IN THE GEORGIA TAX TRIBUNAL
STATE OF GEORGIA

DRIVETIME CAR SALES COMPANY, LLC,	*	
Petitioner,	*	
v.	*	TAX TRIBUNAL DOCKET NO. 1715968
LYNNETTE T. RILEY, Commissioner of the GEORGIA DEPARTMENT OF REVENUE,	*	
Respondent.	*	

DECISION

2018 – 2, Ga. Tax Tribunal, December 13, 2018

I. INTRODUCTION

This matter is an appeal by DriveTime Car Sales Company, LLC ("DriveTime Car Sales") of an Official Assessment and Demand for Payment[1] dated October 21, 2016, (the "Assessment") issued by Respondent, Commissioner of the Georgia Department of Revenue (the "Department") for sales and use tax during the period of October 1, 2010 through September 30, 2013 (the "Audit Period"), and an appeal of the Department's denial of four claims for refund of sales and use tax filed by DriveTime Car Sales. After careful consideration of the parties' motions and arguments and for the reasons set forth below, the Department's Motion for Summary Judgment is **GRANTED** and Petitioner's Motion for Summary Judgment is **DENIED**.

II. PROCEDURAL HISTORY

On November 11, 2016, DriveTime Car Sales filed a Petition initiating this matter. On December 12, 2017, the Tribunal received a Motion to Dismiss from the Department.[2] On December 11, 2017, DriveTime Car Sales filed its response to the Department's Motion and an

[1] Letter ID L1347996816
[2] It appears that the Department's Motion to Dismiss was served on DriveTime Car Sales on or around November 30, 2017, however, it was not ultimately received by the Tribunal via U.S. mail until December 12, 2017.

Amended Petition. The Department filed its reply brief on December 18, 2017. By consent of the parties, an oral argument on the Motion to Dismiss was held by telephone on February 8, 2018. On February 12, 2018, the Court denied the Department's Motion to Dismiss.

On July 21, 2018, DriveTime Car Sales filed an Amended and Restated Motion for Summary Judgment ("DriveTime Car Sales' Motion"). On August 20, 2018, the Department filed a Motion for Summary Judgment ("Department's Motion") and a response to DriveTime Car Sales' Motion. On September 4, 2018, DriveTime Car Sales filed its response to the Department's Motion and a reply to the Department's response. On September 17, 2018, the Department filed its reply to DriveTime Car Sales' response. On September 26, 2018, DriveTime Car Sales filed a request for oral argument on these motions, and a hearing was held on November 13, 2018. At the Tribunal's request, the parties submitted a Post-Hearing Joint Stipulation of Facts on November 26, 2018. Mr. Scott Forbes, Esq. appeared on behalf of the Department. Mr. Peter Larson, Esq. and Ms. Raye Elliot, Esq. appeared on behalf of DriveTime Car Sales.

III. STIPULATIONS OF FACT

The parties have stipulated to the following undisputed facts:

A. DriveTime Car Sales Company, LLC's General Business and Ownership Structure

1.

DriveTime Car Sales is a wholly owned subsidiary of DriveTime Sales and Finance Company, LLC ("DriveTime Sales and Finance"), which in turn is a wholly owned subsidiary of the holding company DriveTime Automotive Group, Inc. ("DTAG").[3] Joint Stipulation of

[3] Unless otherwise indicated, all facts referenced herein occurred during the "Audit Period" of October 1, 2010 through September 30, 2013.

Undisputed Material Facts ("Stip.") ¶ 1. DTAG is owned entirely by two individuals and two family trusts. (Stip. ¶ 1.)

2.

DT Acceptance Corporation ("DTAC") is DriveTime Car Sales' related finance company and is owned by the same two individuals and two family trusts who own DTAG. (Stip. ¶ 2.)

3.

DTAG and its subsidiaries, including DriveTime Car Sales, and DTAC and its subsidiaries qualify as a brother-sister controlled group (the "DriveTime Controlled Group") as defined in the Internal Revenue Code at 26 U.S.C. §1563(a)(2) which applies to two or more corporations in which 50% or more of the stock of the corporations (by vote or by value) is owned by five or fewer persons who are individuals, estates or trusts. (Stip. ¶ 3.) The DriveTime Controlled Group corporations also qualify as related corporations under the Internal Revenue Code at 26 U.S.C. § 267(f)(1) which defines related corporations as two corporations that are members of the same "controlled group" as defined in § 1563 but substituting "more than 50%" for "at least 80%." (Id.)

4.

DTAG is a holding company. (Stip. ¶ 4.) DriveTime Sales and Finance provides management and administrative services to all of the companies in the DriveTime Controlled Group and houses employees who provide services to all of the companies in the DriveTime Controlled Group. (Id.) For example, DriveTime Sales and Finance houses the tax department which oversees the payment of taxes and tax liability for all of the DriveTime Controlled Group legal entities and businesses. (Id.) DriveTime Sales and Finance also houses the human

resources department, the payroll department, the accounting department, the information technology department and the legal department, each of which perform those functions for all of the DriveTime Controlled Group companies. (Id.) There is one chief financial officer, one general counsel and one secretary for the entire DriveTime Controlled Group. (Id.) DriveTime Sales and Finance also contracted with vendors to provide supplies and services, such as facility maintenance, to entities in the DriveTime Controlled Group. (Id.) The DriveTime Controlled Group companies are not required by law to share the business services provided by DriveTime Sales and Finance; instead, these services are shared for better efficiency and rates. (Id.)

5.

GFC Lending, LLC is a wholly owned subsidiary of DTAC which provided subprime auto financing and purchased loans from non-DriveTime, thirty party dealerships. (Stip. ¶ 5.) GFC Lending, LLC, which serviced the loans it purchased, had 100-200 employees during the Current Audit Period. (Id.)

6.

Each of the DriveTime Controlled Group companies, including DriveTime Car Sales and DTAC, have common officers and directors. (Stip. ¶ 6.) For example, there were three or four common directors who served on the boards of both DriveTime Car Sales and DTAC during the audit periods. (Id.)

7.

Both DriveTime Car Sales and DTAC report income and balance sheets to outside parties on the same/single audited U.S. GAAP financial statement, including the ownership of the loans and receivables balances and the charge off or losses with respect to the loans and receivables

balances. (Stip. ¶ 7.) DriveTime Car Sales and DTAC keep consolidated books for GAAP and SEC purposes, but also keep separate company trial balances in the event they are needed for purposes such as licensing or other reviews. (Id.)

B. DriveTime Car Sales' Business

8.

DriveTime Car Sales is a retailer of used motor vehicles at various locations throughout the State of Georgia and the United States. (Stip. ¶ 8.) DriveTime Car Sales owned and operated nine used motor vehicle dealerships in Georgia as of the end of the Audit Period. (Id.)

9.

DriveTime Car Sales is a "buy here, pay here" dealer, which means that DriveTime Car Sales sold used motor vehicles to individual customers and DriveTime Car Sales financed these same sales pursuant to retail installment contracts between DriveTime Car Sales and its Georgia customers, who might not otherwise have been financially able to obtain financing from other dealers, banks or financing sources to purchase the vehicles. (Stip. ¶ 9.)

10.

DriveTime Car Sales employs approximately 1000 people who are responsible for purchasing vehicles, reconditioning purchased vehicles, showing vehicles at dealerships, and selling vehicles to customers. (Stip. ¶ 10.) With the exception of DriveTime Car Sales' subsidiary Carvana, LLC, which is not relevant here, no other company within DriveTime Controlled Group conducted sales activity during the Audit Periods. (Id.)

11.

All DriveTime Car Sales dealerships are directly owned and operated by DriveTime Car Sales, rather than a franchisee or some other third party, and all dealership property is either owned or leased directly by DriveTime Car Sales. (Stip. ¶ 11.)

12.

Employees at DriveTime Car Sales' dealerships are responsible for greeting customers, showing cars on the lot, putting up and handing out advertising, sales, explaining the sales and finance process to customers, responding to online applications from customers, discussing loan terms with customers, and finance origination. (Stip. ¶ 12.)

13.

Individual DriveTime Car Sales dealerships are managed by general managers employed by DriveTime Car Sales who are responsible for dealership sales and operations. (Stip. ¶ 13.) Above these general managers are regional managers who typically move between different dealerships. (Id.)

14.

Approximately 30-50 of DriveTime Car Sales' employees work at its headquarters in Phoenix, Arizona. (Stip. ¶ 14.) Vice-president level employees at the headquarters are responsible for the direction of dealerships, decisions about opening dealerships, sales targets, budgets, program development, and analyzing sales trends. (Id.) These employees lead DriveTime Car Sales' different departments, which include vehicle acquisitions, reconditioning and inspection, marketing and advertising, retail sales, and training and development. (Id.)

