STATE OF MICHIGAN
DEPARTMENT OF LABOR & ECONOMIC GROWTH
MICHIGAN TAX TRIBUNAL

General Motors Corporation,
Petitioner,

v

MTT Docket Nos. 321091, 328925

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Steven H. Lasher

FINAL OPINION AND JUDGMENT

The Tribunal, having given due consideration to the file in the above-captioned case finds:

1. Administrative Law Judge Thomas A. Halick conducted a hearing in this case on September 14, 2010, and issued a Proposed Opinion and Judgment on January 28, 2011. The Proposed Opinion and Judgment provided, in pertinent part, "[t]he parties have 20 days from the date of entry of this Proposed Opinion and Judgment to file exceptions and written arguments with the Tribunal consistent with Section 81 of the Administrative Procedures Act (MCL 24.281). The exceptions and written arguments shall be limited to the evidence and legal issues involved in the hearing."

2. Petitioner filed exceptions on February 17, 2011. In support of the exceptions, Petitioner contends that:

    a. At Page 22 of the Proposed Opinion and Judgment, ALJ Halick states:

    "However, it was clear that the fuel remaining in the tanks would be available for use by the dealers to unload the vehicle and would serve the other purposes testified to in our present case. Petitioner's witness testified that the manufacturers intended to leave enough fuel in the tank to keep the fuel pump submerged during transport, to prevent the low fuel light from illuminating and to allow the dealer to drive the vehicle off the transport truck."

    b. ". . . the minimum amount of fuel placed in the tanks of new vehicles was used by GM for the purpose of Quality Control and Testing. In addition the fuel was used by GM for the purpose of fulfilling its contractual obligation as agent for the dealer in the transportation/delivery of the vehicle to the out-of-state dealer."

    c. "[t]he testimony at trial indicates that fuel was left in the tank after quality control and testing to allow the GM transporter to provide for shipping and delivery. . . .No fuel is intended to be used either to propel the vehicle on Michigan roads and highways or for dealer usage."

d. "It is . . . clear that GM uses the fuel for the purpose of fulfilling its responsibility for transportation and delivery and **not** to pass on the fuel for use by the dealer."

e. " . . . GM pays each dealer to fill up the tank of each new vehicle. The payment by GM is made in the form of a credit on the dealer invoice . . . ."

f. ". . . Michigan Appellate Courts, since 1942, have recognized that concurrent taxable use with an exempt use does not remove the protection of an exemption. . . . Therefore, even if there is a trace amount of fuel left in the tank after driving the vehicles on and off the transportation carriers and onto the dealer lot, GM is still exempt from the motor fuel tax on the entire amount where the record clearly indicates GM was the end user of fuel for off highway use. . . ."

3. Respondent filed exceptions on February 14, 2011. In support of its exceptions, Respondent states:

a. "The facts in this case are not identical to the facts in *AutoAlliance International Inc v Dep't of Treasury,"* 282 Mich App 492; 766 NW2d 1 (2009).

b. "The Court in *AutoAlliance* considered a refund only for fuel put in the tanks of new vehicles for the purpose of powering the vehicles through testing and quality control procedures. . . . The *AutoAlliance* Court even specifically noted that the outcome of the case might differ if more fuel was placed in the tanks than was necessary to power the vehicles through testing without running out of fuel."

c. "The testimony and exhibits in this case demonstrate that GM places fuel in the tanks of vehicles for two separate purposes: 1) testing and quality control while it owns the vehicles, and 2) transferring motor fuel to the dealers after title has passed to the dealers . . . . GM is not an end user of the fuel placed in the tanks for the dealers' use."

d. ". . . by GM's own admission, more fuel was put in the tanks of the vehicles than was necessary to power the vehicles through testing and quality control procedures. This is markedly different evidence than what was provided in *AutoAlliance.*"

e. ". . . the vehicles and their contents, including any fuel, are effectively being transferred to the dealers as soon as the vehicle is put on a common carrier. Thus, GM admits by its testimony and exhibits that it is specifically placing fuel in the tank for the dealers' use – *not* for GM's use."

f. "Under *DaimlerChrysler* and *AutoAlliance*, GM is not an 'end user' of fuel placed in the vehicles for transfer to the dealers. . . GM has admitted that it was not going to use the fuel to propel the vehicle."

g. "[t]he amount of gas placed in the tanks for the dealers' use is not incidental, and, in fact, almost equals the amount of gas required for testing and quality control purposes."

h. "[t]he extension of the *AutoAlliance* decision presented by the Proposed Judgment in this matter opens the door to multiple claims for the same refund."

i. ". . . if GM puts 8 gallons of fuel in a vehicle prior to testing and shipping, GM, the dealers, *and* the customers could *all* claim a refund of fuel for the entire 8 gallons, by reason of the fact that they each used *some* of the fuel . . . It is contrary to all logic that the Legislature may have intended the State of Michigan to pay a motor fuel tax refund three times for the same 8 gallons of fuel."

4. The Administrative Law Judge properly considered the testimony and evidence submitted in the rendering of the Proposed Opinion and Judgment.

a. With respect to Petitioner's issue regarding language contained on page 22 of the Proposed Opinion and Judgment, the Tribunal redrafts that paragraph, as follows:

> "Therefore, the court recognized that fuel would be left in the tank after 'the point where the vehicles were loaded for shipment' and that fuel qualified for a refund. *AutoAlliance* did not state that the manufacturer placed fuel in the tank for the benefit of the dealers. However, it was clear that the fuel remaining in the tanks would be available to unload the vehicle and would serve the other purposes testified to in our present case. Petitioner's witness testified that the manufacturer intended to leave enough fuel in the tank to keep the fuel pump submerged during transport, to prevent the low fuel light from illuminating, and to drive the vehicle off the transport truck."

