

ILLINOIS INDEPENDENT
TAX TRIBUNAL

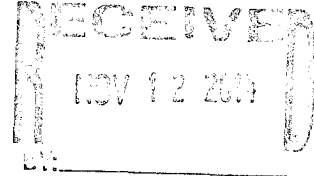
JK BUICK GMC

Petitioner,

v.

ILLINOIS DEPARTMENT
OF REVENUE

Respondent.



CAPTION

Petitioner is identified as J K Pontiac-GMC-Truck Inc., EIN: 36-4002865, in the protested tax notice issued by the Illinois Department of Revenue.

PETITION

Petitioner, JK Buick GMC d/b/a Bill Kay Buick GMC and d/b/a Bill Kay Nissan, hereby petitions the Illinois Independent Tax Tribunal to review and reverse the Notice of Tentative Denial of Claim ("Notice") issued by the Illinois Department of Revenue ("Department"), for the reasons stated below:

JURISDICTION

This petition is being brought pursuant the Illinois Independent Tax Tribunal Act of 2012, 35 ILL. COMP. STAT. 1010/1-1, *et seq.* The Illinois Independent Tax Tribunal's original jurisdiction extends to determinations made by the Illinois Department of Revenue on Notices of Claim Denial under the Use Tax Act and Retailers' Occupation Tax Act, where the amount at issue in such notice exceeds \$15,000, exclusive of penalties and interest. 35 ILL. COMP. STAT. 1010/1-45.

INTRODUCTION

1. The Notice was issued by the Department on September 9, 2014, denying a refund claim in the amount of \$6,652.61 on \$20,920 in total assessed sales tax liability, \$2,791.30 in penalties, and \$357.44 in interest for taxable periods September 3, 2013, October 31, 2013, December 2, 2013, and March 31, 2014. A copy of the Notice is attached to this Petition.
2. Petitioner is a corporation, with its principal place of business in Downers Grove, Illinois.
3. Petitioner is located at 2300 Ogden Ave., Downers Grove, IL 60515, and Petitioner's telephone number is 630-969-0022. Petitioner's account number is 2580-9415.
4. Petitioner is an car dealership and, as a part of a manufacturer incentive program, used some of Petitioner's new cars as loaner cars for a short period of time. The Department alleges that Petitioner has sales tax liability resulting from the purchase of these cars, though Petitioner cannot be liable for sales tax until a sale occurs with Petitioner as the seller. Further, Petitioner cannot be subject to use tax on the loaner cars, as the use constitutes interim use, which is exempt from use tax. As such, Petitioner requests that the Illinois Independent Tax Tribunal review the Department's Notice, eliminate the tax liability shown, and grant Petitioner the resulting refund.

BACKGROUND AND RELEVANT FACTS

5. Petitioner is a Nissan car dealership, primarily in the business of selling new and used cars, but also provides maintenance services.
6. When Petitioner services a Nissan car under warranty, Petitioner provides a loaner car, at no additional cost, for the customer's use while the customer's car is being serviced.
7. Petitioner participates in a loaner car program with Nissan Motor Corporation ("Nissan"), in which Nissan incentivizes Petitioner for using new Nissan cars as these loaner cars.
8. Nissan's incentive to Petitioner comes in the form of a modest bonus earned by Petitioner once a new car is used as a loaner car for three months or driven 3,000 miles.
9. Petitioner maintains the loaner cars in its physical inventory, and accounts for them similarly in Petitioner's books and records. The loaner cars are available for sale at any point, even before Petitioner earns the bonus from Nissan.

10. Petitioner maintains title to the cars from the time the cars are purchased from Nissan, until they are sold to the final consumer at retail.
11. Petitioner takes no depreciation deductions on any of the loaner cars.
12. All of the cars will eventually be sold, either before or after the incentive period. Petitioner is subject to, collects, and remits sales tax from the transaction at that time.
13. For each of the cars Petitioner previously used as loaner cars in the program, Petitioner filed a Form ST-556, Sales Tax Transaction Return, with the Department.
14. On the Forms ST-556, Petitioner was listed as both the seller and the buyer. Despite a slight variation on the names listed, both are actually the same entity. No sales occurred relating to these Forms ST-556.
15. On the Forms ST-556, as originally filed, Petitioner checked boxes 5E, designating the sales exempt from tax as being sold for rental use. Petitioner wrote its account number in the space provided.
16. Petitioner received Return Correction Notices from the Department, which stated that Petitioner's account number was not valid and did not provide an exemption from tax based on sale for rental use. As a result, these notices contained adjustments and had balances due.
17. The Return Correction Notices eventually resulted in Notices of Tax Liability.
18. Petitioner scheduled an administrative hearing regarding the adjustments.
19. Petitioner also contacted the Department in an effort to sort out the confusion. After discussing the facts behind the transactions, the Department informed Petitioner that no administrative hearing was necessary and Petitioner should instead amend its returns and instead of marking box 5E relating to rental use, Petitioner should mark box 5F, for other reason, and write in "interim use".
20. Petitioner heeded the advice of the Department and requested the administrative hearing be withdrawn.
21. Petitioner completed and returned twenty Return Correction Notices to the Department.
22. On the notices, Petitioner checked the box designated for "other reason transaction is exempt from tax", and wrote in "interim use", as recommended by the Department.
23. On several occasions, Petitioner contacted the Department to check the status of the notices, but was told that they were still processing.