15.

All vehicles in DriveTime Car Sales' inventory are purchased from auto auctions by DriveTime Car Sales' vehicle buyers. (Stip. ¶ 15.) Once a vehicle is purchased from auction, it is transported to a DriveTime Car Sales reconditioning and inspection center where employees inspect the vehicle and determine what reconditioning work is required, order parts, and perform work to meet quality standards set by DriveTime Car Sales. (Id.) Once a vehicle is reconditioned, it is transported to a dealership where it will be washed and cleaned and presented for sale by a dealership employee. (Id.)

16.

Almost all of DriveTime Car Sales' customers finance their vehicles through DriveTime Car Sales, but a few customers purchased vehicles from DriveTime Car Sales using cash or outside financing that the customer has already arranged, and DriveTime Car Sales does not prevent customers from using these options. (Stip. ¶ 16.)

17.

In a typical sales transaction, a customer may research makes, models, and colors on cars in inventory on DriveTime Car Sales' website and then set up an appointment with a sales advisor. (Stip. ¶ 17.) The sales advisor will then walk the customer through the vehicles on the lot. (Id.) Once the customer selects a vehicle, a customer service manager will explain financing terms and what down payment is required. (Id.)

18.

DriveTime Car Sales only offers its own financing to its customers and does not offer financing through third party banks or other lenders. (Stip. ¶ 18.)

19.

Once a customer selects a vehicle to purchase, DriveTime Car Sales' dealership staff will originate the financing for the customer to purchase the vehicle, including setting the appropriate interest rate and term for the loan, and enter into a retail installment sales agreement with the customer (the "Agreements"). (Stip. ¶ 19.)

20.

Pursuant to the Agreements, each customer financed the sales price of the vehicle and the Georgia sales tax due thereon, and agreed to repay these amounts over time in installments. Sample Agreements are attached to the Amended Affidavit of Tony Arnold as Exhibit A and to the Department's Statement of Material Facts As To Which There Exists No Genuine Issue To Be Tried (the "Department's Statement of Facts") as Exhibit B. (Stip. ¶ 20.)

21.

When DriveTime Car Sales filed its first sales tax return in Georgia, it elected to report sales on the accrual basis of accounting, because Georgia offered sales tax deductions for bad debt. (Stip. ¶ 21.) In states that do not offer sales tax deductions for bad debts and allow cash basis reporting for sales tax, DriveTime Car Sales elects to report sales tax on the cash basis. (Id.) During the Audit Periods, DriveTime Car Sales maintained and provided all records that were necessary to properly report its Georgia sales on the cash or accrual basis of sales tax reporting. (Id.) DriveTime Car Sales had a valid Georgia dealer sales and use tax license during the Audit Periods. (Id.)

22.

At the time of each vehicle sale, DriveTime Car Sales collected and reported to the Department the full sales tax on the full total agreed sales price of each vehicle sale, up front at

the time of each sale, even though the customers did not pay the sales prices at the times of the sales. (Stip. ¶ 22.) DriveTime Car Sales reported the sales tax on the accrual basis, which meant that DriveTime Car Sales reported and paid the sales tax calculated on the full agreed sales prices of the vehicles, even though the customers were paying the sales prices and sales tax over time in installments. (Id.) Thus, the Department received sales tax up front on sales prices that had not yet been paid. (Id.)

23.

As is typical in the auto dealer industry, DriveTime Car Sales employees are responsible for preparing and filing state title and registration paperwork after a vehicle is sold. (Stip. ¶ 23.)

24.

DriveTime Car Sales used its own electronic sales system that is separate from the electronic loan accounting system used by DTAC. (Stip. ¶ 24.)

25.

Employees at DriveTime Car Sales dealerships were not expected to help customers with their existing DriveTime loans, and DriveTime Car Sales' corporate deposition witness did not know whether dealership employees could even access customer payment records. (Stip. ¶ 25.)

C. DTAC's Business

26.

DTAC is DriveTime Car Sales' related finance company. DTAC owns a number of subsidiary companies, including DT Credit Company, LLC ("DTCC"), GFC Lending, LLC and a number of companies sharing the titles DR Receivables Company or DT Warehouse. (Stip. ¶ 26.) An organization chart for the DriveTime Controlled Group is attached to the Department's Statement of Facts as Exhibit A. (Id.)

27.

DTAC has approximately 100 employees, and these employees are responsible for management of loan servicing and collections and the oversight of approximately 1000 loan advisors and collectors employed by DTCC. (Stip. ¶ 27.) DTCC's loan advisors and collectors are responsible for loan servicing, customer communication, customer management, and collections in accordance with DTAC's credit and collection policy. (Id.) Certain employees of DTAC or DTCC may also have taken questions from state DMV departments to ensure that title paperwork was properly filed. (Id.) No employee of DTAC or DTCC performed any sales to customers during the Audit Period. (Id.)

28.

DTAC and its subsidiary DTCC share a business location in Mesa, Arizona. The Mesa office is not shared with any other DriveTime companies. (Stip. ¶ 28.) DTAC and DTCC also share an electronic loan servicing system that was maintained by the DriveTime Controlled Group's IT department at DriveTime Sales and Finance. (Id.) Beyond employees at DTAC and DTCC and certain accountants with DriveTime Sales and Finance, no other employees had access to this system. (Id.)

29.

DTAC is a related finance company to DriveTime Car Sales and meets the requirements for related finance companies set out in the Internal Revenue Service's January 2005 New Dealer Audit Technique Guide, a copy of which is attached to the Department's Statement of Facts as Exhibit C (the "Guide"). (Stip. ¶ 29.) The Guide states in part that related finance companies are commonly used in the auto sales and finance industry; related finance companies benefit auto retailers by removing the burden of debt collection from dealerships, possibly offering lower

discount rates than third-parties, and allowing retailers to be more selective when offering credit to customers; and related finance companies are usually created by establishing a separate financing entity such as an S Corporation, which then purchases loans from its related auto retailer at a significant discount, allowing the auto retailer to book a "current and deducted loss for the difference between the full contract and the discounted price." Guide, Chapter 11, p. 1. (Id.)

30.

DriveTime Car Sales' and DTAC's legal separation is not required by any state or federal law. Separating these companies is beneficial as it protects the sales company from potential lawsuits arising from the collection of debt and vehicle repossession or suits related to financial operations. (Stip. ¶ 30.)

31.

DriveTime Car Sales contractually transferred its Receivables Balances exclusively to DTAC and not to any other finance company, and DTAC exclusively contractually purchased Receivables Balances from DriveTime Car Sales and not from any other motor vehicle dealer. (Stip. ¶ 31.)

D. Transfer of the Receivables

32.

After DriveTime Car Sales and the customers entered into the Agreements for the purchase of the vehicles, DriveTime Car Sales transferred certain rights under the Agreements to DTAC for an amount that was less than the amount financed under each Agreement (the "Transfers"). (Stip. ¶ 32.) The parties disagree on the scope of the transfer of rights and refer to

the identity of the rights transferred for purposes of this Stipulation as the "Receivables Balances." (Id.)

33.

The Transfers took place by the day after each loan was originated by DriveTime Car Sales via an automated process. (Stip. ¶ 33.) Every night the electronic loan accounting system used by DTAC communicated with the electronic sales system used by DriveTime Car Sales, the Transfers would occur, and cash would be transferred from DTAC to DriveTime Car Sales. (Id.) These Transfers were overseen by employees of DTAC and DriveTime Sales and Finance. (Id.)

34.

Since the Transfers occurred no later than the day after each Agreement was originated, no customers made payments prior to the Transfers and the customers were not yet in default at that time. (Stip. ¶ 34.)

35.

The transfer of Receivables Balances between DriveTime Car Sales and DTAC during the Audit Periods was governed by an Origination Agreement entered into by the companies on March 18, 2003, and an Amended and Restated Origination Agreement entered into on September 26, 2013 (collectively, the "Origination Agreements"). (Stip. ¶ 35.) Copies of both Origination Agreements are attached to the Department's Statement of Facts as Exhibits D and E, respectively. (Id.)

36.