Petitioner's witness stated that two gallons must remain in the tank otherwise the angle on the carrier ". . . could cause the fuel to run away from the fuel pickup in the tank and then the vehicle would not start *to be able to be driven off the carrier*." (Transcript, p. 31) (Emphasis added). Thus, GM did intend for some fuel to remain in the tank to allow the vehicle to be driven off the transport truck. However, the witness did not say that the dealer would drive the vehicle off the carrier.

b. With respect to Respondent's issue regarding use of some of the subject fuel by dealers, *AutoAlliance* held that "AutoAlliance met its burden and established that it was entitled to a refund on the tax on the entire 3.2 gallons of fuel placed into each of the vehicles at issue without regard to the actual amount of fuel consumed during the testing and quality control procedures." AutoAlliance placed the fuel in the tank both for quality control and for loading for final shipment, as did GM.

However, the Tribunal finds no evidence or testimony to support Respondent's contention that Petitioner had the "specific purpose of transferring fuel to a third party." (Respondent's Exceptions, page 2). The operative facts in this case are legally indistinguishable from *AutoAlliance*. As in that case, here "[t]his is not a case where the manufacturer might be deliberately attempting to transfer fuel to a third party's use. In such a case, the Department might be justified in treating the manufacturer as a middleman (such as a jobber or retailer) rather than an end user." *Id.* It is clear that in *AutoAlliance* the remaining fuel was available for use during unloading and that fact did not disqualify the taxpayer as an end user who used all the fuel for a non highway purpose.

c. With respect to Respondent's issue that "the Tribunal appears to be holding that multiple end users may claim a refund for the same gallons of fuel" (Exceptions, pages 4 and 5), the Proposed Judgment and Opinion makes no such ruling. Instead, the Proposed Judgment and Opinion states that *DaimlerChrysler v Dep't of Treasury*, 268 Mich App 528; 708 NW2d 461 (2006), held that the dealer or its customers used the fuel to propel the vehicle, which precluded a finding that the manufacturer was an end user of the fuel. Under *AutoAlliance*, the manufacturer used all the fuel to propel the vehicle because it placed the fuel in the tank for that purpose in relation to testing, quality control and shipment. It was obvious that any remaining fuel would be consumed to propel the vehicle by the dealer or someone else. Nevertheless, reading the cases together, the manufacturer, the dealer, and the customer all fall with the scope of the term "end user" but only the manufacturer could qualify for a refund as the person who paid the tax. The fact that there may be more than one "end user" does not mean that more than one refund can be issued for the same fuel.

d. As discussed above, Respondent has failed to show good cause to justify the modifying of the Proposed Opinion and Judgment. Further, Petitioner has failed to show good cause to justify the modifying of the Proposed Opinion and Judgment, other than the revision to Page 22 of the Proposed Opinion and Judgment as discussed above. The Tribunal finds that the Administrative Law Judge properly considered the testimony and evidence submitted in the rendering of the Proposed Opinion and Judgment. As a result, Petitioner is entitled to a refund of taxes paid as indicated below:

Refund Request	Period	Tax	Interest*
00155437	7/1/04 - 12/31/04	$241,422	
00155438	7/1/04 – 12/31/04	$82,452	
**	1/1/05 – 12/31/05	$479,709	
**	1/1/05 – 12/31/05	$169,359	

*Interest accrues per 1941 PA 122.

**The refund claim number is not in evidence for these periods.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that Respondent shall collect the affected taxes, interest, and penalties or issue a refund as required by this Order within 28 days of entry of this Final Opinion and Judgment.

MICHIGAN TAX TRIBUNAL

Entered: April 12, 2011 By: Steven H. Lasher

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

General Motors Corporation,
Petitioner,

v

Michigan Department of Treasury,
Respondent.

MICHIGAN TAX TRIBUNAL
MTT Docket No. 321091
consolidated w/ 328925

Administrative Law Judge Presiding
Thomas A. Halick

PROPOSED OPINION AND JUDGMENT

A hearing was held September 14, 2010, on Petitioner's appeal of Respondent's denial of refund claims for taxes paid under the Motor Fuel Tax Act, MCL 207.1001, et seq. This proceeding is original, independent, and *de novo*. MCL 205.735(1). Petitioner was represented by Thomas J. Kenny and Bradley S. Defoe, Varnum, LLC. Respondent was represented by Heidi Johnson-Mehney, Assistant Attorney General. Based upon the documentary evidence, testimony, and legal briefs, it is concluded that Petitioner is entitled to a refund of taxes paid as indicated below:

Refund Request	**Period**	**Tax**	**Interest***
00155437	7/1/04 – 12/31/04	$241,422	
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*Interest accrues per 1941 PA 122.
**The refund claim number is not in evidence for these periods.

The following Exhibits were admitted into evidence:

Petitioner's Exhibits

P1 – Claim for Refund (Gasoline) – July 1, 2004 to December 31, 2004 ($241,422.00)

P2 – Letter, January 6, 2006 – denial of claim for refund of tax paid on gasoline

P3 – Claim for Refund (Diesel) – July 1, 2004 to December 31, 2004 ($82,452.00)

P4 – Letter, January 6, 2006 – denial of claim for refund of tax paid on diesel fuel

P5- Claim for Refund (Gasoline) – July 1, 2005 to December 31, 2005 ($479,709.00)

P6 – Claim for Refund (Diesel) – July 1, 2005 to December 31, 2005 ($169,359.00)

P7 – Letter, January 6, 2006 – denial of claim for refund ($649,068)

P8 – BP/Amoco Invoice for Purchase of Motor Fuel by General Motors, 1/1/04 – 12/31/04

P9 – BP/Amoco Invoice for Purchase of Motor Fuel by General Motors, 1/1/05 – 12/31/05

P10 – Diagram of Plant and Photo of Vehicle Storage Lot at GM Facility, Delta Township

P11– GM Invoice to Dealer for 2004, 2005, 2006 Model Vehicles

P12 – Transfer of Title to Dealer/Risk of Loss: GM internal memorandum, February 19, 2007

P13 – Make and Model of Each Vehicle Assembled at Michigan Assembly Plants

P14 – Photograph of Medium Duty Trucks and Engineering Drawing

P15 – General Motors Schedule - 2004 Fuel Fill – gallons by model line

P16 -- General Motors Schedule - 2005 Fuel Fill – gallons by model line

P17 – Resume of Tim Mahoney

P18 – Resume of Donald Panek

P19 – Resume of Robert Voss

P20 – Michigan Treasury Letter Ruling 1990-12

P21 Criteria for Determining the Quantity of Fuel Dispensed to Vehicles in the Assembly Plant

Respondent's Exhibits – Respondent offered no documentary evidence.

