

**BOARD OF TAX APPEALS
STATE OF LOUISIANA**

**GMAC INC. and NUVELL CREDIT COMPANY,
LLC.**

PETITIONER

VERSUS

**B.T.A. DOCKET NOS. 6998, 6999,
7000, 7001, 7012, 7049, 7220 and
7221**

**CYNTHIA BRIDGES, SECRETARY, LOUISIANA
DEPARTMENT OF REVENUE
RESPONDENT**

**ORDER
WITH
WRITTEN REASONS**

A hearing on this matter was held before the Board, by special setting, on October 8, 2013. Present before the Board were: Christopher J. Dicharry, Linda S. Akchin, Jason R. Brown, Daniel H. Schlueter, attorneys for GMAC Inc. and Nuvell Credit Company LLC (Taxpayers), and Debra Morris, attorney for the Secretary, Louisiana Department of Revenue (Secretary). At the conclusion of the hearing, the matter was taken under advisement.

These eight cases were consolidated for hearing.

The primary issues in the cases are whether the Taxpayers were liable for the assessed Louisiana corporate franchise taxes and Louisiana Income taxes and whether they are entitled to refunds of corporate franchise taxes and corporation income taxes that they have paid in the past.

The cases are summarized as follows:

In Case 6998, GMAC appeals from an assessment of corporate franchise taxes for the periods 2004, 2005 and 2006, the assessment period. The assessment was in the amount of \$3,052,719.00 plus interest. The appeal stated that Taxpayer

did not owe the tax assessed and additionally requested a refund of corporate franchise taxes in the amount of \$2,872,331.00 that it claims to have improperly paid during the assessment period. The assessment was dated September 29, 2009, and Taxpayer's petition was filed November 24, 2009.

In Case 6999, GMAC appeals from an assessment of corporate franchise taxes for the periods 2001, 2002 and 2003, the assessment period. The assessment was in the amount of \$953,652.00 plus interest. The appeal stated that Taxpayer did not owe the tax assessed and additionally requested a refund of corporate franchise taxes in the amount of \$5,899,550.00 that it claims to have overpaid during the assessment period. The assessment was dated September 29, 2009, and Taxpayer's petition was filed November 24, 2009.

In Case 7000, GMAC appeals from an assessment of corporate income taxes for the periods 2003, 2004 and 2005, the assessment period. The assessment was in the amount of \$165,134.00 plus interest. Taxpayer claims that it had a net operating loss during the period for which it should be given credit. The appeal stated that Taxpayer did not owe the tax assessed and requested a refund of corporate income taxes in the amount of \$762,662.00 that it claims to have overpaid during the assessment period. The assessment was dated September 29, 2009, and Taxpayer's petition was filed November 24, 2009. On March 5, 2010, Taxpayer amended and supplemented its petition to change its refund request to \$762,558.00.

In Case 7001, GMAC appeals from an assessment of corporate income taxes for the periods 2000, 2001 and 2002, the assessment period. The assessment was in the amount of \$1,447,127.00 plus interest. The appeal stated that Taxpayer did not owe the tax assessed and additionally requested a refund of corporate income taxes in the amount of \$785,394.00 that it claims to have overpaid during the assessment period. Taxpayer claims that it is entitled to a net operating loss for the

period. The assessment was dated September 29, 2009, and Taxpayer's petition was filed November 24, 2009. On March 5, 2010, Taxpayer amended and supplemented its petition and changed its refund request to \$997,671.00.

In Case 7012, Taxpayer appeals the Secretary's failure to act on its request for a refund of corporation franchise taxes for the years 1998, 1999 and 2000 in the amount of \$4,785,607.00. The Taxpayer submitted an amended return to the Secretary on December 11, 2008 requesting the refund, and the Secretary never took action on the Taxpayer's request. On December 22, 2010, the Taxpayer filed this petition with the Board. The Taxpayer filed an alternative claim under the provisions of R.S. 47:1481.

In Case 7049, Taxpayer appeals the Secretary's failure to act on its request for a refund of corporate franchise taxes for the years 2001, 2002 and 2003 in the amount of \$5,899,550.00. The Taxpayer submitted an amended return to the Secretary on December 18, 2008 requesting the refund, and the Secretary never took action on the Taxpayer's request. On March 5, 2010, the Taxpayer filed its petition with the Board. After the trial, the Taxpayer stated that it was withdrawing its refund claim because the requested refund was also included in cases 6998 and 6999.