The Origination Agreements state that DriveTime Car Sales agreed to sell all "Receivables" (as defined therein) originated by DriveTime Car Sales to DTAC. (Stip. ¶ 36.) The Origination Agreements define "Receivables" as "each Contract that has been or will be

originated by [DriveTime Car Sales] . . . but shall not include any obligation under any Special Program, which shall remain a separate corporate obligation of [DriveTime Car Sales]." Exhibit D to Department's Statement of Facts at p. 4, Exhibit E to Department's Statement of Facts at p. 4. (Id.) The Origination Agreements also defined "Contract" as "the retail installment sale contract, with any amendments or modifications thereto, pursuant to which the Obligor has purchased the Financed Vehicle." Exhibit D to Department's Statement of Facts at p. 2, Exhibit E to Department's Statement of Facts at p. 2. (Id.) The Origination Agreements state that DriveTime Car Sales would sell and DTAC would purchase "all of Seller's right, title, and interest in, to and under all Receivables." Exhibit D to Department's Statement of Facts at p. 6, Exhibit E to Department's Statement of Facts at p. 5. (Id.) The Origination Agreements also stated that DriveTime Car Sales would deposit any and all customer payments on the Receivables received by DriveTime Car Sales into DTAC's bank accounts within one to three business days of DriveTime Car Sales' receipt of the payment. Exhibit D to Department's Statement of Facts at p. 16, Exhibit E to Department's Statement of Facts at p. 15. (Id.) Finally, the Origination Agreements state that the price paid by DTAC to DriveTime Car Sales for the Receivables would be "equal to a price reflecting reasonably equivalent value and determined in accordance with a standardized schedule which classifies the Receivables according to expected loss and on that basis grades the investment risk of the Receivables which are being transferred and assigned by [DriveTime Car Sales] to [DTAC], such amounts being equal to the fair market value of such Receivables." Exhibit D to Department's Statement of Facts at p. 3, Exhibit E to Department's Statement of Facts at p. 3. (Id.)

37.

The Agreements state, "Assignment of Dealer: For value received, Dealer hereby transfers and assigns to DT ACCEPTANCE CORPORATION [] all of its right, title, and interest in this Contract and the Vehicle." Exhibit B to Department's Statement of Facts at pp. 4, 11, and 18. (Stip. ¶ 37.) The Agreements also state, "Assignment of Dealer: Dealer may sell or assign its rights in this Contract without your permission. We may sell or assign this Contract for an amount that is more than or less than the Amount Financed." Exhibit B to Department's Statement of Facts at pp. 26, 34, and 45. (Id.)

38.

After the Transfers, customers could make payments directly to DTAC through its website, by phone, by mail, at kiosks located in some retail stores, or by dropping off a payment at a DriveTime Car Sales dealership. (Stip. ¶ 38.) If customers made a payment at a DriveTime Car Sales dealership, dealership employees would deposit the payments into DTAC's bank accounts and accountants employed by DTAC or DriveTime Sales and Finance would apply these payments to the correct customer account. (Id.)

E. DT Receivables and DT Warehouse

39.

Some, but not all, of the Receivables Balances were transferred to DTAC's wholly owned subsidiaries using variations of the titles DT Receivables or DT Warehouse at some point in time during the Audit Periods. (Stip. ¶ 39.) The DT Receivables and DT Warehouse companies were disregarded entities for federal tax purposes, with no employees, that were formed by DTAC to secure funding from third-party lenders. (Id.) DTAC pledged and transferred the Receivables Balances to these companies, and third-party lenders would lend

money based on the value of the future payments associated with these Receivables Balances. (Id.) The funds received from the third party lenders were used by DTAC to purchase Receivables Balances from DriveTime Car Sales which, in turn, used the funds to fund its retail operations. (Id.)

40.

Some of the Receivables Balances that became bad debts that are the subject of this case were transferred by DTAC to DT Receivables and DT Warehouse companies during the Audit Periods. (Stip. ¶ 40.) A majority of these transfers were to either a DT Receivables entity or a DT Warehouse entity and, in many of these cases, the Receivables Balances were transferred back to DTAC if they were not needed as part of a borrowing. (Id.) If there was a customer payment default, the Receivables Balance was transferred back to DTAC and was charged off for accounting and tax purposes by DTAC and on the consolidated books and records of the DriveTime Controlled Group. (Id.)

F. Bad Debt Determinations

41.

Some customers defaulted under their Agreements, and DTAC made the determination that these Agreements were worthless and uncollectible using a credit and collection policy drafted by the management of DTAC. (Stip. ¶ 41.) Under this policy, the Receivables Balances were declared worthless and uncollectible by DTAC after 90 days without payment and automatically charged off in DTAC's electronic loan accounting system and for income tax purposes. (Id.) In addition to this automated process, accountants employed by DTAC and DriveTime Sales and Finance reviewed monthly reports of all delinquent Agreements. (Id.)

42.

To the extent that DTAC maintained separate books and records for certain purposes, the bad debts were charged off on DTAC's books and records and for federal and Georgia state income tax purposes, and also charged off on the DriveTime Controlled Group's consolidated books and records. (Stip. ¶ 42.)

43.

After the unpaid balances due from customers were determined to be worthless and uncollectible and were written off, DriveTime Car Sales deducted the amount of unpaid sales tax on its Georgia sales and use tax returns. (Stip. ¶ 43.)

G. Federal Income Taxes

44.

DTAC is an S Corporation and acts as a pass through entity to DTAC's shareholders for the purpose of federal income tax. (Stip. ¶ 44.) DTAC files a return that reports income, but tax is ultimately reported and paid by DTAC's shareholders via Schedule K1 forms. (Id.)

45.

DriveTime Car Sales is a single-member LLC that is disregarded for federal income tax purposes. (Stip. ¶ 45.) DriveTime Car Sales' income was reported on the return of its parent company, DTAG, but all federal income tax was ultimately paid by DTAG's shareholders. (Id.) DTAG did not report any amount on the line for "bad debts" on its federal return during the Audit Periods. (Id.) DTAG did report losses on the line for "gain or loss on sale" arising from DriveTime Car Sales' losses on the Transfers to DTAC. (Id.) DriveTime Car Sales' losses with respect to a specific Transfer were reported in the period in

which the Transfer was made to DTAC, irrespective of whether a delinquency occurred with respect to the Transfer or when that happened. (Id.)

H. The Prior Audit

46.

The Department initiated a compliance audit of DriveTime Car Sales' sales and use tax returns for the period of October 1, 2007 through September 30, 2010 (the "Prior Audit"). (Stip. ¶ 46.) The Prior Audit was commenced on August 20, 2010. (Id.) In the Prior Audit, the Department reviewed DriveTime Car Sales' monthly sales and use tax returns, systems information and bad debt sales tax deductions and approved DriveTime Car Sales' eligibility for and computations of the sales tax deductions (except for minor agreed adjustments). (Id.) A copy of the Department's Notice of Proposed Assessment with attached work papers dated October 22, 2012 for the Prior Audit is attached to the Arnold Affidavit as Exhibit B. (Id.) The work papers attached to Exhibit B show that the Department closely reviewed and approved DriveTime Car Sales' bad debt sales tax deductions and only adjusted the amount of the deductions to reverse the inclusion of the license and title fee in calculating the amount of the bad debt which only resulted in an additional assessment of tax of $9,035.70. (Id.)

I. The Current Audit and Refund Claims

47.

In November, 2013, the Department initiated another sales and use tax compliance audit of DriveTime Car Sales for the Audit Period. (Stip. ¶ 47.) The Department again reviewed and analyzed DriveTime Car Sales' bad debt sales tax deductions claimed during the Audit Period and, after a detailed audit of all of DriveTime Car Sales' relevant records, the Department's auditor generated proposed audit work papers showing that the Department was allowing the bad debt sales tax deductions in full, except for an approximately $11,000 calculation adjustment to

the bad debt deductions. (Id.) A copy of an e-mail DriveTime Car Sales received from the Department's auditor with her proposed work papers showing the approximately $11,000 adjustment is attached to the Arnold Affidavit as Exhibit C. (Id.)

48.

During the Current Audit Period, DriveTime Car Sales ceased taking bad debt sales tax deductions on March 1, 2013, the date that motor vehicle sales in Georgia became subject to the Title Ad Valorem Tax ("TAVT") instead of the sales tax, because DriveTime Car Sales no longer had ongoing sales tax remittances to the Department against which to claim the bad debt sales tax deductions after March 1, 2013, for sales made before March 1, 2013. (Stip. ¶ 48.)

49.

After review of the Department's work papers for the Current Audit Period, DriveTime Car Sales realized that it was entitled to additional sales tax refunds or deductions for unpaid balances written off after March 1, 2013 for sales made prior to March 1, 2013. (Stip. ¶ 49.) Therefore, DriveTime Car Sales filed a refund claim with the Department on February 6, 2015, in the amount of $730,891.49 ("Refund Claim 1") to recover the overpayments and the bad debt sales tax refunds. A copy of Refund Claim 1 is attached to the Arnold Affidavit as Exhibit D. (Id.)