Findings of Fact

This section is a "concise, separate, statement of facts" within the meaning of MCL 205.751; and, unless stated otherwise, the matters stated or summarized are "findings of fact" within the meaning of 1969 PA 306, MCL 24.285.

Petitioner claims a refund of motor fuel taxes paid during the years 2004 and 2005. Petitioner placed the motor fuel at issue into the fuel tanks of vehicles that it manufactured in Michigan at six plants referred to as Hamtramck, Lansing, Lake Orion, Flint Truck, Flint #3, and Pontiac East. P1-2.

Timothy Mahoney, a Global Quality Staff Engineer for General Motors Corporation, testified regarding Petitioner's process for placing fuel in the fuel tanks of vehicles during the manufacturing process, testing and quality control procedures, and delivery of the vehicles to the common carrier for shipment to dealers. Petitioner ordered fuel in large quantities. The fuel was delivered from the terminal to 10,000 gallon underground storage tanks located at Petitioner's manufacturing facilities. Exhibits P8 and P9 are examples of invoices for fuel purchases that show that motor fuel tax was paid at the time of purchase.

At the plants, the fuel was transported from the storage tanks using pumps to the "fluid fill equipment" located near the end of the manufacturing process. Mr. Mahoney testified regarding Exhibit P10-2, which is a diagram of the Lansing Plant (Delta Township) that shows the relevant portions of the fuel filling and testing process. This process was the same at all the plants in Michigan during the periods at issue. The process of placing fuel into the tank of each vehicle takes approximately one minute. After fuel is placed in the fuel tank, the engine is started for the first time and the vehicle continues to the end of the assembly line, where it is driven to a station for testing the wheel alignment, headlight alignment, and the radio. The vehicle is then driven to a station with vehicle test rollers which allow the wheels to turn at the equivalent of 70 miles per hour for approximately two minutes for testing purposes. The vehicle proceeds to the "care line" where electrical tests occur while the engine is off. The vehicle is restarted at the end of the care line where it is deluged with 900 gallons of water to test for leaks. The vehicle is then driven outside the plant to the "squeak and rattle track" where it is driven and tested for approximately one minute. Finally, the vehicle is driven to the "ship lot" where it is released to the common carrier and driven onto a trailer for delivery to the dealer. TR 34:9.

Exhibit P16 lists various 2004 and 2005 model General Motors vehicles along with the fuel tank capacity and the amount of fuel placed in the tank at the plant. Exhibit P13 lists nine GM assembly plants located in Michigan and 25 models built at those plants. For example, the 2004 Silverado Pickup built at the Flint #3 Assembly plant is equipped with a 26 gallon fuel tank and 8 gallons of fuel were placed in the tank at the plant. The Pontiac Grand Am built at the Lansing North plant in 2004 is equipped with a 14.1 gallon tank and 3.2 gallons were placed in the tank at the plant. Mr. Mahoney stated that the criteria for the amount of fuel placed in each vehicle are set forth on Exhibit P21. The main objective is to place enough fuel in the tank to allow the vehicle to proceed through testing and delivery without running out of fuel or activating the low-fuel indicator light. Also, the fuel pump and fuel pick up located at the bottom of the fuel tank must remain submerged, even when the vehicle is on an incline (such as during transport), otherwise the vehicle will not start. The minimum amount of fuel required to meet these objectives was placed in the tank, which also reduces weight during transport and reduces the time it takes to fill the tank on the assembly line. A vehicle with better fuel efficiency and a smaller tank requires less fuel than one that is less efficient or has a larger fuel tank. Mr. Mahoney testified based on his experience as an engineer that after the final assembly, testing, and loading process there is a "very small amount of fuel in the vehicle."

Mr. Mahoney testified that during the years at issue, approximately 1,000 vehicles per day were manufactured in Michigan and approximately 12 or less vehicles per day were selected at random for a quality audit where they were driven on Michigan roads. TR 37:16-21. An additional one gallon of fuel was placed in the vehicles that were selected for the quality audit,

but this fuel was not included in the fuel for which Petitioner seeks a refund. TR 38:2-4. None of the fuel involved in road testing was included in the refund claim.

Mr. Donald Panek is Petitioner's Manager of Property and Sales Taxes. He testified regarding his personal knowledge of the refund claims filed in this matter. Petitioner paid motor fuel tax on all the fuel at issue at the time of purchase at the terminal. TR 50:20-25. Prior to 2001, Petitioner filed claims for refunds of all prepaid motor fuel taxes for motor fuel placed in vehicles shipped outside Michigan and the Department of Treasury honored those claims. TR 51:5.

Exhibit P-20 is an invoice related to Petitioner's sale of a vehicle to a dealer, which shows that Petitioner did not charge the dealer for motor fuel and did not collect motor fuel tax from the dealer. The invoice includes a "retail amenity delete" or a "full fuel credit," which is a credit that Petitioner provides to the dealer to encourage the dealer to fill the tank so that the vehicles reach the customer with a full fuel tank. TR 53 - 54.

In 2004 and 2005, Petitioner applied to Respondent for a refund of all fuel tax paid on fuel that it placed in the tanks of vehicles manufactured in Michigan that were shipped to dealers located outside this state. No refund was sought for any fuel taxes paid on fuel that was placed in the tanks of vehicles shipped to Michigan dealers. Exhibit P1 is a "Claim for Refund of Motor Fuel" form that Petitioner completed to claim a refund for taxes paid from July 1, 2004 through December 31, 2004, indicating that the claim is for "non-taxable use of gasoline used for industrial/commercial." P1. Line 8 of the form indicates that the claim pertained to 1,270,642 gallons of fuel "purchased at retail and in bulk" upon which $241,422 in tax was paid. Line 9

indicates that none of the 1,270,642 gallons were "put in vehicles for taxable highway use." For example, each vehicle manufactured at the Lansing Assembly plant in 2004 received 3.59 gallons of fuel for testing and other purposes outlined above. Petitioner calculated the total gallons placed in all vehicles manufactured at that plant and subtracted the gallons that were placed in vehicles sold to Michigan dealers. The testimony establishes that the fuel reported on the claim forms did not include the additional one gallon of fuel that was placed in a small sample of vehicles for the purpose of conducting a quality audit, which included operating those vehicles on a Michigan road or highway. This same procedure was followed for all the Michigan plants. TR 60-66. Attached to the refund claim form was a schedule indicating the states to which the vehicles were delivered.