24. On September 9, 2014, Petitioner received the Notice of Tentative Denial of Claim, showing sales tax liability resulting from Petitioner's purchase of new cars used as loaner cars on the dates listed on the Notice.
25. The Notice also states that the claim was tentatively denied because a duplicate claim was filed, but Petitioner is not aware of another claim being filed.
26. Petitioner was not subsequently contacted by the Department and received no explanation regarding the Notice or regarding the duplicate claim referenced therein.
27. The tax periods covered by the Notice do not cover the entirety of the transaction periods to which Petitioner filed Return Correction Notices for, as some may still be processing with the Department.

APPLICABLE LAW

28. Sales tax is imposed upon persons engaged in the business of selling tangible personal property at retail. 35 ILL. COMP. STAT. 120/2; ILL. ADMIN CODE tit. 86, section 130.101.
29. A sale at retail is any transfer of the ownership of or title to tangible personal property to a purchaser, for the purpose of use or consumption, and not for the purpose of resale in any form as tangible personal property to the extent not first subjected to a use for which it was purchased, for valuable consideration. 35 ILL. COMP. STAT. 120/1.
30. Illinois' use tax is imposed upon the privilege of using, within the state, tangible personal property purchased at retail from a retailer. 35 ILL. COMP. STAT. 105/3; ILL. ADMIN CODE tit. 86, section 150.101.
31. Tangible personal property purchased by a retailer for resale, and used by the retailer or his or her agents prior to its ultimate sale at retail is exempt from use tax, provided that the tangible personal property is of the same general type of property sold by that retailer, and is carried as inventory on the books of the retailer or is otherwise available for sale during the interim use period. ILL. ADMIN CODE tit. 86, section 150.306(a)(1).
32. The interim use exemption may not be claimed if the title to the property is held by any party other than the retailer, except for the manufacturer or a captive finance company, if the retailer elects to claim a depreciation deduction under 26 U.S.C. section 179, or if the item is leased by the retailer and

the gross receipts received from leasing exceed the retailer's selling price of the item. ILL. ADMIN CODE tit. 86, section 150.306(a)(1)(A)

33. Property not excluded under section 150.306(a)(1)(A), can be deemed exempt for interim use under a safe harbor rule if six requirements are met. ILL. ADMIN CODE tit. 86, section 150.306(a)(1)(A). First, the property must be listed in the retailer's records as part of the retailer's inventory, not have been depreciated under 26 U.S.C. section 167, or be shown in the retailer's records, documents, or operations as available for sale during the interim period. ILL. ADMIN CODE tit. 86, section 150.306(a)(1)(B)(i). Second, the period of use or lease of the property by the retailer must be less than 24 months. ILL. ADMIN CODE tit. 86, section 150.306(a)(1)(B)(ii). Third, the property must be of the same general type of property sold by the retailer. ILL. ADMIN CODE tit. 86, section 150.306(a)(1)(B)(iii). Fourth, the property must ultimately be sold by the retailer. ILL. ADMIN CODE tit. 86, section 150.306(a)(1)(B)(iv). Fifth, if the retailer received revenues from the lease of the same general type of property as the item for which interim use is claimed, then the annual total of such lease revenues must be less than the annual total of the sales revenues received from such property. ILL. ADMIN CODE tit. 86, section 150.306(a)(1)(B)(v). Finally, if the item is leased under a lease agreement for more than thirty days, the lease agreement must contain a provision that, if the retailer locates a buyer for the item, the lease may be terminated within seven days or the lessee may receive comparable property substituted by the retailer for the item within seven days. ILL. ADMIN CODE tit. 86, section 150.306(a)(1)(B)(vi).
34. Use of property that does not fall under the safe harbor, may nonetheless be considered exempt as for interim use based on all facts and circumstances, including: the retail sales history or records of the type of items in question, inventory records, advertising of the item, manufacturer contract terms, conditions, discounts and rebates, length and location of use or lease prior to sale, whether depreciation was taken under 26 U.S.C. section 167, ownership and control documents, including, but not limited to, books, records, titles, and insurance documents, and the terms and conditions on leasing documents. ILL. ADMIN CODE tit. 86, section 150.306(a)(1)(C).