In Case 7220, Taxpayer appeals the Secretary's failure to act on its request for a refund of corporate franchise taxes for the years 2004, 2005 and 2006 in the amount of \$2,872,331.00. The Taxpayer submitted an amended return to the Secretary on December 22, 2009 requesting the refund, and the Secretary never took action on the Taxpayer's request. On March 17, 2011, the Taxpayer filed this petition with the Board. After the trial, the Taxpayer stated that it was withdrawing its refund claim because the requested refund was also included in cases 6998 and 6999.

In Case 7221, Taxpayer, Nuvell Credit Company, appealed the Secretary's failure to act on its request for a refund of corporate franchise taxes for the years 2004, 2005 and 2006 in the amount of \$998,940.00. The Taxpayer submitted an amended return to the Secretary on December 22, 2009 requesting the refund, and the Secretary never took action on the Taxpayer's request. On March 17, 2011, the Taxpayer filed this petition with the Board. The Taxpayer has pled in the alternative a claim under the provisions of R.S. 47: 1481.

After the cases were taken under advisement, an examination of the record caused the Board to request that the record be supplemented so that the Board could fully evaluate the timeliness of the Taxpayers' petitions. The record included certain waivers of the time for the Secretary to timely assess and for the Taxpayers to timely request a refund (sometimes referred to as "prescription waivers"). The Board ordered the parties to appear before it and produce any additional such waivers that may exist. At that hearing the parties produced additional prescription waivers for prior years. An examination of the waivers revealed that all of the Secretary's assessments, all of the Taxpayers' requests for refunds, and all of the appeals to the Board, were within the time periods allowed by law.

CORPORATION FRANCHISE TAXES

The first discussion pertains to the Taxpayers' claims for refunds of Louisiana corporation franchise taxes that they paid from 1998 through 2006 and the Secretary's assessment of corporation franchise taxes. The question is whether certain retail installment contracts (sometimes referred to as the Contracts) purchased by the Taxpayers from independent GM dealerships in this state should be attributed to Louisiana for the purpose of computing Taxpayers' corporate franchise tax liability.

The evidence adduced at the hearing established the following. GMAC is a Delaware corporation with its principal place of business in Detroit, Michigan.

GMAC is engaged in retail automotive financing, an activity that GMAC conducted both directly on its own and through its wholly-owned subsidiary, Nuvel Credit Company (“Nuvel”). Nuvel is a non-Louisiana limited liability company with its principal place of business in Little Rock, Arkansas. GMAC and Nuvel are collectively referred to herein as Taxpayers.

Taxpayers conducted their retail financing business by purchasing retail installment sales contracts from authorized GM dealerships. The Contract between the dealerships and the purchaser required the purchaser to make a number of monthly payments to the dealership. Neither of the Taxpayers was a party to the Contracts at their inception. The dealerships then assigned some of the Contracts to the Taxpayers. The undisputed testimony established that dealerships were not required to sell the Contracts to the Taxpayers, and that dealerships sometimes sold the Contracts to other buyers.

All of the Taxpayers’ activities associated in the acquisition of the Contracts took place outside the state of Louisiana. When the dealership agreed to sell, and the Taxpayers agreed to buy a Contract, the Contract was acquired by the Taxpayers outside of Louisiana and was physically stored outside of Louisiana. When the Taxpayers purchased a Contract, it was “Booked” by the Taxpayers into their computer systems. Subsequent to “Booking” the Contract, all “servicing” of the Contract was performed in Taxpayers’ offices in Texas, Colorado, Michigan or Arkansas. All payments made by the purchasers were sent to locations outside of Louisiana. Taxpayers’ corporate level activities took place outside of Louisiana. All activities to securitize the contracts took place outside of Louisiana.

GMAC, during the years 1998-2006, and Nuvel, during the years 2004-2006, in their Louisiana corporation franchise tax returns, attributed the Contracts that involved Louisiana sales to Louisiana. Taxpayers now claim that they should not have attributed the Contracts to Louisiana, and that this caused Taxpayers to

overpay their corporation franchise taxes for those years. Taxpayers claim that they are entitled to a refund of the overpayment.

In determining whether Taxpayers overpaid corporation franchise taxes or owe additional income taxes, an examination of the pertinent statutes is in order.

The corporation franchise tax is found in R.S. 47:601 *et seq.* R.S. 47:601A. requires that a tax be paid on a corporation's "taxable capital" which shall be determined as provided in Chapter 5 of Subtitle II of Title 47 of the Louisiana Revised Statutes.