Exhibit P2 is a letter from Respondent (signed by Sue Karr, Audit Clerk, Motor Fuel Tax Division) indicating that the refund claim for gasoline tax (claim no. 00155437 for the period 7/1/2004 to 12/31/2004) was denied because: "you are not licensed to export gasoline." Exhibit P4. Respondent notified Petitioner that its refund claims for 2005 (totaling $649,068) were denied, as follows:

> In order to claim a refund for exported fuel, one must be licensed as a Michigan Fuel Exporter and maintain ownership of the vehicle at the time of export. In addition, owners of vehicles imported into Michigan would need to be registered as an Importer and remit Michigan Motor Fuel tax and the MUST environmental fee. My understanding of industry practice is that ownership of the vehicle usually transfers at the manufacturer's dock. Hence, the manufacturer has no claim for refund, as they export no vehicles from Michigan. If you feel General Motors meets the above qualifications as a Motor Fuel Exporter, please register as such and begin filing refund claims prospectively. Also, please provide proofs that GM maintains ownership of the vehicles as they cross the border leaving Michigan. Such documentation would include copies of contracts with purchasers, shippers

> and insurers. Finally, please register as a fuel importer for vehicles you import into Michigan which are manufactured outside of the state. P7 – Letter to Petitioner signed by Stephen R. Hilker, Director, Customer Service Bureau, Michigan Department of Treasury, July 25, 2006.

Mr. Panek testified that the title to the vehicles transferred from Petitioner to the dealer when the vehicle was released to the carrier for shipment, which occurred at the Michigan plant. The new vehicle was sold to the dealer at the end of assembly and testing.

Respondent's sole witness was Douglas R. Miller, who is presently the Administrator of the Special Taxes Division of the Michigan Department of Treasury. During 12 years of employment at the Department of Treasury he has served as an attorney and a hearing referee. Mr. Miller testified that under section 85 of the MFTA a person may become licensed to export motor fuel. He stated that Petitioner was not licensed to export motor fuel during the years at issue.

Conclusions of Law

The issue in this case is whether Petitioner is entitled to a refund of motor fuel taxes paid on fuel that it placed in the tanks of vehicles manufactured in Michigan that were shipped to dealers located outside this state. Petitioner claims that it is entitled to refund because it is an end user who used the fuel for nonhighway purposes within the meaning of MCL 207.1033 and MCL 207.1039.

> An end user may seek a refund for tax paid under this act on motor fuel used by the person for nonhighway purposes. However, a person shall not seek and is not eligible for a refund for tax paid on motor fuel used in a snowmobile, off-road

> vehicle, or vessel as defined in the natural resources and environmental protection act, 1994 PA 451, MCL 324.101 to 324.90106. MCL 207.1033.
>
> An end user may seek a refund for tax paid under this act on motor fuel or leaded racing fuel used in an implement of husbandry or otherwise used for a nonhighway purpose not otherwise expressly exempted under this act. However, a person shall not seek and is not eligible for a refund for tax paid on gasoline or leaded racing fuel used in a snowmobile, off-road vehicle, or vessel as defined in the natural resources and environmental protection act, 1994 PA 451, MCL 324.101 to 324.90106. MCL 207.1039.

Petitioner placed between 3.2 and 8 gallons of fuel into the tanks of automobiles and light trucks manufactured in this state. In the case of medium duty trucks, approximately 13 gallons were placed in the fuel tanks. TR 35:24. The fuel was placed into the vehicle at the end of the assembly process for several reasons. The fuel is necessary to start the engine and put the new vehicle through testing procedures and to propel the vehicle from one testing station to another, including a one-minute run on Petitioner's private test track to check for rattles and squeaks. The fuel is also needed to drive the vehicles to the shipping area and onto transport trucks. Based upon the testimony and evidence, it is not feasible or practical to deliver the vehicles to the common carrier with no fuel remaining in the tanks. The testing process and moving the vehicles onto the transport trucks would be impossible if the vehicles ran out of fuel. A small amount of fuel must remain in the tank, fuel pump, or the fuel delivery system at the time the vehicles are loaded for transport. The facts do not indicate precisely how much fuel was burned during testing and transportation or how much fuel remained in the tanks when the vehicles were delivered to the common carrier for shipment to the dealer. However, Mr. Mahoney testified that it was a very small amount. He also stated that the low-fuel light illuminates when there is less than

approximately two gallons of fuel in the tank. In dispute is the approximately two gallons of fuel that were in the tank of most vehicles when they left the plant destined for out-of-state dealers.

Respondent cites the Court of Appeals decision in *DaimlerChrysler v Michigan Dep't of Treasury*, 268 Mich App 528; 708 NW2d 461 (2006), which held that a vehicle manufacturer was not entitled to a refund of motor fuel taxes because it failed to prove that it was an "end-user" under MCL 207.1033 or MCL 207.1039. As reported by the Court of Appeals, the refund claim applied to the "unused fuel left in the fuel tanks of new vehicles that were sold to out-of-state dealers." The court interpreted the undefined term "end-user" by reference to dictionary definitions, and concluded that an end-user is the "party who uses the fuel to power the motor vehicle into which the fuel was placed." *Id.*, p 536. The court also held that an "end user" is the "ultimate user for whom a machine is designed." Furthermore, MCL 207.1026 equates the term "used or consumed" with "producing or generating power for propelling the motor vehicle." Under the facts presented in *DaimlerChrysler*, the taxpayer failed to establish that it used the fuel remaining in the tanks to produce or generate power for propelling the motor vehicle, and therefore was not the end user of that fuel.