ERRORS

35. The Department has not provided reasoning or explanation regarding the denial of Petitioner's claim and additional tax shown on the Notice, thus Petitioner cannot specifically allege errors made by the Department. As such, Petitioner can only apply the relevant facts to the applicable law in a general fashion.
36. The type of tax listed on the Department's Notice is Form ST-556 sales tax, which relates to the Forms ST-556 filed by Petitioner relating to the loaner cars.
37. Though collected from buyers, sales tax is only imposed upon sellers of tangible personal property at retail. 35 ILL. COMP. STAT. 120/2.
38. Though Petitioner is a seller of tangible personal property at retail, Petitioner is only liable for sales tax on the cars that are sold, and only when they are sold.
39. The transactions between Nissan and Petitioner are not taxable transactions, as Nissan is not a retailer and the cars are being sold to Petitioner for resale, thus is exempt from sales tax as not being a sale at retail. 35 ILL. COMP. STAT. 120/1.
40. Even if the transactions between Nissan and Petitioner gave rise to sales tax liability, the sales tax would be imposed on Nissan, as the seller, and not Petitioner.
41. Thus, a seller can never be liable for sales tax on property until the property is actually sold.
42. When the loaner cars were actually sold to consumers, Petitioner correctly collected and remitted sales tax from those transactions.
43. However, because the transactions resulting in the tax liability on the Notice were not sales by Petitioner, the Department erred in its determination of Petitioner's sales tax liability on the Notice and the resulting denial of refund.
44. Petitioner is exempt from use tax under the interim use exception in ILL. ADMIN CODE tit. 86, section 150.306(a)(1).
45. The interim use exception applies generally to the use of property purchased by a retailer for resale, provided the property is of the same general type of property sold by the retailer and is carried on the books of the retailer or is otherwise available for sale during the interim use period. ILL. ADMIN CODE tit. 86, section 150.306(a)(1).

46. The new cars used as loaners are same type of property sold by Petitioner and are in Petitioner's physical inventory and listed as inventory in Petitioner's books and records.
47. Petitioner does not fall under any of the three automatic exclusions to the interim use exception under ILL. ADMIN CODE tit. 86, section 150.306(a)(1)(A).
- a. Petitioner maintained title to the cars from the time Petitioner purchased them from Nissan, until the cars are sold to the final consumer at retail.
 - b. Petitioner never took a depreciation deduction under 26 U.S.C. section 179 for any of the loaner cars.
 - c. Petitioner did not lease the cars in exchange for compensation, thus any gross receipts resulting from interim use cannot exceed Petitioner's selling price of the cars.
48. Petitioner meets the safe harbor of ILL. ADMIN CODE tit. 86, section 150.306(a)(1)(A), and even if Petitioner did not, all facts and circumstances show that Petitioner meets the general requirements of the interim use exception as provided for in ILL. ADMIN CODE tit. 86, section 150.306(a)(1)(C).
- a. Though only one is required, Petitioner meets all three of the alternative options of the first requirement, as Petitioner listed the cars in inventory, did not take any depreciation under 26 U.S.C. section 167, and kept the cars available for sale during the interim period.
 - b. The period of interim use of the vehicles was about three months.
 - c. The cars are the type of property sold by Petitioner.
 - d. The cars are eventually sold by Petitioner.
 - e. Petitioner did not receive revenues from leasing the cars.
 - f. Petitioner did not have a lease agreement relating to the loaner cars.
49. Because Petitioner would purchase the new cars even if they could not be used as loaners, Petitioner's use of the cars as loaners is merely incidental to buying the cars for the purpose of resale.
50. Similarly, Petitioner would not buy the cars to use as loaners if they could not be sold at retail during or after the loaner period.
51. Therefore, Petitioner's use of the cars as loaners qualifies as interim use under ILL. ADMIN CODE tit. 86, section 150.306(a)(1), which exempts Petitioner from tax on that use.