50.

After DriveTime Car Sales filed Refund Claim 1, the Department, after initially providing work papers approving the bad debt sales tax deductions as a legal matter and indicating only minor computational adjustments to the bad debt sales tax deductions, noted that it had received DriveTime Car Sales' Refund Claim 1 and then questioned for the first time whether DriveTime Car Sales was entitled to the bad debt sales tax deductions that DriveTime

Car Sales claimed on its sales and use tax returns during the Current Audit Period. (Stip. ¶ 50.) The Department advised DriveTime Car Sales that "its position is evolving" and that the Department's new position was that it allowed buy here, pay here dealerships such as DriveTime Car Sales to claim the bad debt sales tax deductions if the sales entity was the parent company of the finance company. (Id.) However, since DriveTime Car Sales and DTAC were "brother-sister" companies rather than "parent-subsidiary," the Department stated DriveTime Car Sales could qualify for the bad debt sales tax deductions if, as a factual matter, there was a sufficiently close connection between DriveTime Car Sales and DTAC (notwithstanding that in the Prior Audit, DriveTime Car Sales and DTAC had the same brother-sister relationship, facts and connections). (Id.)

51.

After reviewing the factual information regarding the connections between DriveTime Car Sales and DTAC, the Department issued a Notice of Proposed Assessment ("NOPA") on September 25, 2015, that proposed to disallow all bad debt sales tax deductions claimed during the Current Audit Period and to assess sales tax in the amount of $2,818,104.46, plus interest and penalties, for 100% of the bad debt sales tax deductions claimed during the Audit Period. (Stip. ¶ 51.) A copy of the NOPA is attached to the Arnold Affidavit as Exhibit E. DriveTime Car Sales timely filed a protest of the Department's NOPA on October 19, 2015. (Id.)

52.

In addition, the Department denied DriveTime Car Sales' Refund Claim 1 by letter dated October 30, 2015, a copy of which is attached to the Arnold Affidavit as Exhibit F. (Stip. ¶ 52.) DriveTime Car Sales timely filed a protest of the Department's denial of the Refund Claim on or about December 4, 2015.

53.

On or about October 29, 2015, DriveTime Car Sales filed claims for refund for the period of October 1, 2010 through February 28, 2013 in the amount of $866,297.21 ("Refund Claim 2") and for the period of March 1, 2013 through September 30, 2013 in the amount of $209,335.10 (Refund Claim 3") for additional amounts due and owing to DriveTime Car Sales pursuant to O.C.G.A. § 48-8-45, for sales tax that DriveTime Car Sales overpaid on its reporting of post charge-off recovering of unpaid balances that were the subject of prior bad debt sales tax deductions. (Stip. ¶ 52.) Copies of Refund Claims 2 and 3 are attached to the Arnold Affidavit as Exhibit G and H. The basis for Refund Claims 2 and 3 is that, in accordance with the Agreements with its customers, their loan and accounting systems and applicable tax and accounting rules, DriveTime Car Sales and DTAC apply payments on current, non-charged off accounts as follows: (1) interest due from any past due payments, (2) principal from any past due payments, (3) interest currently due, (4) principal currently due, (5) any assessed late fees, and (6) any assessed "not sufficient funds" fees. (Id.) However, when DriveTime Car Sales and DTAC received recoveries on charged-off accounts, they mistakenly applied the full amount of the recovery to principal only (which was not the method used under the Agreements) and therefore overstated the tax that DriveTime Car Sales paid. (Id.)

54.

The Department denied Refund Claims 2 and 3 by letters dated November 24, 2015. (Stip. ¶ 54.) Copies of the Department's denial letters for Refund Claims 2 and 3 are attached to the Arnold Affidavit as Exhibits I and J. DriveTime Car Sales timely filed a protest of the Department's denials on or about December 4, 2015. (Id.)

J. The Cash Basis Application and Refund Claim

55.

On October 30, 2015, pursuant to O.C.G.A. § 48-8-45(a) and Ga. Comp. R. & Regs. 560-12-1-.06(2)(a), DriveTime Car Sales submitted a request to the Department to change its method of sales and use tax reporting of Georgia sales and use tax from the accrual basis to the cash basis, effective October 1, 2010 (the "Application"), a copy of which is attached to the Arnold Affidavit as Exhibit K. (Stip. ¶ 55.) The Department has neither granted nor denied DriveTime Car Sales' Application, nor has DriveTime Car Sales received any information from the Department regarding the status of its Application. (Id.)

56.

At the time of the Application filed on October 30, 2015, DriveTime Car Sales and the Department had in force a written agreement extending the statute of limitations and the holding open of all periods for sales and use tax purposes back to October 1, 2010. (Stip. ¶ 56.) A copy of the agreement is attached to the Arnold Affidavit as Exhibit L. (Id.)

57.

Also on October 30, 2015, DriveTime Car Sales submitted a fourth claim for refund for the period of October 1, 2010 through September 30, 2013 in the amount of $897,067.22 ("Refund Claim 4"), a copy of which is attached to the Arnold Affidavit as Exhibit M. Refund Claim 4 represented the difference between the sales tax DriveTime Car sales actually paid to the Department pursuant to the accrual basis of sales tax reporting during the Current Audit Period and the tax that DriveTime Car Sales would have owed had it used the cash basis of sales tax reporting during the Current Audit Period. (Stip. ¶ 57.) The Department denied Refund Claim 4 by letter dated November 24, 2015, a copy of which is attached to the Arnold Affidavit as

Exhibit N. (Id.) DriveTime Car Sales timely filed a protest of the Department's denial of Refund Claim 4 on December 4, 2015. (Id.) The Department has not issued any decision on DriveTime Car Sales' protest of Refund Claim 4. (Id.)

K. The Department's Administrative Review

58.

On August 25, 2016, the Department held an informal conference with DriveTime to discuss the protests to the NOPA and the denials of the Refund Claim, Refund Claim 2 and Refund Claim 3. (Stip. ¶ 58.)

59.

On October 21, 2016, the Department issued a Legal Affairs and Tax Policy ruling (the "Ruling") recommending the denial of all three refund claims and that the Department issue an assessment for the tax set forth in the NOPA, plus interest (with some interest waived) and a full waiver of the penalties. A copy of the Ruling is attached to the Arnold Affidavit as Exhibit O. (Stip. ¶ 59.)

60.

Also on October 21, 2016, the Department issued an Official Assessment and Demand for Payment (the "Final Assessment") finding DriveTime Car Sales liable for $2,817,665.47 in sales taxes, plus interest for the Current Audit Period based on the Department's disallowance of the bad debt sales tax deductions. (Stip. ¶ 60.) A copy of the Final Assessment is attached to the Arnold Affidavit as Exhibit P. (Id.) The Final Assessment reflected a partial waiver of interest, as recommended in the Ruling, but did not specify the amount of interest that was waived or how the interest was calculated. (Id.) The Department contemporaneously affirmed the proposed denials of the Refund Claim, Refund Claim 2, and Refund Claim 3. (Id.)

61.

On October 24, 2016, the Department issued a penalty waiver, waiving 100% of all penalties with respect to the tax set forth in the Final Assessment. (Stip. ¶ 61.) A copy of the penalty waiver is attached to the Arnold Affidavit as Exhibit Q. (Id.)

IV. STANDARD OF REVIEW

1.

To prevail on a motion for summary judgment, the moving party must demonstrate that there is no genuine issue as to any material fact as to each element of its claim and that the undisputed facts, when viewed in the light most favorable to the nonmoving party, warrant judgment as a matter of law. O.C.G.A. § 9-11-56(c); see also Lau's Corp., Inc. v. Haskins, 261 Ga. 491, 491 (1991); Scholastic Book Clubs, Inc. v. Comm'r, 2017-2 Ga. Tax Tribunal, Feb. 14, 2017.

2.

In interpreting the Georgia Revenue Code, it is well-settled that:

> [t]axation is the rule, and exemption from taxation [is] the exception. . . . Exemption, being the exception to the general rule, is not favored; but every exemption, to be valid, must be expressed in clear and unambiguous terms, and, when found to exist, the enactment by which it is given will not be enlarged by construction, but, on the contrary, will be strictly construed.

Georgia Dep't of Revenue v. Owens Corning, 283 Ga. 489, 490 (2008) (citing Collins v. City of Dalton, 261 Ga. 584, 585-586 (1991)); see Superior Pine Prods. Co. v. Williams, 214 Ga. 485, 493 (1958).