In our present case, Respondent does not dispute that the taxpayer would be entitled to a refund of fuel actually consumed by the vehicle's engine during the manufacturing or testing process, as long as it could prove the amount of fuel so used. Respondent contends that Petitioner is not entitled to a refund for any fuel at issue in this case because it has failed to prove the amount of fuel burned during testing and that it is it is not the end user of the fuel that remained in the fuel tanks.

Petitioner claims that it is entitled to a refund of tax paid on all fuel placed in the tank, including fuel remaining at the time the vehicle is delivered to the dealer, because it has proven that it is an "end user" that used all the fuel for nonhighway purposes under *DaimlerChrysler* and *AutoAlliance International, Inc v Dep't of Treasury*, 282 Mich App 492; 766 NW2d 1 (2009).

The facts of *AutoAlliance* are indistinguishable from our own. In *AutoAlliance*, the court of claims granted the department's motion for summary disposition after an evidentiary hearing and denied the taxpayer's refund claim. The court ruled that the taxpayer failed to present evidence of the actual amount of fuel that it used for a nontaxable purpose, indicating that the taxpayer would be entitled to a refund for fuel actually consumed, but not for fuel remaining in the tanks.

The Court of Appeals overruled the trial court, holding that the taxpayer presented undisputed evidence that: 1) it was an end user, and 2) that it used all the motor fuel for nonhighway purposes, even the fuel remaining in the tanks at the time of delivery. Petitioner has presented nearly identical testimony and legal arguments here as in *AutoAlliance*. Petitioner's refund claim also pertains to fuel placed in the tanks of vehicles destined for out-of-state dealers. Like *AutoAlliance*, Petitioner did not request a refund for fuel placed in the tanks of vehicles sold to Michigan dealers or for any fuel consumed while operating a vehicle on a Michigan road.

Petitioner has proven specific facts that all the fuel was necessary to power the vehicle because it is unavoidable that some fuel must remain in the tank, otherwise the vehicle could not be operated throughout the testing process and the process of loading the vehicle onto the carrier.

Petitioner offered proofs nearly identical to *AutoAlliance* to establish the necessity of placing 3.2 to 13 gallons of fuel in the tank, depending upon the type of vehicle, which was the minimum amount needed to power the vehicle[1]. Under the facts and reasoning set forth in *AutoAlliance*, the fuel that remained in the tank at the time of delivery was used to propel the vehicle because the vehicle could not have been operated during the testing process without it.

Although *DaimlerChrysler* held that the taxpayer in that case did not use the fuel to power the vehicle, this does not mean that it was impossible for the taxpayer to meet its burden. In other words, the ruling in *DaimlerChrysler* does not preclude a taxpayer from offering proofs to establish "end use" of fuel without actually combusting the fuel in the engine's cylinders. *AutoAlliance* establishes that with appropriate proofs, a taxpayer may meet this burden. Note that the *DaimlerChrysler* court's ruling in this regard was limited to the "circumstances presented in this case."

> *Under the circumstances presented in this case*, petitioner purchased the fuel at retail, and then placed the fuel into the fuel tanks of new vehicles. Those vehicles were then transferred to dealerships when they were placed in the possession of the common carrier in this state. Petitioner never used the fuel at issue to power the vehicles. Rather, petitioner passed the fuel on to the dealership, which may have used the fuel to power the vehicle or may have passed the fuel on to a purchaser who used the fuel to power the vehicle. We conclude that, because the evidence demonstrates that petitioner did not use the fuel to power the vehicles, but passed the fuel on to someone else who so used it, *there is no genuine issue of fact regarding whether petitioner was an end user of the fuel*. *DaimlerChrysler v Dep't of Treasury*, 268 Mich App 528, 536-537; 708 NW2d 461, 466 (2005). (Emphasis added.)

[1] ". . . AutoAlliance argued that, because the 3.2 gallons of fuel selected for placement in each vehicle was calculated to be the minimum amount needed to ensure that the vehicles could proceed through testing without running out of fuel, it 'used' that amount." *AutoAlliance*, p 498.

Under the present facts, as in *AutoAlliance*, Petitioner has proven that it used all the fuel to propel the vehicle, even the fuel that remained in the fuel tank at the time of delivery to the dealer. Therefore, even though *DaimlerChrysler* denied the refund, it did so under the facts of that case, which did not include detailed sworn testimony regarding how the taxpayer used the fuel at issue. The court reasoned that the taxpayer could not have used the fuel to propel the vehicle because the dealer or the dealer's customer would have used that fuel. This ruling does not preclude a finding that both Petitioner and the dealer (or customers) used the fuel to propel the vehicle. Note that the statute provides a refund to "*an* end user" and not *the* end user. MCL 207.1033, MCL 207.1039. Use of the indefinite article "an" allows for more than one end user.

In *AutoAlliance*, the Court of Appeals held that the taxpayer was an end user that used all of the fuel for a nonhighway purpose, regardless of whether the fuel was burned in Michigan or remained in the fuel tanks when shipped to dealers outside Michigan. The court opined that the plain and ordinary meaning of an "end user" applies to a person who purchases and places fuel in newly manufactured vehicles for final testing and quality control measures, and not in order to sell the fuel to third parties. The court cited a definition from the Random House Webster's College Dictionary (1997) to support its view that an end user is anyone who purchases fuel for its own purposes, other than a "jobber or retailer who purchases fuel in order to resell it to a third party." The fact that some fuel remains in the tank did not "alter AutoAlliance's status as an end user." *Id.*, p 501. However, the court noted that it was unable to apply its interpretation (which the court declared to be the "plain meaning") because a prior panel had already "construed" the term in *DaimlerChrysler*. (The court in *DaimlerChrysler* also stated that it gave the term end user "its plain and ordinary meaning" and referred to dictionary definitions). The *AutoAlliance*

court noted that *DaimlerChrysler* held that an end user is the "ultimate user of the motor fuel, i.e., the party who uses the fuel to power the motor vehicle." *DaimlerChrysler*, p 536. The court applied that definition and concluded that all the fuel at issue was in fact used to power the motor vehicle, because it was placed in the fuel tank for that purpose. "The plant's workers placed the fuel in the new vehicles in order to enable the workers to move the vehicles through the final testing and quality control procedures, to drive some of the vehicles to a facility for installation of aftermarket parts, and to drive the vehicles to the point at which the vehicles were loaded for final shipment." *AutoAlliance*, p 504. The entire amount of fuel was placed into the vehicle for such purposes within the meaning of the relevant exemption statutes. Therefore, AutoAlliance was an end user. The factual basis for this ruling is also present in the instant case.