CONCLUSION AND RELIEF REQUESTED

52. Petitioner cannot be subject to sales tax on the purchase of the cars used as loaners, as sales tax is not levied on buyers. Petitioner also cannot be subject to use tax on the loaner cars, as the use qualifies as interim and is exempt from use tax.

WHEREAS, Petitioner requests that the Notice be modified as to reflect no tax balance owed, and the resulting refund be issued for the reasons contained herein, and to the extent that it is shown that any part of this assessment was made without reasonable cause, Petitioner requests a finding that its attorney and accountant fees are recoverable against the Department pursuant to 20 ILL. COMP. STAT. 2520/7.

Dated: November 7, 2014

JK BUICK GMC

By: 
Colin J. Walsh, Attorney representing
JK Buick GMC

Representatives:

Colin J. Walsh
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Telephone: 312-729-8043
Fax: 312-240-2243
E-mail: colin.walsh@bakertilly.com
IL Bar License #: 6301124



Illinois Department of Revenue

Docket no. _____

IL-2848-AH Power of Attorney For Administrative Hearing Proceedings**Read this information first**

If you do not have a Form IL-2848, Power of Attorney, on file, you must file this original form, in person or by mail, with the Office of Administrative Hearings. This form allows you to become the official representative of record for the identified protested tax matter and to establish your authority to act on behalf of this taxpayer, receive notices, and file documents for the identified proceeding. You must be an attorney to represent a taxpayer at an administrative hearing or other preliminary proceedings, including status calls and pretrial conferences. Please type or print when completing this form and mail to one of our offices below.

OFFICE OF ADMINISTRATIVE HEARINGS (7-900)
ILLINOIS DEPARTMENT OF REVENUE
100 W RANDOLPH ST
CHICAGO IL 60601-3274

OFFICE OF ADMINISTRATIVE HEARINGS (5-500)
ILLINOIS DEPARTMENT OF REVENUE
101 W JEFFERSON ST
SPRINGFIELD IL 62794-9044

Step 1: Complete the following taxpayer information

1 J K PONTIAC-GMC-TRUCK INC.
Taxpayer's name
2 2300 OGDEN AVE
Mailing address
3 DOWNERS GROVE IL 60515
City State ZIP

4 Write all applicable taxpayer identification numbers.
IBT number _____
FEIN 36 - 4002865
SSN _____
Account number 2580-9415
License number _____

Step 2: Complete the following representative information

5 COLIN J. WALSH
Representative's name
6 BAKER TILLY VIRCHOW KRAUSE, LLP
Firm name, if applicable
7 205 NORTH MICHIGAN AVE.
Mailing address
8 CHICAGO IL 60601
City State ZIP
9 (312) 729-8043 (312) 240-2243
Phone number Fax number

11 Identify the type of protested item. (Check all that apply.)
_____ Assessment _____ Deficiency
_____ Revocation _____ Penalty ☒ Claim
_____ Other _____
Type of protested item
a Issue date of protested items ____/____/____
____/____/____
b Periods covered 012013-062014
c Assessment or notice numbers, if any L0618438672
(If needed, attach additional sheets to identify items a, b, and c.)

10 Identify the type of proceeding. (Check all that apply.)
_____ Informal review ☒ Hearing

Step 3: Taxpayer's signature

I, the undersigned taxpayer, authorize the party identified in Step 2 to represent me with full power and authority at the identified proceeding. I authorize all further notices and written documents, including confidential information, pertinent to this proceeding to be sent to the representative's address listed in Step 2. If signing as a corporate officer, partner, or fiduciary on behalf of the taxpayer, I certify that I have the authority to execute this power of attorney on behalf of the taxpayer identified in Step 1.

Bernard F. McQuinn CFO 11/5/2014
Taxpayer's signature Title, if applicable Date

Step 4: Representative's signature

I, the undersigned, affirm that the taxpayer identified in Step 1 has authorized me as representative for the identified proceeding and that I am an attorney, either

- ☒ in good standing of the Illinois Bar; or
☐ admitted (or am seeking admission) *pro hac vice* for this Illinois proceeding.

Colin J. Walsh IL Colin Walsh 11/5/14
Printed name of representative Jurisdiction or states Representative's signature Date



Notice of Tentative Denial of Claim

for Form ST-556, Sales Tax Transaction Return



September 9, 2014



Letter ID: CNXXX13X23369921

Account ID: 2580-9415

#BWNKMGV
#CNXX X13X 2336 9921#
J K PONTIAC-GMC-TRUCK INC
2300 OGDEN AVE
DOWNERS GROVE IL 60515-1711



We have reviewed the claim described on the last page of this letter and have tentatively denied it because a duplicate claim has been filed.

