DEPARTMENT OF JUSTICE
STATE OF NEBRASKA • 2115 STATE CAPITOL
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Don Stenberg
Attorney General

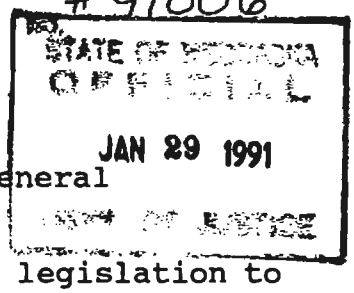
DATE: January 28, 1991

SUBJECT: Sales and Use Tax - Amendment of Neb.Rev.Stat. §77-2702(15)(b) (Reissue 1990) to Exclude Amounts of Manufacturer's Rebates and Incentives from the Definition of "Sales Price".

#91006

REQUESTED BY: Senator Chris Beutler
Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
L. Jay Bartel, Assistant Attorney General



You have requested our opinion on the need for legislation to permit deduction of the amount of manufacturer's rebates or incentives from the basis upon which sales and use tax is computed. Specifically, your request refers to a situation in which an individual purchased a new car with a list price of $21,000. The purchaser received $4000 credit for trading in another vehicle, thus reducing the price of the vehicle to $17,000. In addition, the transaction involved a manufacturer's rebate of $1000 and a manufacturer's special incentive of $400, which effectively reduced the buyer's actual cost of purchase to $15,600. The amount of sales tax due on the transaction, however, was computed on the basis of the list price minus trade-in value [$17,000], without any reduction based on the amounts of the manufacturer's rebate and special incentive. Your question concerns whether this is the proper interpretation of the basis for calculating the amount of sales tax due for a transaction of this nature under current Nebraska law, and, if so, whether the draft legislation you have provided for our review would effectively change this result to permit a deduction from the basis for computing sales tax on such purchases by excluding the amount of manufacturer's rebates and incentives.

A sales tax is imposed "upon the gross receipts from all sales of tangible personal property sold at retail in this state. . . ." Neb.Rev.Stat. §77-2703(1) (Reissue 1990). A corresponding use tax is imposed "for storage, use, or other consumption in this state of tangible personal property . . . on the sales price of the property. . . ." Neb.Rev.Stat. §77-2703(2) (Reissue 1990).

"Gross receipts" is defined as "the total amount of the sale or lease or rental price . . . of the retail sales of retailers valued in money whether received in money or otherwise, without any deduction . . ." for the following: (1) "The cost of tangible personal property sold"; (2) "The cost of the materials used, labor or service costs, interest paid, losses, or any other expense"; (3) "The cost of transportation of the tangible personal property prior to its sale to the purchaser"; (4) "The amount of any excise or property tax levied against the tangible personal property. . ."; or (5) "The amount charged for warranties, guarantees, or maintenance agreements". Neb.Rev.Stat. §77-2702(4)(a) (Reissue 1990). The following are specifically excluded from the definition of gross receipts: (1) "Cash discounts allowed and taken on sales"; (2) "Sales price of tangible personal property returned by customers when the full sales price is refunded either in cash or credit"; (3) "[T]he amount charged for labor or services rendered in installing or applying the tangible personal property sold if such amount is separately stated. . ."; (4) "The amount charged for finance, carrying charges, service charges, or interest from credit extended on sales of tangible personal property. . ."; (5) "The value of tangible personal property taken by a seller in trade as all or part of the consideration for a sale of tangible personal property of any kind or nature"; (6) "The value of a motor vehicle taken by any person in trade as all or a part of the consideration for a sale of another motor vehicle"; or (7) "Receipts from conditional sale contracts, installment sale contracts, rentals, and leases executed in writing prior to June 1, 1967, ..." Neb.Rev.Stat. §77-2702(4)(d)(i)-(viii) (Reissue 1990).

"Sales price" is defined as "the total amount for which tangible personal property is sold valued in money whether paid in money or otherwise, without any deduction. . ." for the following: (1) "The cost of the tangible personal property sold"; (2) "The cost of material used, labor or service costs, interest paid, losses, or any other expenses"; (3) The cost of certain transportation of the property; (4) "The cost of computer software contained on the tangible personal property"; or (5) "The cost of any license, franchise, or lease for the use of computer software or entertainment property such as videotapes or movie films. . . ." Neb.Rev.Stat. §77-2702(15)(a) (Reissue 1990). The following are specifically excluded from the definition of "sales price": (1) "Cash discounts allowed and taken on sales"; (2) "The amount refunded for tangible personal property returned by customers when all or part of the amount charged therefore is refunded either in cash or credit"; (3) "The amount charged for labor or services rendered in installing and applying the property sold if such amount is separately stated. . . "; (4) "The amount charged for finance charges, carrying charges, service charges, or interest from credit extended on sales of tangible personal property. . ."; (5) "The value of tangible personal property taken by a seller in

trade as all or a part of the consideration for a sale of tangible personal property of any kind or nature"; (6) "The value of a motor vehicle taken by any person in trade as all or part of the consideration for a sale of another motor vehicle"; or (7) "The amount charged for labor or services rendered in incorporating tangible personal property into real estate". Neb.Rev.Stat. §77-2702(15)(b)(i)-(vii) (Reissue 1990). With respect to sales of motor vehicles, the tax imposed "shall be computed on the difference between the total sales price and the allowance for any trade-in. . . ." Neb.Rev.Stat. §77-2703(1)(j) (Reissue 1990).