In *AutoAlliance* the court used similar reasoning to support its holding that the taxpayer used the fuel for a "nonhighway purpose" within the meaning of MCL 207.1033 and MCL 207.1039. This ruling applies to our case, where the testimony also establishes that Petitioner added the minimum amount of fuel needed to run the motor and propel the vehicle during testing and final delivery to the common carrier and the fuel was not used for a highway purpose. The additional one gallon of fuel that was added to the tanks of a small number of vehicles for purposes of a quality audit that included testing on Michigan roads was used for a highway purpose, but that fuel is not the subject of Petitioner's refund claims.

Reconciling DaimlerChrysler and AutoAlliance

Both *DaimlerChrysler* and *AutoAlliance* are published cases that are binding on this Tribunal. MCR 7.215(C)(2). In both cases the taxpayer was denied relief at the trial level (the Tax Tribunal

and Court of Claims). Both cases were decided on motions for summary disposition. However, in *AutoAlliance* an evidentiary hearing was held and a factual record was developed through the sworn testimony of the taxpayer's employees who had personal knowledge of the facts and circumstances under which the fuel was placed into the vehicles during the assembly and testing process as well as the facts regarding the refund claims. The taxpayer in *AutoAlliance* offered the testimony of its manufacturing engineering manager at the Flat Rock assembly plant, and the testimony of the taxpayer's controller who had personal knowledge of the refund claims under the former MFTA (for periods prior to April 1, 2001) and for periods under the current MFTA. In our present case, Petitioner's witnesses established virtually identical facts as in *AutoAlliance*.

The only significant factual distinction is that in our case approximately 1.2% of the vehicles consumed a small amount of fuel while being driven on Michigan roads. In *AutoAlliance* "15 to 20 percent of the vehicles were driven 6 ¼ miles to the Mazda North America Operations" for installation of certain aftermarket items, but those vehicles were not driven on Michigan public roads. *AutoAlliance*, pp 496-497. In our present case, approximately 12 of the 1,000 vehicles manufactured per day were selected for testing and were driven on Michigan roads. Petitioner placed one additional gallon of fuel in these vehicles for purposes of highway testing. In no sense could that fuel be "used for a nonhighway purpose." However, this factual distinction is inconsequential because the unrebutted testimony of Mr. Mahoney and Mr. Panek establishes that Petitioner's refund claims do not include this fuel. Therefore, there is no need to adjust the number of gallons of fuel stated in the refunds claims.

In *DaimlerChrysler*, the factual record was less developed. Much of the litigation focused on the issue of whether the taxpayer was an exporter of motor fuel and other issues. The opinions of the Tribunal and the Court of Appeals do not report facts regarding the specific purposes for which the taxpayer placed the fuel in the fuel tanks. The appellate court merely noted that Petitioner claimed that "during the assembly process, fuel was placed in each vehicle's fuel tank according to engineering specifications." *Id.*, p 530. The court cited no facts of record to establish that all the fuel was needed to power the vehicle. In *DaimlerChrysler*, the Tribunal stated that the taxpayer failed to create a genuine issue of material fact that it qualified as an "end-user." Upon review, the Court of Appeals did not hold as a matter of law that an automobile manufacturer could never meet its burden that it was the "ultimate user of the motor fuel, i.e., the party who uses the fuel to power the motor vehicle into which the fuel was placed." *Id.*, p 536. As stated above, the court's ruling was limited to the "circumstances presented in this case." *Id*., p 536. It was held that "because the evidence demonstrates that petitioner did not use the fuel to power the vehicles, but passed the fuel on to someone else who used it, there was no genuine issue of material fact whether Petitioner was an end user of the fuel." The fact that "someone else" used the fuel to power the vehicle in *DaimlerChrysler* does not preclude a finding in this case that both the manufacturer and the dealer used the fuel to power the vehicle.

DaimlerChrysler also stated that "end user" is defined as the "ultimate user for whom a machine, [such] as a computer, or product, [such] as a computer program, is designed. *The Random House Dictionary of the English Language: Second Edition Unabridged*." *Id*., p 536. The *AutoAlliance* panel took notice of this definition and found it to be consistent with its holding that an end user

is a person who puts the motor fuel to his or her own use as opposed to purchasing it for resale. The court held that in order to be an end user under *DaimlerChrysler*:

> . . . a person must apparently use the fuel in a manner that is consistent with the way in which one would typically use the fuel in the machine at issue. Thus, where the motor fuel is put into a motor vehicle, in order for the person to qualify as an end user, that person must use "the fuel to power the motor vehicle. . . ." *AutoAlliance,* p 502.

Although the court stated its disagreement with this particular portion of the *DaimlerChrysler* opinion, it stated that the case was on point and "we must apply it." *AutoAlliance*, p 503. Based on the record presented in *AutoAlliance*, the Court of Appeals ruled that under the legal definition set forth in *DaimlerChrysler*, by placing the fuel in the tank of each vehicle in order to operate the vehicle during testing, the taxpayer did use the fuel "in a manner that is consistent with the way in which one would typically use the fuel in the machine." Therefore, the taxpayer was entitled to a refund on all fuel placed into the fuel tanks of the newly manufactured vehicles that were shipped to dealers outside Michigan. The taxpayer "used the motor fuel to power the vehicles during the testing process, we conclude that AutoAlliance qualified as an end user of the motor fuel it placed in the vehicles at issue under the decision in *DaimlerChrysler*." *Id*., p 504. The reasoning in *AutoAlliance* presents some fine distinctions, but it is concluded that the opinion is binding on this Tribunal when presented with substantially identical facts.

Conflict Rules - MCR 7.215(J)(2)

MCR 7.215(J)(2) states:

> Conflicting Opinion. A panel that follows a prior published decision only because it is required to do so by subrule (1) must so indicate in the text of its opinion,

> *citing this rule* and explaining its disagreement with the prior decision. The panel's opinion must be published in the official reports of opinions of the Court of Appeals. MCR 7.215(J)(2). (Emphasis added.)