If you do not agree, you may contest this notice by following the instructions listed below.

- If the amount of tax tentatively denied, exclusive of penalty and interest, is more than \$15,000, or if no tax is being denied but the total penalties and interest being denied is more than \$15,000, file a petition with the Illinois Independent Tax Tribunal within **60 days** of this notice. Your petition must be in accordance with the rules of practice and procedure provided by the Tribunal (35 ILCS 1010/1-1, *et seq.*).
- In all other cases that do not fall within the jurisdiction of the Illinois Independent Tax Tribunal, file a protest with us, the Illinois Department of Revenue, and request an administrative hearing within **60 days** of the date of this notice. Your request must be in writing, clearly indicate that you want to protest, and explain in detail why you do not agree with our actions. If you do not file a protest within the time allowed, you will waive your right to a hearing, and this tentative denial of claim will become final. An administrative hearing is a formal legal proceeding conducted pursuant to the rules adopted by the Department and is presided over by an administrative law judge. A protest of this notice does not preserve your rights under any other notice.

If you are currently under the protection of the Federal Bankruptcy Court, contact us and provide the bankruptcy number and the bankruptcy court. The bankruptcy automatic stay does not change the fact that you are required to file tax returns.

If you have questions regarding this matter, write or call us weekdays between 8 a.m. and 4:30 p.m. Our address and telephone number are below.

Michael Goebel-Bain
Revenue Tax Specialist II

SALES TAX PROCESSING DIVISION 2-242
ILLINOIS DEPARTMENT OF REVENUE
PO BOX 19013
SPRINGFIELD IL 62794-9013

217 782-7517
217 524-9001 fax

Notice Before Collection Action



2

September 8, 2014



Letter ID: CNXXX1X439674564

Taxpayer ID: 36-4002865

#BWNKMGV
#CNXX X1X4 3967 4564#
J K PONTIAC-GMC-TRUCK INC
2300 OGDEN AVE
DOWNERS GROVE IL 60515-1711



We have not received all of your required payments.

You must immediately pay the balance due of \$17,416.83.

Details are shown on the following pages.

This may be the **only** notice we will send you before we take other collection action. Other collection action may include garnishment of your wages or seizure and sale of your assets.

It is important that you respond to us immediately.

If you have any questions about this notice, please contact us at the address and phone number listed below. If you are currently making payments on an installment contract for this liability period, please disregard this notice.

ICS PAYMENT AND CORRESPONDENCE UNIT
ILLINOIS DEPARTMENT OF REVENUE
PO BOX 19043
SPRINGFIELD IL 62794-9043

217 785-2698
217 557-5757 fax

enclosures

For information about

- › how to pay
- › how to file
- › what you owe
- › collection actions

Turn page

Taxpayer Statement



September 9, 2014



Letter ID: L0618438672

J K PONTIAC-GMC-TRUCK INC
2300 OGDEN AVE
DOWNERS GROVE IL 60515-1711

Taxpayer ID: 36-4002865
Total amount due: \$17,416.83



This statement lists our most recent information about your unpaid balance, available credits, or returns you have not filed.
A payment voucher is included so you may pay the balance due.

ST-556 Sales Tax

Account ID: 2580-9415

Period	Tax	Penalty	Interest	Other	Payments/Credits	Balance
03-Sep-2013	6,727.00	672.70	80.46	-	(5,866.61)	1,613.55
31-Oct-2013	8,331.00	1,333.10	171.86	-	-	9,835.96
02-Dec-2013	4,200.00	620.00	86.64	-	-	4,906.64
31-Mar-2014	1,662.00	166.20	18.48	-	(786.00)	1,060.68

SOC

Retain this portion for your records.

P-002922

Fold and detach on perforation. Return bottom portion with your payment.

Taxpayer Statement (R-12/08) (136)



Letter ID: L0618438672
J K PONTIAC-GMC-TRUCK INC

Total amount due: \$17,416.83
Write the amount you are paying below.

Mail this voucher and your payment to:
ILLINOIS DEPARTMENT OF REVENUE
PO BOX 19035
SPRINGFIELD IL 62794-9035

\$ _____
Write your Taxpayer ID on your check.

000 006 003140356008 731 123199 9 0000001741683