A corporation is deemed to have employed in this state the portion of its taxable capital that is equal to the arithmetic average of two ratios. The first ratio is found in R.S. 47:606A.(1) which states in part:

"R.S. 47:606. Allocation of taxable capital

A. General allocation formula.

...

(1) The ratio that the net sales made to customers in the regular course of business **and other revenue attributable to Louisiana** bears to the total net sales made to customers in the regular course of business and other revenue..."(emphasis supplied)

The second ratio is found in R.S. 47:606A.(2) which states in part:

"R.S. 47:606. Allocation of taxable capital

...

(2) The ratio that the value of all the Taxpayer's **property and assets situated in Louisiana** or **used** in Louisiana bears to the value of all of its property and assets wherever situated or used..." (emphasis supplied)

The corporation franchise tax issue in this case is whether the retail sales contracts and the income derived therefrom should be apportioned to Louisiana for the purposes of the "property and assets", "net sales" and "other revenue" factors referred to in the foregoing statute.

The Taxpayers claim that they have no "net sales", "revenue attributable to Louisiana" or "property and assets" in Louisiana and therefore owe no corporation franchise taxes to this state.

The first matter that will be discussed is whether the Contracts are “property and assets situated in Louisiana or used in Louisiana” as contemplated by the R.S. 47:606A. (2).

R.S. 47:606A. (2) (c) refers to “trade accounts and trade notes receivable” and states in part:

“(c) Trade accounts and trade notes receivable shall be allocated by reference to the transactions from which receivables arose, on the basis of the location at which delivery was made in the case of sale of merchandise...”

The relevant provisions of the Louisiana Administrative Code state in part:

(c) Trade accounts and trade notes receivable are construed to mean only those accounts and notes receivable resulting from the sale of merchandise...in the regular course of business of the **taxpayer**...”

LAC 61:306(a)(2)(c) (emphasis supplied)

The retail sales contracts were not a result of the sale of merchandise in the regular course of business of these Taxpayers. They were from the sale of merchandise in the regular course of business of the dealers from whom Taxpayers later purchased the Contracts. The Board rules that the Contracts are not trade accounts or trade notes of these Taxpayers.

R.S. 47:606A. (2) (e) refers to “notes and accounts” and states:

“(e) notes and accounts other than those notes and accounts described under (b) through (d) above shall be allocated to the state in which they have their business situs, in the absence of a business situs, to the state in which is located the commercial domicile of the taxpayer”.

Taxpayers do not have a business situs or commercial domicile in Louisiana and, therefore, the Contracts are not “notes and accounts” as contemplated by the foregoing statute.

The next matter to be discussed is whether the interest received by the taxpayers from the obligors on the retail sales contracts is “other revenue attributable to Louisiana” as contemplated by the R.S. 47:606A. (1).

R.S. 47:606A.(1) (h) refers to interest on customers’ notes and states:

“(h) Interest on customers’ notes and accounts shall be attributed to the state in which the customers are located.”

The dealers from whom the Taxpayers purchased the retail installment contracts were actually located in Louisiana. It is axiomatic that the overwhelming majority of the vehicle purchasers, the obligors on the contracts, would also have been located in Louisiana.

LAC 61:306(A)(1)(f) is the relevant regulation associated with interest on customers’ notes and accounts and states:

“f. Interest on Customers' Notes and Accounts

i. Interest on customers' notes and accounts can generally be associated directly with the specific credit instrument or account upon which the interest is paid and shall be attributed to the state at which the goods were received by the purchaser or services rendered. Interest is construed to include all charges made for the extension of credit, such as finance charges and carrying charges.

ii. When the records of the taxpayer are not sufficiently detailed so as to enable direct attribution of the revenue, interest, as defined herein, shall be attributed to each state on the basis of a formula or formulas which give due consideration to credit sales in the various states, outstanding customer accounts and notes receivable, and variances in the rates of interest charged or permitted to be charged in each of the states where the taxpayer makes credit sales”.

Taxpayers argue that the phrase “where the taxpayer makes credit sales” in subparagraph LAC 61: 306(A)(1)(f)(ii) dictates that the interest from the Contracts at issue is not “Interest on Customers’ Notes and Accounts”.

