STATE OF WISCONSIN

TAX APPEALS COMMISSION

BRAEGER CHRYSLER PLYMOUTH
JEEP EAGLE, INC.
4201 S. 27th Street
Milwaukee, WI 53221,

DOCKET NO. 02-S-213

Petitioner,

vs.

DECISION AND ORDER

WISCONSIN DEPARTMENT OF REVENUE
P.O. Box 8907
Madison, WI 53708-8907,

Respondent.

This matter came before the Commission for trial on August 21 and 22, 2003, in Madison, Wisconsin. A partial stipulation of facts was entered on the record on August 21, 2003.

Petitioner, Braeger Chrysler Plymouth Jeep Eagle, Inc. (Braeger), is represented by Attorney Paul R. Norman of Boardman, Suhr, Curry & Field LLP, Madison, Wisconsin. Respondent, Wisconsin Department of Revenue (Department), is represented by Attorney John R. Evans.

Based on the briefs of the parties and the evidence received at trial, including the exhibits, testimony and partial stipulation of facts, the Commission finds, concludes, and orders as follows:

FINDINGS OF FACT[1]

Stipulated Facts

1. Braeger is a Wisconsin corporation doing business as a retail seller of motor vehicles and related products and services in Milwaukee. Braeger holds a sales tax permit number.

2. Braeger is an authorized motor vehicle dealer for Chrysler, Plymouth, and Jeep vehicles manufactured and/or distributed by DaimlerChrysler Motor Corporation (DCMC).

3. DCMC conducts an Employee/Retiree New Vehicle Purchase/Lease Program (Program) under which DCMC employees, retirees, and their family members (eligible participants) may purchase or lease new motor vehicles from DCMC dealers in accordance with Program rules provided by DCMC to its dealers.

4. Braeger regularly participates in the Program by selling or leasing DCMC vehicles to eligible participants.

5. When Braeger either sells or leases a vehicle under the Program, it must complete and deliver to DCMC a document prescribed by DCMC entitled "Chrysler Employee/Retiree New Vehicle Purchase/Lease Agreement" (Agreement), signed by both the eligible participant and an authorized representative of Braeger.

6. Under the Program, eligible participants may choose to purchase or lease a vehicle already in Braeger's inventory or may special order a vehicle through

[1] Unless otherwise stated, all facts relate to November 1, 1994 through October 31, 1998 (the "audit period" or "period under review").

Braeger from DCMC.

7. In or about May 2000, the Department concluded a sales and use tax audit of Braeger for the period under review.

8. As a result of the audit, under date of July 11, 2001, the Department issued an assessment to Braeger of $53,270.76, of which Braeger did not contest $13,339.25. Braeger did object to $39,931.51, consisting of $23,031.51 in sales and use tax, $11,200 in interest, and $5,700 in penalties. The contested amount was based on the Department's assertion that amounts Braeger had received from DCMC under the Program should have been included in the "gross receipts" Braeger reported on its sales and use tax returns.

9. Under date of September 4, 2001, Braeger filed a petition for redetermination with the Department.

10. In March 2002, Braeger paid to the Department $13,815.49, the undisputed portion of the assessment with interest updated, and deposited $41,441.19, under Wis. Stat. § 77.58(6)(c), representing the disputed portion of the assessment.

11. Under date of June 4, 2002, the Department denied Braeger's petition for redetermination of the disputed portion of the assessment.

Additional Facts

12. Under the Rules and Provisions of the Program (the Rules), in a section entitled "DEALER OBLIGATION," it states: "By participating in this Program, and in consideration of allowances or fees to be paid to dealer under the Program, dealer agrees to comply with all the requirements and obligations set forth in Section C-

1 of the Gold Book." (Petitioner's Exhibit D, p. 3)

13. Under a section entitled "SELLING DEALERSHIP," the Rules further state: "(3) any non-compliance with the Rules by the dealership or anyone acting on its behalf may result in (a) the recovery by charge-back or otherwise of sales fees paid to the dealership or incurred as an obligation to the dealership by DaimlerChrysler Corporation. . . ." (Petitioner's Exhibit D, p. 5.)