The *AutoAlliance* panel stated its disagreement with *DaimlerChrysler,* and indicated that it followed that case only because it was required to by court rule. However, the court did not cite the court rule pertaining to conflicting opinions, as specifically required by MCR 7.215(J)(2). Had it done so, the chief judge of the Court of Appeals would have been required to "poll the judges of the Court of Appeals to determine whether the particular question is both outcome determinative and warrants convening a special panel to rehear the case for the purpose of resolving the conflict. . . ." MCR 7.215(J)(3)(a). Because the rule was not specifically cited, it is arguable that the Chief Judge did not have a duty to poll the judges of the Court of Appeals. In any event, the conflict procedure was not invoked.

Respondent cites case law regarding the resolution of conflicts. If a panel of the Court of Appeals fails to follow established precedent, the earlier opinion remains binding law, unless a conflict panel is convened and rules that the subsequent case is correct. However, in order for that principle to apply, there must be a conflict between a prior and subsequent ruling. Therefore, the Tribunal must determine whether the *AutoAlliance* panel failed to follow precedent established by *DaimlerChrysler*. MCR 7.215(C)(2) provides that a published opinion is precedential. There is no question that *DaimlerChrysler* is law. However, the *AutoAlliance* panel did not merely overlook *DaimlerChrysler* and render its own ruling. Rather, the court thoroughly analyzed the per curiam opinion in *DaimlerChrysler* and indicated its disagreement.[2] The three

[2] The court's opinion in *AutoAlliance* was authored by "M.J. Kelly, J."

judge panel unanimously confirmed that it was bound by *DaimlerChrysler* and applied that law, albeit rendering an opposite conclusion based on the facts presented. Therefore, it cannot be concluded here that *AutoAlliance* disregarded and failed to follow established precedent.

If it were clear that the panel in *AutoAlliance* disagreed with and failed to follow the law established by the prior case, that panel's decision would be in error, and the prior case would control the Tribunal's decision here. Respondent claims that "While the *AutoAlliance* court claimed that it applied the *DaimlerChrysler* opinion, it is clear that it did not do so." Respondent's Post Hearing Brief, p 6. However, the court in *AutoAlliance* unequivocally announced that it was bound by *DaimlerChrysler* and set forth detailed analysis and reasoning to support its ruling as consistent with *DaimlerChrysler.* It shall not be lightly presumed that a panel of the Court of Appeals was disingenuous or errant in making such statements.

On November 14, 2006, the Supreme Court heard oral arguments in *DaimlerChrysler* on the application for leave to appeal. In the Order denying leave, Justice Markman wrote a concurrence, indicating that the petitioner had conceded that "nothing in the record demonstrates that it has used motor fuel to test its vehicles" and had failed to establish a right to a refund under various sections of the motor fuel tax act. "I agree with the Court of Appeals that *under the instant circumstances* petitioner is not entitled to a refund. . . ." *DaimlerChrysler v Treasury*, 477 Mich 962; 724 NW2d 279 (2006). (Emphasis added.) Justice Markman's concurrence supports a conclusion that *DaimlerChrysler* is a fact-based decision, the outcome of which was dictated by the failure of the taxpayer's proofs. This supports the efficacy of the *AutoAlliance* decision, which came to a different conclusion on a different factual record.

On September 11, 2009, the Supreme Court considered and denied the department's application for leave to appeal in *AutoAlliance,* indicating that the court was not persuaded that the question should be reviewed. In briefing the case on application for leave to appeal, the appellant had the opportunity to argue that *DaimlerChrysler* was binding upon the *AutoAlliance* panel. The Supreme Court was on notice of *DaimlerChrysler*, having denied leave to appeal in that case on December 8, 2006, but saw no reason to grant leave to appeal in *AutoAlliance* in order to resolve a conflict and did not remand the case for further review. Therefore, it would be improvident for this hearing officer to find a conflict where both the Court of Appeals and impliedly the Supreme Court found none.

Respondent cites *People v Young*, 212 Mich App 630; 538 NW2d 456 (1995), where the court was posed with the "quandary" of deciding which of two prior conflicting appellate opinions to follow. The first case[3] had rejected a non-binding plurality opinion of the Supreme Court (by Justice Mallett) and the subsequent case[4] followed Justice Mallett's opinion. The second panel was unaware of the first panel's ruling. The conflict procedures under former Administrative Order 1994-4[5] were not invoked. In deciding which case to follow, the *Young* court considered both prior rulings and determined that there was "unarguably" a conflict. It was clear that the subsequent case simply overlooked the precedent established by the previous panel of the Court of Appeals. The court properly ruled that it was required to follow the first of the two conflicting opinions.

[3] *People v Armstrong*, 207 Mich App 211; 523 NW2d 878 (1994).
[4] *People v Bender*, 208 Mich App 221; 527 NW2d 66 (1994).
[5] Administrative Order 1994-4 provided that "[a] panel of the Court of Appeals must follow the rule of law established by a prior published decision. . .unless a special panel of this Court is convened. . . ."

Our present circumstances are distinguishable because the panel in *AutoAlliance* acknowledged disagreement, but affirmatively held that it followed the prior case. In *Young*, the court noted that the two cases "explicitly conflict with each other" and that the subsequent panel was unaware of and did not consider the prior decision. *Id.*, p 638.

Respondent claims that the court in AutoAlliance "purported to apply the *DaimlerChrysler's* Court's definition, but clearly applied its own. . . ." Respondent's Post Hearing Brief, p 6. However, *AutoAlliance* held that under the facts proven in that case, the taxpayer was "the party who uses the fuel to power the motor vehicle," which is the law of *DaimlerChrysler*. It is true that *DaimlerChrysler* denied the refund for fuel that remained in the fuel tank because it found that the taxpayer did not use that fuel, but rather the dealer or its customers used it. In our case, the remaining fuel was also be used by the dealer or its customers. However, as observed by Justice Markman in his concurrence in denying leave for appeal, "nothing in the record demonstrates that [the taxpayer] has used motor fuel to test its vehicles." In our present case, the record is replete with facts to establish that Petitioner used the fuel as needed to power the vehicle during the testing process.

