



**COMMONWEALTH OF PENNSYLVANIA  
GOVERNOR'S OFFICE OF GENERAL COUNSEL**

March 15, 2010

Chad W. Marsar  
Vice President  
Legal and Regulatory Affairs  
Pennsylvania Automotive Association  
P.O. Box 2955  
Harrisburg, PA 17105-2955

Re: Pennsylvania Sales and Use Tax  
Pennsylvania Automotive Association

Dear Mr. Marsar:

This responds to your January 5, 2010 letter requesting an opinion on whether a “wind-down payment” received by a dealer from General Motors Corporation (“GM”) solely in exchange for various covenants, releases and waivers by the dealer and for the dealer’s transfer of a nonexclusive right to the use of the dealer’s customer lists and service records is a “bulk sale” which would trigger a requirement to comply with the provisions of Section 1403 of the Fiscal Code, 72 P.S. § 1403 or 69 P.S. § 529.

Section 1403 of the Fiscal Code and 69 P.S. § 529 (which is in Pennsylvania’s general sales provisions) both provide in pertinent part, as follows:

(a) Every corporation, joint-stock association, limited partnership, or company, which shall sell or transfer in bulk fifty-one per centum or more of any stock of goods, wares, or merchandise of any kind, fixtures, machinery, equipment, buildings, or real estate, shall give the Department of Revenue ten days' notice of the sale or transfer prior to the completion of the transfer of such property. (Emphasis added.)

The issue is whether the dealer’s covenants, releases, waivers and nonexclusive rights to the dealer’s customer lists and service records are “goods, wares, or merchandise” as these items clearly are not “fixtures, machinery, equipment, buildings, or real estate.” There are no specific tax cases addressing this issue.



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In Gitt v. Hoke, 301 Pa. 31 (1930), Gitt was a creditor of Hoke, a manufacturer who had sold his entire manufacturing business to a third party. Gitt sued Hoke claiming Hoke was required under the Bulk Sales provisions in effect at the time to notify all creditors prior to the sale. The statutory provision required such notification in the case of a sale of "...any stock of goods, wares, or merchandise of any kind and fixtures in bulk..." The Pennsylvania Supreme Court found that the Hoke sale was not a violation of the Bulk Sales provisions holding that:

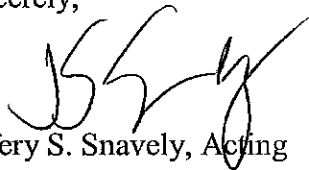
The [Bulk Sales ] Act, being in derogation of the common law right to purchase and sell property and also being highly penal, must be strictly construed and cannot be extended beyond its plain language. The words 'goods,' 'wares' and 'merchandise,' include commodities handled by merchants or dealers in the course of trade; not the unsold products of a manufacturer or a farmer's produce, and the fixtures intended are evidently those which belong to the business, like trade fixtures, and not to the building. The logical result of Gitt's contention would subject Bulk Sales of all kinds of personal property to the [Bulk Sales Act]. Had that been the legislative intent it should have been expressed in plain words.

Id. at 33. It was clear to this Court, the clause "goods, wares, and merchandise" did not even include all categories of tangible personal property. As not all tangible personal property was included, it is difficult to envision a court finding that intangible personal property was intended to be included.

Based on the above-discussion, it is the opinion of the Department of Revenue that a payment for intangibles such as covenants, releases and waivers by an automobile dealer, and the dealer's transfer of a nonexclusive right to the use of the dealer's customer lists and service records do not fall within the Bulk Sales provisions of 72 P.S. § 1403 and 69 P.S. § 529.

I trust this letter answers your inquiry. If you have any questions, please contact me.

Sincerely,



Jeffery S. Snavely, Acting  
Chief Counsel

JSS:rm  
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