14. The Rules further state that the Dealer is required to review the Rules with the customer and provide a copy to the customer upon request. (Petitioner's Exhibit D, p. 3.)

15. On the back of the Agreement, which is required to be signed by the eligible participant and the authorized dealer representative, it states, "By participation in this Program and in consideration of allowances or fees to be paid to Dealer under the [Program], Dealer agrees to comply with all the requirements and obligations set forth in the [Agreement]." (Petitioner's Exhibit G, back page.)

16. The Agreement is sent to the eligible participant from DCMC, and the eligible participant brings it to Braeger when purchasing a vehicle. (August 21, 2003 Transcript, at 13-14.)

17. Braeger has a contract with DCMC which provides instructions on how to calculate the price of motor vehicles purchased and rented to eligible participants under the Program.

18. Braeger calculated the employee purchase price of a motor vehicle under the Program as follows:

A. Braeger began with the manufacturer's established factory invoice price.

B. Adjustments were made for the value of options which the purchaser wanted added to or deleted from the vehicle.

C. Eligible participants were entitled to three additional price reductions: (1) A "holdback," an amount included in Braeger's invoice and paid to DCMC, then refunded to Braeger at a later time;[2] (2) A "Chrysler Marketing Adjustment," which was included in the factory wholesale price of the vehicle and was established by DCMC each year for each type of vehicle; and (3) "Advertising Group Funds."[3]

D. If a purchaser had a trade-in, its value was subtracted from the purchase price. (August 21, 2003 Transcript, at 12-18; Petitioner's Exhibit R.)

19. The sales tax was then applied to the purchase price calculated under Finding 18. (August 21, 2003 Transcript, at 12-13.)

20. When Braeger leased a motor vehicle to an eligible participant under the Program, it first calculated the sales price of the vehicle under Finding 18, then calculated the gross capitalized cost of the lease, next calculated the amount of monthly payments, and finally applied the sales tax to the payments. (August 21, 2003 Transcript, at 37-43; Petitioner's Exhibits M and N.)

21. Subsequent to the sales transaction, Braeger received a payment from DCMC of six percent of the Employee Purchase Price plus $75 (Program

[2] The undisputed testimony was that holdback payments were made from DCMC to Braeger on a quarterly basis (August 21, 2003 Transcript, at 16), and that a holdback is "a trade discount offered by the manufacturer [that] represents a reduction in the dealer's cost of goods sold, rather than a sharing of the selling price with the employee." (August 22, 2003 Transcript, at 25). The parties do not dispute that the holdback sums were returned to Braeger from DCMC regardless of whether Braeger sold the vehicle for which the holdback appeared on the invoice. There is also no dispute that these holdbacks are not subject to sales tax.

payment). The $75 may have been dropped from the repayment at some time during the period under review. (August 21, 2003 Transcript, at 19-21.)

22. The difference between the manufacturer's suggested retail price and the employee purchase price is greater than the Program payment. (August 21, 2003 Transcript, at 9-11; Petitioner's Exhibit E.)

23. In a December 15, 2000 letter from Vicki Gibbons of the Department to Bob Foulks of the Wisconsin Automobile & Truck Dealers Association, and in response to an inquiry by Mr. Foulks, the Department expressed its view that Program payments such as those at issue here are taxable. (Petitioner's Exhibit R, Page 2.)

24. Braeger filed a timely petition for review with the Commission.

CONCLUSIONS OF LAW

1. The Program payments received by Braeger from DCMC are includable in Braeger's gross receipts and are, therefore, subject to Wisconsin sales tax.

2. The Department's assessment did not deny Braeger its right to due process.

OPINION

Program Payments

The first question before the Commission is whether the Program payments provided by DCMC to Braeger were part of Braeger's "gross receipts" under

[3] The "Chrysler Marketing Adjustment" and the "Advertising Group Funds" were not items of disagreement between the parties during the trial or in their briefs.

Wis. Stat. § 77.52(1) and therefore subject to sales tax, or were nontaxable reductions of the wholesale price paid by Braeger for the vehicles sold or leased under the Program.