In 1975, the Nebraska Department of Revenue issued a ruling relating to the effect of manufacturer's rebates associated with purchases of tangible personal property on sales and use tax liability. The ruling addressed the question of "whether consumers who have paid sales or use tax upon the total retail price and who later receive a cash rebate directly from a manufacturer would be entitled to a sales or use tax refund based on the amount of the manufacturer's rebate." Nebraska Department of Revenue Ruling 1-75-9, May 30, 1975. The Department concluded no refund was allowable under these circumstances, stating "the retail price remains at the amount agreed upon at the time of the sale, and this is the amount upon which the sales or use tax must be computed." Id. In addition, the Department has promulgated a regulation which addresses the effect of manufacturer's rebates on the basis for computing sales and use tax on retail transactions involving motor vehicles. Reg. 1-020.08 provides:

> A rebate received from a manufacturer does not reduce the sales and use tax base. Rebates are received after the sales transaction is finalized between the dealer and the consumer and does not affect the amount received by the dealer from the sale. The retail price remains at the amount agreed upon at the time of the sale which is the amount upon which the tax must be collected.

It is well established that "the interpretation of a statute given by an administrative agency to which the statute is directed is entitled to weight." Vulcraft v. Karnes, 229 Neb. 676, 678, 428 N.W.2d 505, 507 (1988); ATS Mobile Tel., Inc. v. Curtin Call Communications, Inc., 194 Neb. 404, 232 N.W.2d 248 (1975). While construction of a statute by an administrative agency charged with enforcing it is not controlling, considerable weight will be given to such construction, particularly when the Legislature has not acted to change the agency's interpretation. McCaul v. American Savings Co., 213 Neb. 841, 331 N.W.2d 795 (1983).

Even if the Department had not, by administrative construction, set forth its position that manufacturer's rebates are not excludible from the basis upon which sales or use tax liability is determined, we would concur with this interpretation based on the plain language of the pertinent statutes. The sales tax imposed pursuant to §77-2703(1) is, as previously noted, based on the "gross receipts" from sales at retail of tangible personal property. The definition of "gross receipts" excludes consideration of amounts attributable to various factors, including, inter alia, cash discounts and the value of trade-ins, including value attributable to motor vehicles traded in upon the sale of motor vehicles. Neb.Rev.Stat. §77-2702(4)(d)(i), (v), and (vi). The use tax imposed pursuant to §77-2703(2) is based on the "sales price" of purchases of tangible personal property stored, used, or consumed in the state. The definition of "sales price" mirrors, in large part, the definition of "gross receipts," and excludes, inter alia, cash discounts and the value of trade-ins, including value based upon trade-ins when motor vehicles are purchased. Neb.Rev.Stat. §77-2702(15)(b)(i), (v) and (vi). The basis for computation of sales tax liability on purchases of motor vehicles is, as noted previously, the "sales price" of the vehicle, less "allowance for any trade-in. . . ." Neb.Rev.Stat. §77-2703(1)(j).

In view of the language contained in these statutory provisions, we believe that amounts attributable to manufacturer's rebates may not be deducted from the amount of "gross receipts" or the "sales price" of tangible personal property for purposes of computing the basis for sales or use tax liability. The definitions of "gross receipts" or "sales price," while delineating numerous specific exclusions, do not provide for any deduction or exclusion for amounts related to manufacturer's rebates in connection with retail sales or purchases of tangible personal property. Absent any specific declaration of legislative intent to eliminate such amounts from the statutory definitions establishing the basis upon which sales or use tax is imposed, we cannot conclude that, under existing law, such rebates can be utilized to reduce the amount by which sales or use tax liability must be calculated.[1]

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[1] In addition to rebates, your proposed legislation also includes reference to "dealer incentives". Due to the varying types of dealer incentive programs offered, we cannot reach a general conclusion as to the effect of such incentives on the determination of taxable basis for sales or use tax under current law. Our opinion is therefore limited to the subject of manufacturer's rebates.