3.

Moreover, "the interpretation of a statute by an administrative agency which has the duty of enforcing or administering it is to be given great weight and deference." Owens Corning, 283

Ga. at 490 (citing Kelly v. Lloyd's of London, 255 Ga. 291, 293 (1985)); see also Pruitt Corp. v. Georgia Dep't of Community Health, 284 Ga. 158, 159 (2008) ("[J]udicial deference is to be afforded the agency's interpretation of statutes it is charged with enforcing or administering and the agency's interpretation of rules and regulations it has enacted to fulfill the function given it by the legislative branch."); Excelsior Elec. Membership Corp. v. Georgia Pub. Serv. Comm'n, 322 Ga. App. 687, 691 (2013) ("The administrative interpretation of a statute by an administrative agency which has the duty of enforcing or administering it is to be given great weight.").

V. CONCLUSIONS OF LAW

A. History Of The Bad Debt Statute

1.

This matter turns on the interpretation and application of Georgia's bad debt statute, O.C.G.A. § 48-8-45. Under this statute, any entity qualifying as a "dealer" may opt to report its sales tax using the accrual basis of accounting. O.C.G.A. § 48-8-45(a). A dealer using the accrual basis of accounting must report and remit sales and use tax on the full sales price of an item at the time of sale even though the customer may actually pay for the item over time through an installment loan. See O.C.G.A. § 48-8-45(a); Ga. Comp. R. & Regs. 560-12-1-.06. The dealer recovers this sales tax from the customer over time as payments are made on the loan. If the customer defaults on the loan, the dealer will not be fully reimbursed for the sales tax remitted, and the amount of sales tax will not reflect the actual amount paid for the item. The bad debt statute allows dealers to deduct sales tax not paid when a customer defaults on an installment loan. O.C.G.A. § 48-8-45(b).

2.

The specific language of the bad debt statute has gone through three revisions during the Audit Period. From July 1, 2008 through December 31, 2010, O.C.G.A. § 48-8-45 provided, in relevant part:

> (a) Any person taxable under this article having both cash and credit sales may report the sales on either the cash or accrual basis of accounting. Each election of a basis of accounting shall be made on the first return filed and, once made, the election shall be irrevocable unless the commissioner grants written permission for a change. Permission for a change in the basis of accounting shall be granted only upon written application and under rules and regulations promulgated by the commissioner.
>
> . . .
>
> (c) Any person reporting on the accrual basis of accounting shall be allowed a deduction for bad debts under rules and regulations of the commissioner on the same basis that bad debts are allowed as a deduction on state income tax returns.
>
> (d) An assignee of private label credit card debt purchased directly from a dealer without recourse or a credit card bank which extends such credit to customers under a private label credit card program shall be allowed a deduction for private label credit card bad debts under rules and regulations of the commissioner on the same basis that private label credit card bad debts are allowed as a deduction on state income tax returns. An issuer or assignee of private label credit card debt may claim its deduction for private label credit card bad debts on a return filed by a member of an affiliated group as defined under 26 U.S.C. Section 1504.

See O.C.G.A. 48-8-45 (2009); 2007 Ga. Laws, p. 473 § 3.

3.

On January 1, 2011, O.C.G.A. § 48-8-45 was amended to delete the requirement that bad debt deductions for sales and use tax be allowed on the same basis that bad debt deductions are allowed on state income tax returns and provided, in relevant part:

> (a) Any person taxable under this article having both cash and credit sales may report the sales on either the cash or accrual basis of accounting. Each election of a basis of accounting shall be made on the first return filed and, once made, the election shall be irrevocable unless the commissioner grants written permission for a change. Permission for a change in the basis of accounting shall be granted

only upon written application and under rules and regulations promulgated by the commissioner.

. . .

(c) Any person reporting on the accrual basis of accounting shall be allowed a deduction for bad debts under rules and regulations of the commissioner.

(d) An assignee of private label credit card debt purchased directly from a dealer without recourse or a credit card bank which extends such credit to customers under a private label credit card program shall be allowed a deduction for private label credit card bad debts under rules and regulations of the commissioner. An issuer or assignee of private label credit card debt may claim its deduction for private label credit card bad debts on a return filed by a member of an affiliated group as defined under 26 U.S.C. Section 1504.

See O.C.G.A. § 48-8-45 (2010); 2010 Ga. Laws, p. 507 § 12.

4.

The bad debt statute was substantially revised to its current form on April 27, 2011, and provides, in relevant part:

(a) Any dealer taxable under this article having both cash and credit sales may report the sales on either the cash or accrual basis of accounting. Each election of a basis of accounting shall be made on the first return filed and, once made, the election shall be irrevocable unless the commissioner grants written permission for a change. Permission for a change in the basis of accounting shall be granted only upon written application and under rules and regulations promulgated by the commissioner.

. . .

(c) Any dealer reporting on the accrual basis of accounting shall be allowed a deduction for bad debts under rules and regulations of the commissioner. Any deduction taken or refund claimed that is attributed to bad debts shall not accrue or include interest.

(d) The bad debt may be deducted on the return for the period during which the bad debt is written off as uncollectable in the claimant's books and records and is eligible to be deducted for federal income tax purposes. Any such deduction for such bad debt shall be reported as a separate line item on the claimant's sales and use tax return. If such deduction is not reported as a line item, it shall be disallowed. A claimant who is not required to file federal income tax returns may deduct a bad debt on a return filed for the period in which the bad debt is written

off as uncollectable in the claimant's books and records and the claimant would be eligible for a bad debt deduction for federal income tax purposes if the claimant was required to file a federal income tax return.

(e) If a deduction is taken for a bad debt and the debt is subsequently collected in whole or in part, the tax on the amount so collected must be paid and reported on the return filed for the period in which the collection is made. For the purposes of reporting a payment received on a previously claimed bad debt, any payments made on a debt or account are applied first proportionally to the taxable price of the property or service and the sales tax thereon, and, secondly, to interest, service charges, and any other charges.

(f)(1) As used in this subsection, "assignee" includes but is not limited to:

(A) Assignees of promissory notes, accounts, or accounts receivable; or

(B) Financial institutions that do not make taxable retail sales but that finance retail sales by making loans or issuing credit cards to purchasers.

(2) The deduction and refund provided for in this Code section are not assignable. The deduction and refund provided for in this Code section are only available to a dealer that makes a taxable retail sale, remits tax on that sale, and subsequently incurs a bad debt with respect to that sale. Assignees may not take a deduction or claim a refund pursuant to this Code section.

(g) For purposes of calculating the deduction taken or refund claimed, a "bad debt" shall have the same meaning as defined in 26 U.S.C. Section 166. However, the amount calculated pursuant to 26 U.S.C. Section 166 shall be adjusted to exclude:

(1) Financing charges or interest;

(2) Sales or use taxes charged on the purchase price;

(3) Uncollectable amounts on property that remain in the possession of the seller until the full purchase price is paid;

(4) Expenses incurred in attempting to collect any debt; and

(5) Repossessed property.

(h) For bad debts incurred and written off after January 1, 2011, when the amount of bad debt exceeds the amount of taxable sales for the period during which the bad debt is written off, a refund claim may be filed. The statute of limitations for filing such claim shall be three years from the due date of the return on which the

bad debt could first be claimed. Such refund shall be claimed on such form as shall be established by the commissioner.

O.C.G.A. § 48-8-45; 2011 Ga. Laws, p. 46 § 6.

5.

The treatment of bad debts during the Audit Period was also governed by Department Rule 560-12-1-.06, which states, in relevant part:

> (1)(a) Any person taxable under the Act for both cash and credit sales may report such sales on either the cash or accrual basis of accounting. Those persons reporting on the accrual basis shall report and remit the tax due on all transactions, whether credit or cash, occurring during the reporting period. The first return filed under the Act shall be deemed an election as to the method of reporting such sales. Provided, however, for the purposes of reporting under the Act, any person who takes a note or other written contract to pay and subsequently sells, assigns or transfers such contract, with or without recourse, shall be deemed to have received cash payment at the time of such sale or discount.
>
> (b) when any dealer sells, discounts or otherwise disposes of his accounts receivable, or discontinues business, such dealer shall include in his sales and use tax report for the current month the gross amount of such original sales on which sales tax has not been previously remitted to the State, irrespective of the sales price of such accounts.
>
> . . .
>
> (3) Any person under the accrual basis may claim bad debt deductions where all the surrounding and attending circumstances indicate that such debt is worthless and uncollectible, and legal action to enforce payment would in all probability not result in the satisfaction of execution on a judgment. Any such taxpayer requesting claim for allowance for bad debts must accompany the return with a schedule showing, as to each debt claimed to be worthless and charged off, the amount of said debt together with the name of the person or persons owing such debt, when each was created, when each became due, what efforts were made to collect the same and why they were actually determined to be worthless. Such taxpayers who have established the reserve method of treating bad debts and who maintain proper reserve accounts for bad debts, or who adopt the reserve method of treating bad debts, may deduct from gross sales a reasonable amount for bad debts in lieu of a deduction for specific bad debt items.