Wisconsin Statutes § 77.52(1) imposes sales tax on the "gross receipts from

the sale, lease or rental of tangible personal property." As provided in Wis. Stat. § 77.51(4)(a), "'gross receipts' means the total amount of the sale, lease or rental price, as the case may be, from sales at retail of tangible personal property, or taxable services, valued in money, whether received in money or otherwise. . . ." Gross receipts generally include "[a]ll receipts, cash, credits and property. . . ." Wis. Stat. § 77.51(4)(c)1.

The Department's position is that the Program payments are employee discounts reimbursed to Braeger by DCMC and are, therefore, part of the purchase price of the vehicle. As such, they are part of Braeger's taxable gross receipts. The Department states that this case is legally indistinguishable from *Schenker v. Dep't of Revenue*, Dane County Circuit Court Case No. 98CV0928 (Sept. 1998).

In *Schenker*, petitioners purchased two vehicles from Burtness Chevrolet. A manufacturer's rebate and employee discount were subtracted from the price the Schenkers paid for each vehicle. Burtness was credited by General Motors for these rebates and discounts. The Schenkers filed a claim for a refund of that portion of the sales taxes which was attributable to the amount of the sales prices covered by the rebates and discounts. The Department denied the claim, and the Commission upheld the Department's decision.

The Schenkers appealed to the circuit court, which upheld the Commission's determination that under Wis. Stat. § 77.51(4)(c)1 "gross receipts" includes manufacturer's rebates and employee discounts where the manufacturer compensates the retailer for the amount of the rebate and discount allowed. Under the

Commission and circuit court's rationale in *Schenker*, the Department asserts, the Program payments are part of Braeger's taxable gross receipts.

The Department further asserts that the Program payments are analogous to a manufacturer's rebate, which, pursuant to Wis. Admin. Code § Tax 11.28(6), "is not a reduction of the retailer's gross receipts or sales price . . . for sales or use tax purposes." This conclusion is also expressed in Wisconsin Tax Bulletin No. 25 (Oct. 1981), which addresses the sales tax treatment of auto manufacturers' cash rebate programs and states: "When applied toward the purchase price of the car, the bonus is the same as any other money received by the dealer and this part of the dealer's gross receipts is subject to tax." (Department's Exhibit 15, subpart V.)

The Department also compares the transactions in the instant case to transactions involving manufacturer's discount coupons, where the manufacturer reimburses the retailer for the coupon's value. In its March 1973 *Tax Report* (Department's Exhibit 20), the Department stated that the amount the manufacturer reimburses the retailer is consideration which constitutes part of the taxable gross receipts of the retailer. Similarly, Wis. Admin. Code § Tax 11.28(3)(a)(b) provides that a retailer's taxable gross receipts includes "the amount the manufacturer reimburses the retailer for the coupon. . . ." The Department's view is that the Agreement, which is sent to an eligible participant from DCMC and which an eligible participant brings to Braeger upon purchasing a vehicle, serves as a sort of coupon.

However, Braeger asserts that the Program payments in this case are nontaxable wholesale price reductions which were necessary to make Braeger's cost of

goods sold lower than the employee purchase price. Braeger contends that a Program payment is more akin to a "holdback," which is an amount that a manufacturer includes in a vehicle's invoice price at the time the vehicle is shipped to the dealer, but which is subsequently returned to the dealer by the manufacturer in the form of a payment or credit. The Department does not dispute that holdbacks are viewed as a reduction in the dealer's cost of goods sold and are nontaxable.

Braeger also compares the Program payments in this case to manufacturer wholesale incentives under which, for example, if a dealer sells a certain number of vehicles during a given period of time, the dealer will receive a payment of a certain amount from the manufacturer for each vehicle sold. The Department does not dispute that such incentive programs are nontaxable.

Braeger further asserts that this case is distinguishable from *Schenker* because, in *Schenker*, the dealer collected only a portion of the retail sales price from the retail purchaser and collected the remainder from General Motors in the form of a manufacturer rebate and a sum equivalent to the employee discount. However, in the instant case, Braeger agreed to sell the vehicle to an eligible participant at the employee purchase price established by DCMC, and then collected the full amount of the employee purchase price (less the reductions discussed in Finding 18 above) from the purchaser.