While the Nebraska courts have not addressed an issue of this nature, the Supreme Court of Illinois dealt with a similar question in Keystone Chevrolet Co. v. Kirk, 69 Ill. 2d 483, 372 N.E.2d 651 (1978) ["Keystone"]. Keystone involved application of the Illinois Retailers' Occupation Tax to transactions involving sales of motor vehicles where purchasers were eligible to receive manufacturer's rebates. The Illinois tax was imposed upon the gross receipts from sales of tangible personal property at retail, which was defined as "the total selling price." Id. at 487, 372 N.E.2d at 653. "Selling price," in turn, was defined as "the consideration for a sale valued in money whether received in money or otherwise. . . ." Id. The court, rejecting the contention that the amount of rebates paid by the manufacturer to automobile purchasers should be deducted from the sales price in determining the amount of tax due, stated:

> We find nothing in the Act or regulations . . . permitting a seller to deduct from his gross receipts an amount paid by a third party directly to the purchaser even though the purpose of the payment is to reimburse the purchaser for a part of the purchase price. The gross receipts of the seller remain the same whether or not a rebate is paid by someone not directly involved in the retail sale.

Id.

The court also dismissed the plaintiff's argument that the tax due should be based upon the sales price less the value of the manufacturer's rebate, as, from the purchaser's standpoint, the cost of the motor vehicle did not include the amount of the rebate. In this regard, the court stated:

> This argument . . . ignores the taxation scheme provided in the Act. It is the retailer who is taxed, not the purchaser, and the retailer has the legal obligation to pay the tax whether or not he collects it from the purchaser. While the manufacturer's rebate is unquestionably offered as an inducement to a purchaser to buy a car, it neither changes the character of the transaction between seller and purchaser nor affects the liability of the retailer to pay a tax computed on the basis of the amount received by him.

Id. at 488, 372 N.E.2d at 653.

We find the rationale of the Illinois Supreme Court compelling, and, in view of the similarities between the Nebraska sales and use tax provisions and the Illinois tax statutes construed in Keystone, we believe this decision provides further

support for the conclusion that manufacturer's rebates may not be excluded from the basis for determining Nebraska sales or use tax. In Illinois, the tax was imposed on the "gross receipts" from retail sales of tangible personal property, based upon the "selling price" of the property. Id. at 487, 372 N.E.2d at 653. The court, as noted, concluded the rebate amounts were not excludible from the basis upon which the tax was to be computed, as such amounts did not affect the "gross receipts" of the seller. Similarly, under Nebraska law, the definition of "gross receipts" (utilized in computing sales tax due on retail sales of tangible personal property), and the definition of "sales price" (utilized in computing use tax due on the storage, use, or other consumption of tangible personal property purchased at retail, or the amount of sales tax due on retail purchases of motor vehicles), provide no exception which would allow exclusion of amounts received by purchasers or sellers in the nature of manufacturer's rebates, as the amount of "gross receipts" or the "sales price" is not affected by rebates paid by a third party not directly involved in the retail sale. Accordingly, it is our opinion that manufacturer's rebates are not presently excludible from the basis established for the imposition of Nebraska sales and use tax.

Having concluded that legislation is necessary to permit the taxable basis for transactions subject to sales or use tax to be reduced by the amount of manufacturer's rebates or incentives, we wish to address a few comments with respect to the specific legislative proposal you have provided to accomplish this result. First, we note that, while your proposed amendment to the definition of "sales price" to include a reduction for rebates or incentives would alter the basis upon which sales tax is computed on purchases of motor vehicles, it would also alter the basis for calculating use tax liability on all purchases of tangible personal property subject to use tax where rebates or incentives are involved. Thus, if it is your intent to limit the allowance of a reduction in taxable basis to transactions involving the sale of motor vehicles, the bill provided for our review would not accomplish this result. In fact, a bill recently introduced this session addresses this concern by limiting the amendment of the definition of "sales price" to allow an exclusion for rebates "granted by a motor vehicle manufacturer or dealer at the time of sale of the motor vehicle. . . ." LB 300, §1.

Second, absent a corresponding amendment to the definition of "gross receipts," we point out that the amendment you propose would create a situation in which an exclusion from taxable basis would be provided for sales of motor vehicles and purchases of tangible personal property subject to use tax, without providing a corresponding exclusion from the taxable basis of retail sales of tangible personal property subject to sales tax. The use tax is a correlative of, and is complementary to, the sales tax, although

there is no requirement that the taxation of transactions for use tax purposes be identical to the taxation of transactions subject to sales tax. Nevertheless, we believe it is appropriate to note this fact to advise you of the difference in treatment of transactions for sales and use tax purposes under your proposed legislation. If the Legislature were to enact legislation limiting the exclusion to rebates granted on sales of motor vehicles, such as provided under LB 300, this discrepancy would be eliminated.

Very truly yours,

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7-500-2

cc: Patrick J. O'Donnell
Clerk of the Legislature

APPROVED BY:

Attorney General