B. Applicability of Department Rule 560-12-1-.06

6.

As an initial matter, DriveTime Car Sales argues that Department Rule 560-12-1-.06 is inconsistent with O.C.G.A. § 48-8-45 because of the changes to this statute over time, and that the rule should be disregarded here. Amended Petition ¶ 29. The Court rejects this argument and finds that the rule is valid as written and controls here for three reasons.

7.

First, there is no question as to the Department's authority to promulgate this rule; in fact, every version of O.C.G.A. § 48-8-45 relevant here explicitly calls on the Department to regulate bad debt deductions by rule. O.C.G.A. § 48-8-45(c); O.C.G.A. § 48-8-45(c) (2010); O.C.G.A. § 48-8-45(c) (2009). Further, the Department is generally authorized to make rules for the enforcement of the Georgia Revenue Code and collection of revenues. O.C.G.A. § 48-2-12(a).

8.

Second, the General Assembly has been aware of and has consistently acquiesced to Department Rule 560-12-1-.06 and its interpretation of the Sales & Use Tax Act. GMAC v. Jackson, 247 Ga. App. 141, 144 (2000). For example, in 1998 the General Assembly amended O.C.G.A. § 48-8-45 to allow assignees of credit card debt to claim bad debt deductions, which was previously disallowed. Id. The General Assembly could have overwritten Department Rule 560-12-1-.06 by statute at any time. Instead, the latest amendment to O.C.G.A. § 48-8-45 brings it further in line with the rule by explicitly barring assignees from taking bad debt deductions. See 2011 Ga. Laws, p. 46 § 6.[4]

[4] The earlier versions of O.C.G.A. § 48-8-45 only specifically allowed for bad debt deduction by assignees of private label credit card debt, with no affirmative language allowing or disallowing deductions for any other types of assignees. The Current Version of O.C.G.A. § 48-8-45(f) specifically states that "assignees of promissory notes, accounts, or accounts receivable" "may not take a deduction or claim a refund pursuant to [O.C.G.A. § 48-8-45]"

9.

Third, DriveTime Car Sales has not identified a conflict between the text of O.C.G.A. § 48-8-45 and Department Rule 560-12-1-.06 which would invalidate the rule. "All duly enacted regulations carry a presumption of validity," and "courts give great deference to executive agencies' policy decisions, because executive agencies provide a high level of expertise and an opportunity for specialization unavailable in the judicial or legislative branches that enables such agencies to make rules and enforce them in fashioning solutions to very complex problems." Ga. Dep't of Revenue v. Ga. Chemistry Council, Inc., 270 Ga. App. 615, 616-617 (2004) (citations and internal quotation marks omitted). To be invalidated, a rule must be unauthorized or unreasonable. Id. at 616 (citing Dept. of Human Resources v. Anderson, 218 Ga. App. 528, 529 (1995)).

10.

DriveTime Car Sales alleges that the rule is "out of sync and not consistent" with O.C.G.A. § 48-8-45 because it has not been updated, but does not identify any specific inconsistencies or basis for finding the rule to be unreasonable. Amended Petition ¶ 29. Accordingly, the Court finds that these allegations do not affirmatively show that Department Rule 560-12-1-.06 is unreasonable, DriveTime Car Sales has not overcome the presumption of validity, and the rule must be applied here as written.

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and, "[d]eductions and refunds are only available to a dealer that makes a taxable retail sale, remits tax on that sale, and subsequently incurs a bad debt with respect to that sale." O.C.G.A. § 48-8-45(f)(2). In other words, the Current Version confirms the Department's consistent approach regarding the deductibility of bad debt pursuant to Ga. Comp. R. and Regs. 506-12-1-.06.

C. DriveTime Car Sales' Claims for Bad Debt Sales Tax Deductions Individually

11.

DriveTime Car Sales alleges that it bears actual bad debts because it incurs losses on loans sold to DTAC and loans are ultimately written off as bad debts to the detriment of DriveTime Car Sales' owners. Amended Petition ¶ 35-36. The Court finds that this argument fails because (A) DriveTime Car Sales sells all interest in the loans to DTAC prior to any bad debt write-offs, and (B) Department Rule 560-12-1-.06 bars DriveTime Car Sales from taking bad debt deductions for loans sold to DTAC.

12.

DriveTime Car Sales sells every loan it originates to DTAC within one day of origination. Stip. ¶ 33. This process is automated and takes place before customers make any payments on their loans and before any loan could possibly enter default. Stip. ¶¶ 33, 34. DriveTime Car Sales retains no interest in these loans after selling them to DTAC, which receives all of DriveTime Car Sales' "right, title, interest in, to and under" all loans. Stip. ¶ 36. Loans are only ever determined to be worthless and uncollectible and written off as bad debts once they are in the possession of DTAC and 90 days without payment elapse. Stip. ¶ 41. This is reflected in the federal income tax returns filed by DriveTime Car Sales' parent company DTAG, which does not report "bad debt" losses, and DTAC, which does report "bad debt" losses. Stip. ¶¶ 42, 44, 45. The Court finds that, as DriveTime Car Sales only ever possesses and sells good loans to DTAC, it never had any bad debt and cannot claim any bad debt sales tax deductions.

13.

DriveTime Car Sales also cannot claim bad debt deductions for loans it sells to DTAC because, for the purpose of sales tax, dealers who sell loans are deemed to have received full payment for those loans at the time of sale. Department Rule 560-12-1-.06(1)(a) states that "any person who takes a note or other written contract to pay and subsequently sells, assigns, or transfers such contract, with or without recourse, shall be deemed to have received cash payment at the time of such sale or discount." In reporting payments for loans, the dealer must "include in his sales and use tax report for the current month the gross amount of such original sales on which sales tax has not been previously remitted to the State, *irrespective of the sales price of such accounts.*" Ga. Comp. R. & Regs. 560-12-1-.06(1)(b) (emphasis added). This rule applies even if the dealer has elected to report sales and use tax using the accrual basis of accounting. See Ga. Comp. R. & Regs. 560-12-1-.06(1). Notably, there is no exception for loans that are sold and subsequently written off as bad debt, and dealers are responsible for all sales tax from the underlying retail purchase without regard to the sale price of the loan or what happens to that loan after it is sold. See Ga. Comp. R. & Regs. 560-12-1-.06.

14.

This requirement makes sense as sales tax liability originates from the retail sale of an item from dealer to customer, and the dealer's financing of this sale and subsequent transfer of this financing does not undo the retail sale or affect sales tax liability. See O.C.G.A. § 48-8-30. The Court finds Department Rule 560-12-1-.06 to be clear and unambiguous, and that, accordingly, DriveTime Car Sales cannot claim bad debt deductions for loans it sells to DTAC no matter the sales price of those loans or their subsequent history.

D. DriveTime Car Sales' Claims For Bad Debt Sales Tax Deductions as a Single "Person" With DTAC

15.

DriveTime Car Sales alternatively alleges that it and DTAC qualify as a single "person" under the Georgia Revenue Code because they form a "group or combination acting as a unit" to sell and finance cars, and, because they are a single "person," DriveTime Car Sales may claim bad debt deductions even though all loans were sold to DTAC and only DTAC wrote off loans as bad debts. See Amended Petition ¶¶ 37-38.

16.

This "single person" argument is an attempt to make an end run around the prohibition against assignees like DTAC claiming bad debt deductions,[5] and fails both as a matter of fact and as a matter of law. First, while DriveTime Car Sales and DTAC do share ownership and have a business relationship, these companies operate independently and do not act as a single unit. Second, even if they operated as a single unit, two separate corporate entities cannot be a single "person" capable of claiming bad debt deductions under the Georgia Revenue Code.