For the same reasons expressed in *Schenker*, we agree with the Department that the Program payments are part of the taxable gross receipts of Braeger. As the Commission stated in *Schenker*:

> Section 77.51(4)(c)1 provides that the definition of gross receipts includes all "receipts, cash, credits and property." There is no requirement that such receipt, cash, credit or property be received from the purchaser. Petitioners argue that the rebates and discounts at issue here cannot be considered to be credits because they are discounts. Regardless of how they are labeled, the substance of the transactions makes it clear that the rebates and discounts at issue here were actually credits.

David and Carole Schenker v. Dep't of Revenue, WTAC Docket No. 97-S-230-SC (March 1998).

Similarly, labeling the Program payments in the instant case "wholesale price reductions" does not change the substance of the transactions, which is that Braeger was credited for at least a part of the employee discount received by the customer. While it is true that in *Schenker* the dealership was credited by the manufacturer in an amount *equal* to the rebates and discounts provided, whereas here it appears that the Program payments compensated for only a *part* of the employee discount,[4] this difference is not sufficiently significant to distinguish this case from *Schenker*. Thus, we see no reason to deviate from the rationale of the Commission and circuit court in *Schenker*. Under that rationale, the Commission concludes that the Program payments made to Braeger constituted credits to Braeger for the sales of vehicles at the employee purchase price and are, therefore, part of Braeger's gross receipts.

The Commission also concludes that the transactions in this case are more analogous to rebates and coupon discounts reimbursed by a manufacturer, which are not precluded from sales tax, than to holdbacks and incentive programs, which are.

The Program payments are tied to the sale of a particular vehicle at an employee discount, the price and terms of which are dictated by DCMC and not by Braeger.

[4] This assumes that the comparison is between the employee purchase price and the manufacturer's suggested retail price.

Unlike holdbacks and incentive programs, the Program payments are received only in *exchange for* the sale of a *particular* vehicle. Contrastingly, DCMC returned "holdback" sums to Braeger on a quarterly basis, regardless of whether or not Braeger sold the vehicles to which the holdback sums were initially charged. Moreover, incentive program payments, which are not tied to any discount offered the customer by the manufacturer, do not in any way serve to offset a discount and therefore cannot be viewed as a credit for that discount.

In view of the foregoing, the Commission concludes that the program payments were part of the taxable gross receipts under Wis. Stat. § 77.51(4)(c)1.

Due Process Claim

The Commission's conclusion on the first issue in this case also serves to address the second. Braeger argues that the Department's assessment of sales and use tax on the Program payments denies Braeger of its constitutional right to due process because the Department first informed Braeger of its position regarding such payments more than two years after the end of the audit period, in its December 15, 2000 letter from Ms. Gibbons to Mr. Foulks. Relying on *Elections Board v. WMC*, 227 Wis.2d 650, 597 N.W.2d 721 (1999), Braeger argues that it did not have fair warning that such amounts were taxable prior to Ms. Gibbons' letter. The Commission has determined that under applicable Wisconsin Statutes, Administrative Codes, Tax Bulletins, and the *Schenker* decisions discussed above—all of which were in existence during the audit period—it is evident that such Program payments were taxable. While the letter from Ms. Gibbons reinforces that point, it does not articulate a "new test," as was the

situation in *Elections Board*, and Braeger's reliance on that case is therefore misplaced. There is no retroactive application of a new test here; there is simply the application of existing law to a particular fact scenario. Accordingly, no deprivation of due process occurred.

ORDER[5]

The Department's action on the petition for redetermination is affirmed.

Dated at Madison, Wisconsin, this 12th day of October, 2004.

WISCONSIN TAX APPEALS COMMISSION

Jennifer E. Nashold, Commissioner

ATTACHMENT: "**NOTICE OF APPEAL INFORMATION**"

[5] This Decision and Order is issued by a single Commissioner under the authority provided by Wis. Stat. § 73.01(4)(em)2 as created by 2003 Wisconsin Act 33, § 1614d.