That phrase does not apply to the situation under consideration. It applies only “When the records of the taxpayer are not sufficiently detailed so as to enable direct attribution of the revenue...”. The “records of the taxpayer” are the records of Petitioners herein, and there has been no proof to show that they are “not sufficiently detailed.”

The relevant interest under consideration is the interest from the notes that the Taxpayers in this case have purchased from these Louisiana automobile dealers. The customers who are the obligors on the notes are located in this state.

There are still significant connections with Louisiana in regard to the Contracts purchased by the Taxpayers. The source of the principal and interest that comprise the payments comes from Louisiana residents. The Contracts, by their terms, are to be interpreted under Louisiana law. Any repossessions, voluntary or involuntary, suits to collect the obligations represented by the Contracts, or matters in bankruptcy would occur in Louisiana. There are still obligations owed by the Taxpayers to the obligors on the Contracts. The Contracts provide:

“NOTICE: ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO...”.

The Board rules that the interest from the Contracts is “Interest on customers’ notes and accounts” as contemplated by La. R.S. 47:606 (A) (1)(h) and, as such is, “other revenue attributable to Louisiana” under La. R.S. 47:306 (A)(1) and is properly included in the Taxpayers’ computation of their Louisiana corporation franchise taxes.

In summary, the Board rules that: (1) the Contracts are not “trade accounts and trade notes receivable” as contemplated by R.S. 47:606 (2) (c); (2) the Contracts are not “notes and accounts” as contemplated by La. R.S. 47:606 (2) (e); and (3) the interest and any other charges or income received from the Contracts by the Taxpayers are “Interest on customers’ notes and accounts” as contemplated and defined by La. R.S.47:606 (A) (1) (h).

CORPORATION INCOME TAXES

The next discussion pertains to the Taxpayers’ request for refunds of corporation income taxes and the Secretary’s assessments of corporation income taxes. The first question pertains to adjustments made by the Internal Revenue Service, which were not reflected in the assessments. The Taxpayers state that this adjustment has now been agreed to by the Secretary and is reflected in Taxpayers’

exhibits 30 through 35. The second question pertains to losses sustained between 2004 and 2006, which losses, the Taxpayers allege, should be carried back to 2001 through 2004. The Taxpayers claim that the adjustments have been agreed to by the Secretary and are reflected in Taxpayers' Exhibits 30 through 35. The third income tax issue pertains to an expense allocation factor in the audit period and assessment for 2000 through 2002, which allocation factor was different from the expense allocation factor that was previously agreed to with the Secretary and actually used in the tax periods both immediately prior and immediately subsequent to the 2000, 2001 and 2002 period. The Secretary has given no explanation for the change in the expense allocation factor and presented no justification for the change at trial.

CONCLUSION

The Board finds that the Secretary shall re-calculate the amount of corporate franchise tax that the Taxpayers may owe or the amount of corporation franchise tax refund to which the Taxpayers may be entitled in accordance with these Written Reasons.

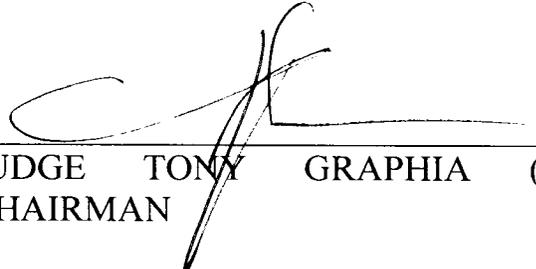
The Board also finds that the Secretary shall adjust the corporation income tax assessments to include: (1) the changes made by the IRS; (2) take into consideration the loss carry back for 2004 through 2006 and (3) make adjustment to the income tax assessments for 2000 through 2002 using the same expense allocation factor for that period that was used in the immediately prior and immediately subsequent audits.

IT IS ORDERED that the parties shall submit to the Board a proposed Judgment conforming to these Written Reasons, and that this Judgment shall contain the proper dollar amounts resulting from the changes provided for in these Written Reasons.

IT IS FURTHER ORDERED that if Taxpayers and the Secretary cannot agree on the form of a proposed Judgment within 45 days, then each party may submit a proposed Judgment together with a Memorandum in support thereof. The opposing party shall be given 10 days to file a Memorandum in response.

This is a non-final Order and does not constitute an appealable Judgment as contemplated by La. R.S. 47:1410 and La. R.S. 47:1434.

THUS DONE AND SIGNED at Baton Rouge, Louisiana this 8 day of October, 2014.



JUDGE TONY GRAPHIA (RET.),
CHAIRMAN