[5] As mentioned *supra*, the Current Version of O.C.G.A. § 48-8-45(f) states that "assignees of promissory notes, accounts, or accounts receivable" "may not take a deduction or claim a refund pursuant to [O.C.G.A. § 48-8-45]." Further, "[d]eductions and refunds are only available to a dealer that makes a taxable retail sale, remits tax on that sale, and subsequently incurs a bad debt with respect to that sale." O.C.G.A. § 48-8-45(f)(2). The earlier versions of O.C.G.A. § 48-8-45 bar assignees like DTAC from claiming bad debt deductions because they contain no affirmative language allowing deductions for anyone other than assignees of private label credit card debt. O.C.G.A. § 48-8-45(d) (2010); O.C.G.A. § 48-8-45(d) (2009); see also GMAC, 247 Ga. App. at 144-145 (stating that "only where there is expression of a clear provision providing for it will a deduction be allowed" and finding that an earlier but substantially similar version of O.C.G.A. § 48-8-45 barred an assignee of auto loans from claiming bad debt deductions because the statute's explicit deduction for assignees of credit card debt implicitly denied the deduction for assignees of other types of debt). Even without these statutory prohibitions, Department Rule 560-12-1-.06 would bar assignees from claiming bad debt deductions. GMAC, 247 Ga. App. at 144 ("As reflected in Rule 56-12-1-.06 . . . the Sales & Use Tax Act has been interpreted consistently as allowing a deduction only to a dealer and only under certain circumstances."). DriveTime Car Sales appears to recognize this prohibition and does not argue that DTAC could claim bad debt deductions independently of DriveTime Car Sales.

17.

DriveTime Car Sales and DTAC operate as two separate companies with separate businesses, separate employees, separate offices, and separate income tax filings. There is no doubt that both companies share owners and benefit from a close business relationship, but they do not act as a single company or unit.

18.

DriveTime Car Sales is a used motor vehicle retailer. Stip. ¶ 8. DriveTime Car Sales' approximately 1000 employees handle all aspects of auto sales including purchasing vehicles, reconditioning vehicles, operating dealerships, showing vehicles, selling vehicles to customers, originating loans to finance the sale of vehicles, and filing required title paperwork. Stip. ¶ 10. DriveTime Car Sales purchases inventory using its own financing from third-party lenders rather than some form of inventory financing from DTAC. See Stip. ¶ 39. DTAC has no involvement in the vehicle sales or origination process and has no contact with each customer until after DriveTime Car Sales originates his or her loan and sells it to DTAC. See Stip. ¶¶ 10, 12, 19, 27. Further, DriveTime Car Sales does not require customers to use financing from DTAC if they have cash or outside financing, and some customers purchase vehicles from DriveTime Car Sales using these options. Stip. ¶ 16.

19.

DTAC is a finance company. Stip. ¶ 26. DTAC employs approximately 100 employees who are responsible for management of loan servicing and collections and the oversight of approximately 1000 loan advisors and collectors employed by DTAC's subsidiary, DT Credit Company, LLC ("DTCC"). Stip. ¶ 27. These loan advisors and collectors are responsible for, customer communication, customer management, loan servicing, and collections and perform

their duties in accordance with a credit and collection policy written by DTAC's management. Id. No DTAC or DTCC employee performs any sales activity. Id.

20.

DTAC and DTCC share a single office in Mesa, Arizona. Stip. ¶ 28. DTAC and DTCC also share an electronic loan servicing system that is maintained by the DriveTime Sales and Finance IT department. Id. Beyond employees at DTAC and DTCC and certain accountants with DriveTime Sales and Finance, no other employees have access to this system. Id.

21.

DriveTime Car Sales and DTAC conduct the sale of loans as if they were separate, unrelated entities. Both companies have entered into origination agreements which govern the sale of loans. Stip. ¶ 35. These origination agreements were no mere shams, nor lacking a business purpose, and include specific representations and warranties by DriveTime Car Sales to DTAC about itself and the loans it originated. See Stip. ¶ 35, 36, 37. Pursuant to these origination agreements, DriveTime Car Sales' electronic sales system automatically transfers loans each night to the electronic loan accounting system used by DTAC, and cash is transferred from DTAC to DriveTime Car Sales. Stip. ¶ 33. As is required in the origination agreements, the amount of cash DTAC pays DriveTime Car Sales each night equals the fair market value of the loans, as determined by a grading system. Stip. ¶ 36.

22.

DriveTime Car Sales and DTAC also respected their boundaries after the sale of each loan. DriveTime Car Sales employees were not expected to help customers with loans after they were sold to DTAC, and it is not clear whether these employees had access to DTAC's electronic loan servicing system. Stip. ¶ 25. If a customer made a payment at a DriveTime Car Sales

dealership, dealership employees would deposit that check into an account accessible by DTAC and accountants with DTAC or DriveTime Sales and Finance would handle the application of that payment to the customer's account. Stip. ¶ 38.

23.

DTAC is a "related finance company" to DriveTime Car Sales and meets the requirements for related finance companies established by the IRS. Stip. ¶ 29. Related finance companies are commonly used in the auto sales and finance industry, and they benefit auto retailers by removing the burden of debt collection from dealerships, possibly offering lower discount rates than third-parties, and allowing retailers to be more selective when offering credit to customers. Id. Related finance companies are usually created by establishing a separate financing entity such as an S Corporation which then purchases loans from its related auto retailer at a significant discount and allows the auto retailer to deduct the loss on this discount. Id. DTAC is a valid related finance company and conforms to all independence requirements. Id. Accordingly, even though DTAC and DriveTime Car Sales may have a common owner, they continue to act as separate companies operating businesses.

24.

DriveTime Car Sales argues that even if DriveTime Car Sales and DTAC do not act as a single business, they are separately organized companies that act as a single "person" as a matter of law. Under the Georgia Revenue Code, a "person" is "any individual, firm, partnership, cooperative, nonprofit membership corporation, joint venture, association, company, corporation, agency, syndicate, estate, trust, business trust, receiver, fiduciary, or other group or combination acting as a unit, body politic, or political subdivision, whether public, private, or quasi-public." O.C.G.A. § 48-1-2(18). DriveTime Car Sales argues that it constitutes a person with DTAC

under the catchall category of "other group or combination acting as a unit, body politic, or political subdivision, whether public, private, or quasi-public." DriveTime Car Sales specifically alleges that they "are a group or combination acting as a unit to effect the sales and the financings of motor vehicles and neither the sales nor the financings would occur without the other." Amended Petition ¶ 37.

25.

When the rules of statutory construction are applied to O.C.G.A. § 48-1-2(18), it becomes clear that DriveTime Car Sales and DTAC are not a "person" under the catchall provision because: (1) "persons" are not defined by their business relationships, type of ownership, and tax status; (2) the catchall provision was not intended to include companies and corporations like DriveTime Car Sales and DTAC; and (3) courts have rejected DriveTime Car Sales' argument under similar catchall provisions.

26.

The catchall provision must be read in the light of the other entities specifically named in O.C.G.A. § 48-1-2(18). "[W]hen a statute or document enumerates by name several particular things, and concludes with a general term of enlargement, this latter term is to be construed as being ejusdem generis [i.e., of the same kind or class] with the things specifically named, unless, of course, there is something to show that a wider sense was intended." Ctr. For Sustainable Coast v. Coastal Marshlands Prot. Comm., 284 Ga. 736, 737-38 (2008) (quoting Dept. of Transportation v. Montgomery Tank Lines, 276 Ga. 105, 106 n. 5 (2003)). Accordingly, the "other group or combination" must be similar in nature to the listed entities that qualify as "persons."

27.

When this rule is applied, it is clear that DriveTime Car Sales and DTAC do not fall within this category. First, none of the enumerated entities are formed by a business transaction like DriveTime Car Sales' sale of receivables to DTAC. The list of "persons" does not include buyers and sellers, contractors and contractees, or other similar parties bound by a transaction or contractual relationship. See O.C.G.A. § 48-1-2(18). Interpreting O.C.G.A. § 48-1-2(18) to create a "person" from these relationships would lead to absurd results with new "persons" forming every time a business made a sale or contracted with another firm. Instead, the listed entities are defined by non-transactional or non-contractual actions that have some legal consequence – corporations incorporate, partnerships and trusts form through intent, etc. See, e.g., O.C.G.A. §§ 14-2-203, 14-8-7, 53-12-20.

28.

Second, none of entities listed in O.C.G.A. § 48-1-2(18) are defined by their ownership. All corporations are "persons" under O.C.G.A. § 48-1-2(18) no matter who owns them or how their ownership is distributed. All partnerships are "persons" even though their ownership structure differs substantially from that of corporations. See id. All estates are "persons" even though they do not have owners in the traditional meaning of that word. See id. "Persons" are clearly not defined by their ownership, and DriveTime Car Sales and DTAC do not fall into the catchall provision simply because they share common owners.

29.

