 200
Boston, Massachusetts 02114

Docket Nos. S342587-S342605

DILLON CHEVROLET, INC.
Appellant
v.

COMMISSIONER OF REVENUE
Appellee

DECISION WITH FINDINGS

These appeals concern eighteen consolidated claims brought by Dillon Chevrolet, Inc. ("appellant") against the Commissioner of Revenue ("Commissioner" or "appellee") with respect to sales paid on eighteen vehicles owned by the appellant. Commissioner DeFrancisco ("Presiding Commissioner") made the following findings of fact and rulings of law.

The appellant operates a Chevrolet dealership and participates in an incentive program with car manufacturer General Motors ("GM"). A component of this incentive program is the Courtesy Transportation Program ("CTP"). Through the CTP, the appellant loans certain of its vehicles to customers who are having their vehicles serviced at the appellant through a repair order, including an inspection or a trade-in appraisal. The CTP vehicles are new or recent GM models, and the loan period on these vehicles is limited to keep the mileage low so that the vehicles can be sold at retail. The appellant at various times from January 5, 2017 to February 14, 2018 removed eighteen such vehicles from its inventory, registered them to itself, and began to loan these vehicles to its customers in conjunction with the CTP. The appellant paid sales tax at the time that it registered the vehicles. The appellant later filed abatement applications with the appellee claiming that the tax payments were made in error. The appellee denied the abatement applications.

General Laws c. 64I § 2 imposes a use tax on the storage, use, or consumption of tangible personal property in the commonwealth. There is an exception to the sales and use tax for items held for "resale in the regular course of business" *See* G.L. c. 64H, § 1. However, the purchaser of an item held for resale cannot itself use that item. As indicted by G.L. c. 64H, § 8(d), a use beyond mere demonstration or display of the item will trigger the sales tax: "If a purchaser who gives a certificate makes any use of the service or property other than retention, demonstration or display while holding it for sale in the regular course of business, the use shall be deemed a retail sale by the purchaser as of

the time the service or property is first used by him." Parallel language is found in the use tax statutes at G.L. c. 64I, §8(e).

The Commissioner has promulgated a regulation addressing the use tax's resale exception as it specifically pertains to car dealers and lessors. That regulation, 830 CMR 64H.21.1(10) provides in pertinent part:

> (a) *General rule*. The sale of a motor vehicle, trailer, or other vehicle to a Massachusetts dealer or Massachusetts lessor who purchases the vehicle for resale in the regular course of business is exempt from the sales and use tax. During the period in which the vehicle is held for resale, the dealer or lessor may use it for ***demonstration or display***, without incurring liability for sales or use tax. However, if the dealer or lessor uses the vehicle for any purpose other than resale in the regular course of business, a use tax must be paid to the Commissioner. (emphasis added)

The appellant argues that the CTP vehicles serve as demonstration models in its sales business. The appellant testified that the motivation behind using these vehicles as loaners is that they will entice customers to want to upgrade their older cars after driving the newer models.

The Commissioner maintains that, since the cars were removed from Dillon's sale inventory and used as loaner vehicles, the vehicles are no longer items purchased for resale by Dillon. Instead, they are used for other business purposes by Dillon - to provide courtesy loaners to customers while Dillon repairs their vehicles - and that Dillon's use of those vehicles thus did not qualify as exempt from the sales/use tax.

The informational brochure from GM that describes the components of the CTP contradicts the appellant's contention that the ultimate purpose of the CTP vehicles is to be used for demonstration models. The brochure, entered into evidence, specifies that the vehicles are restricted to use as loaners or test drives, and that the use of the vehicles as "demonstrators, marketing/promotional use" is "strictly prohibited."

Presumably, a dealer's interactions with its customers are all designed to bring about an eventual sale. However, in order not to trigger the use tax, the item in question must be reserved for resale; the taxpayer cannot itself use the item. The sales and use tax statutes do not define "use" but the Supreme Judicial Court has noted that the statutory term is sufficiently broad to encompass "the exercise of any right or power over tangible personal property incident to the ownership of that property." ***Commissioner of Revenue v JC Penney*****,** 431 Mass 684, 692 (2000) (quoting (finding that the taxpayer made a taxable use of catalogs that were mailed from out-of-state locations to Massachusetts residents); *see also* ***COR v Outdoor World***, 431 Mass. 1003 (2000)(same).

The Commissioner issued ***Department of Revenue Directive 01-01*** ("***DD 01-01***"), which pertains to the sales and use tax consequences for a dealer that takes cars out of its inventory to use as customer loaners. The fact pattern in ***DD 01-01*** mirrors the instant

appeals, where an automobile dealer provides free "loaner" vehicles to customers whose vehicles are being repaired. "Generally, these are new vehicles that are removed from inventory for several months, used as loaners and then sold for a discounted price. . . . The vehicle manufacturer may pay the dealer a specified sum per month for each loaner provided under such an agreement."

DD 01-01 states that, during the period when a vehicle is held for resale, a dealer may use the vehicle for "demonstration and display" without incurring liability for sales or use tax; however, if dealer makes any other use of the vehicle, other than "demonstration and display," taxes are due. According to ***DD 01-01***, the courtesy rental described above does not qualify as being held for "demonstration or display." Thus, according to ***DD 01-01***, when the vehicles were removed from the dealer's inventory and used as free loaners, the dealer made a use of that vehicle.

DD 01-01 also refers to Registry of Motor Vehicles ("RMV") Regulations at 540 CMR 18.04(3)(a), which prohibit dealer plates from being used on loaner vehicles: "A dealer who has received a general registration number plate may not operate a motor vehicle owned by the dealer as equipment utilized in the operation of the business of said dealer, such as a courtesy bus or parts or service vehicle, using the general dealer's registration number plate."

The Presiding Commissioner found that the Commissioner's interpretation of the use tax as applying to the appellant's CTP vehicles is wholly consistent with the framework of statutes and regulations of the Commonwealth.

Based on the evidence presented, the Presiding Commissioner found and ruled that, as a matter of law, the appellant's use of the CTP vehicles as loaners to its customers was inconsistent with these vehicles being exempt from sales/use tax as items held for resale. Accordingly, the Presiding Commissioner issued a decision for the appellee in these appeals.

APPELLATE TAX BOARD

By: /s/ *Mark J. DeFrancisco*
Mark J. DeFrancisco, Commissioner

Attest: /s/ *William J. Doherty*
William J. Doherty, Clerk

Date: February 17, 2022

NOTICE: Pursuant to G.L. c. 58A, §§ 7B and 13, no further appeal is available and the Board will issue no further findings of fact or reports.