Third, these entities are not defined by their treatment under the Internal Revenue Code or Georgia Revenue Code. For example, individuals and corporations receive different tax treatment, but both are "persons" under O.C.G.A. § 48-1-2(18). See, e.g., 26 U.S.C. §§ 1, 11;

O.C.G.A. §§ 48-7-20, 48-7-21. The mere fact that DriveTime Car Sales and DTAC are part of a "controlled group" and are "related corporations" under the Internal Revenue Code has no bearing on whether they fall within the catchall provision. Hence, O.C.G.A. § 48-1-2(18) cannot be read to define "other group or combination acting as a unit" by business transactions, common ownership, or tax treatment; therefore, DriveTime Car Sales and DTAC are not a "person" simply because they are linked by these factors.

30.

Even if the term "other group or combination acting as a unit" could encompass two separate entities bound by business transactions, common ownership, or tax treatment, this term was not intended to include validly formed limited liability companies or corporations like DriveTime Car Sales and DTAC. "[T]he fundamental rules of statutory construction . . . require us to construe a statute according to its terms, to give words their plain and ordinary meaning, and to avoid a construction that makes some language mere surplusage." Couch v. Red Roof Inns, Inc., 291 Ga. 359, 362 (2012) (quoting Slakman v. Continental Cas. Co., 277 Ga. 189, 191 (2003)) (internal quotation marks omitted).

31.

This rule requires O.C.G.A. § 48-1-2(18) to be read so that each enumerated term has a separate and distinct meaning with no overlap. The terms "company" and "corporation" must include entities that are different from those included by the terms "partnership," "individual," "estate," etc. and the catchall provision must include entities that are not included in the specifically enumerated categories. As "company" and "corporation" are both listed separately from "other group or combination acting as a unit," the General Assembly could not have intended to include companies or corporations in this term. Instead, the catchall provision was

likely intended to include: "groups or combinations acting as a unit even though the group or unit does not fit within the legal definition of any of the specifically designated entities. Thus, an improperly incorporated putative corporation could not escape sales tax liability by relying on its legal infirmities." Pemco, Inc. v. Kansas Dep't of Revenue, 907 P.2d 863, 866 (Kan. 1995) (considering a definition of "person" under the state revenue code that included the catchall phrase "or any group or combination acting as a unit"). As a validly formed company and corporation, DriveTime Car Sales and DTAC are separate "persons" under the Georgia Revenue Code.

32.

Courts have rejected DriveTime Car Sales' argument that two companies can be a single "person" in combination under catchall provisions that are similar or identical to the provision set out in O.C.G.A. § 48-1-2(18). In DriveTime Car Sales, Inc. v. Nev. Dep't of Taxation, No. 55028, 2011 Nev. Unpub. LEXIS 962 (Nev. February 24, 2011), DriveTime Car Sales made a claim for sales tax credits under Nevada's bad debt statute under facts that are nearly identical to those here. Like O.C.G.A. § 48-1-2(18), the Nevada statute defining a "person" for the purpose of taxation included a catchall provision which stated that a person could be a "group or combination acting as a unit." Id. at *10-11. The Nevada Supreme Court found that "[a]lthough DriveTime and [DTAC] may work as a unit to make money for their parent company, only DriveTime sells motor vehicles. [DTAC] strictly handles the financing agreements. These are separate functions that should not be conflated simply because they are interdependent." Id. at *12. The term "group or combination acting as a unit" simply could "not include separate entities, which separate the retail and finance functions between the retail entity liable for the sales tax and the finance entity assigned the finance agreement." Id. at *13. DriveTime Car

Sales and DTAC were not a single "person" in Nevada and could not jointly qualify for bad debt deductions. See id. at *10-13.

33.

Courts in other states have considered and rejected similar arguments about catchall provisions with similar language. See, e.g., Circuit City Stores, Inc. v. Dir. of Revenue, 438 S.W.3d 397, 401 (Mo. 2014) ("[T]o read 'group or combination acting as a unit' to permit combinations of corporations would be inconsistent with . . . decisions recognizing the importance of separate corporate existence, even when two corporations act in concert and share a parent corporation."); S.C. Dep't of Revenue v. Anonymous Co. A, 678 S.E.2d 255, 258 (S.C. 2009) (corporations sharing common ownership and a dealer/financer business relationship were not a "person" under a catchall provision that included "any group or combination acting as a unit"); Linnehan Leasing v. State Tax Assessor, 898 A.2d 408, 414 (Me. 2006) (catchall provision was "not a device to allow separate corporations to be treated as a single entity under the tax code when such single entity treatment suits their purpose"); Pemco, 907 P.2d at 866-67 (corporations with common ownership could not claim to be a "group or combination acting as a unit"); Sears, Roebuck & Co. v. Roberts, No. M2014-02567-COA-R3-CV, 2016 Tenn. App. LEXIS 319 at *22 (Tenn. Ct. App. May 11, 2016) (finding that "'other group or combination acting as a unit' must refer to another type of business association and not to any two independent corporations that happen to contract with one another").

34.

Underlying these decisions, in part, is the principle that "a corporation, having chosen the legal form in which to exist and do business, should not be permitted to pierce its own corporate veil to gain a tax advantage." Pemco, 907 P.2d at 866. "[A]dvantages include the limitation of

personal liability, the continuity of corporate existence, and the facilitation of business administration. Having taken advantage of the benefits of incorporation, a corporation cannot decline to accept the liabilities of the corporate form in order to reduce the incidence of taxation." Id. (quoting Southern States Coop. v. Dailey, 280 S.E.2d 821, 827 (W.Va. 1981)).

35.

The owners of DriveTime Car Sales and DTAC have made just such a decision here. The legal separation of these sales and finance businesses is not required by any state or federal law, but their owners have chosen to do so anyway because separating these businesses insulates DriveTime Car Sales from potential lawsuits arising from the collection of debt, repossessions, or financial operations. Stip. ¶ 30. Further, both companies benefit from better efficiency and rates from sharing business services through DriveTime Sales and Finance. Stip. ¶¶ 29, 30.

36.

Having made this choice, DriveTime Car Sales and DTAC cannot ignore their legal forms simply to fit within the terms of Georgia's bad debt statute. DriveTime Car Sales and DTAC are different "persons" under O.C.G.A. § 48-1-2(18) and cannot take bad debt deductions under the 2008 and 2010 Versions of O.C.G.A. § 48-8-45. Nor can DriveTime Car Sales and DTAC, acting collectively, take bad debt deductions under the Current Version of O.C.G.A. § 48-8-45 as they cannot be a "dealer" without being a "person." See O.C.G.A. § 48-8-2(8) ("As used in this article, the term . . . "Dealer" means every *person* . . . .") (emphasis added).

E. DriveTime Car Sales' Claims for a Change in Accounting Method and a Refund of Sales Tax Based On This Change

37.

As an alternative to its bad debt deduction claims, DriveTime Car Sales seeks to retroactively change its method of accounting sales tax for the Audit Period from the accrual to

the cash method and claims a refund of sales tax which, it argues, would not have been paid if it had used the cash method. See Amended Petition ¶¶ 9-10, 13, 40-41.

38.

In Georgia, once a dealer makes its initial election, its choice of accounting method is irrevocable unless the dealer applies for and receives permission from the Department. O.C.G.A. § 48-8-45(a) ("[T]he election shall be irrevocable unless the commissioner grants written permission for a change. Permission for a change in the basis of accounting shall be granted only upon written application and under rules and regulations promulgated by the commissioner."). It is undisputed that DriveTime Car Sales initially elected to use the accrual method of accounting and has not since been granted permission to change its accounting method. See Amended Petition ¶ 10.

39.

DriveTime Car Sales' claims for a change in accounting method and a refund of sales tax based on that change fail as a matter of law, as the Court does not have subject matter jurisdiction over DriveTime Car Sales' application to change its method of accounting. The Court's jurisdiction over matters such as a change in accounting method under O.C.G.A. § 48-8-45(a) exists only where there has been an "order, ruling, or finding" of the Department. O.C.G.A. §§ 48-2-59(a); 50-13A-9. The Department has made no decision here, and, as no order, ruling, or finding has been made, the Court lacks jurisdiction to hear any appeal from this application. Amended Petition ¶ 10.

VI. DECISION

For all the forgoing reasons, the Department's Motion is hereby **GRANTED**, DriveTime Car Sales' Motion is **DENIED**, and judgment is entered in favor of the Department.

. **SO ORDERED**, this 13th day of December, 2018

James E. O'Neal

HONORABLE LAWRENCE E. O'NEAL, JR.
CHIEF JUDGE
GEORGIA TAX TRIBUNAL

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