DaimlerChrysler does not stand for the proposition that any fuel left in the tank cannot have been used to power the vehicle, but rather, the facts in that case did not prove that the fuel was used to power the vehicle. In *AutoAlliance*, the record included evidence and testimony virtually identical to our present case. The court considered those facts, applied the law set forth in *DaimlerChrysler*, and concluded that the taxpayer was entitled to a refund of all taxes paid on all

the fuel at issue. *AutoAlliance* is more closely on point procedurally, factually, and legally, with our present case than *DaimlerChrysler*.

Respondent argues that even if *AutoAlliance* is controlling, the facts in this case are distinguishable. Respondent states that the court relied upon the fact that the taxpayer put "barely enough fuel in the tanks . . . to enable them to make it through the testing process without stalling." Respondent's Post-Hearing Brief, p 13. The vehicles in *AutoAlliance* received 3.2 gallons of fuel. Some of the vehicles in our case also received 3.2 gallons of fuel. Other vehicles that had larger fuel tanks or lower fuel economy received more than 3.2 gallons, but Mr. Mahoney's testimony establishes that each vehicle received the minimum amount of fuel necessary for that type of vehicle. The *AutoAlliance* court indicated that the outcome might be different if the manufacturer was "deliberately attempting to transfer fuel to a third party for the third party's use." Although Petitioner's witness testified to various criteria that determine the amount of fuel to be placed in the tank, the predominant goal was to use the least amount of fuel possible in order to run the vehicle during testing and loading the vehicle for shipment, followed by the related purposes to reduce weight, to keep the fuel pump submerged, to minimize fueling time, and to keep the "low fuel" light from illuminating. All of the criteria cited focus on using the smallest amount of fuel possible for each type of vehicle, rather than a deliberate attempt to transfer fuel to another user tax free. In fact, Petitioner provided a credit to the dealer for filling the fuel tank once the vehicle reached the dealer.

The taxpayer in *DaimlerChrysler* contended that the "fuel was placed in each vehicle's fuel tank according to engineering specification" but did not provide detailed, sworn testimony regarding

the use of the fuel as did Petitioner in our case. *AutoAlliance* held that all of the fuel was necessary to complete testing and quality control procedures without running out of fuel, and also to minimize the risk of disruptions caused by vehicles running out of fuel. *AutoAlliance* cited facts that all the fuel was used to "enable the workers to move the vehicles through the final testing and quality control procedures, to drive some vehicles to a facility for installation of aftermarket parts, and to drive the vehicles to the point at which the vehicles were loaded for final shipment." The court held that "testimony also established that, although every vehicle might not need the 3.2 gallons in order to move throughout the final testing and quality control procedures, that amount was selected to ensure that production would not be disrupted by vehicles running out of fuel." *Id.*, p 503. Therefore, the court recognized that fuel would be left in the tank after "the point where the vehicles were loaded for shipment" and that fuel qualified for a refund. *AutoAlliance* did not state that the manufacturer placed fuel in the tank for the benefit of the dealers. However, it was clear that the fuel remaining in the tanks would be available for use by the dealers to unload the vehicle and would serve the other purposes testified to in our present case. Petitioner's witness testified that the manufacturer intended to leave enough fuel in the tank to keep the fuel pump submerged during transport, to prevent the low fuel light from illuminating, and to allow the dealer to drive the vehicle off the transport truck. The fact that the remaining fuel would serve these purposes does not override the predominant reason that Petitioner placed fuel in the vehicles, which was to power the vehicle through the testing and quality control process and for loading onto carriers, just as in *AutoAlliance*. Therefore, the testimony in our present case that Petitioner had an interest in transferring the vehicle to the dealer with a minimal amount of fuel does not take this case outside the scope of the ruling in *AutoAlliance*.

Having ruled that the taxpayer was an "end user" the *AutoAlliance* court determined that the taxpayer "used the fuel for nonhighway purposes." The *DaimlerChrysler* case ruled on the meaning and application of the term "end user" but did not reach the "separate inquiry" of whether the fuel was used for nonhighway purposes. (Therefore, any ruling in *AutoAlliance* regarding the term "used for nonhighway purposes" presents no conflict with *DaimlerChrysler*.) *AutoAlliance* held that an "end user" is entitled to a refund for tax paid on any fuel that it used for nonhighway purposes, which means for "purposes other than to operate the vehicles at issue on Michigan's public roads or highways." *Id.*, p 506. The taxpayer met its burden of proof on this issue by undisputed evidence that all the vehicles at issue were shipped to dealers outside this state, and therefore, the court held that "there is no possibility that the incidental amounts of motor fuel remaining in the vehicles were used to power the vehicles on Michigan's public roads and highways." *Id.*, p 507. In our case, Mr. Mahoney credibly testified that the vehicles shipped to dealers outside Michigan had a "small amount" of fuel remaining in the tank that was insufficient for the vehicles to be driven back to Michigan.

Conclusion

Based upon the record in this case after a full evidentiary hearing, and upon consideration of the legal arguments presented, Petitioner has met its burden of proof. The record in *AutoAlliance* was virtually identical to the record here, and that court rendered its ruling after thorough analysis of the prior ruling in *DaimlerChrysler*. The *AutoAlliance* court reversed the court of

claims and remanded the case for entry of judgment in favor of the taxpayer consistent with its opinion. The court did not retain jurisdiction. Application for leave to appeal to the Supreme Court was denied on September 11, 2009. *AutoAlliance v Dep't of Treasury*, 485 Mich 866; 771 NW2d 727 (2009). The Supreme Court considered and denied Respondent's motion for reconsideration on February 26, 2010. *AutoAlliance v Dep't of Treasury*, 485 Mich 1105; 778 NW2d 226 (2010). There were no further reported proceedings in that case. There is no reason to believe that the Court of Appeals or Supreme Court would treat our present case differently. This is not a case involving a clear conflict of law between two panels of the Court of Appeals where the Tribunal is bound by the prior case. The Tax Tribunal should not lightly declare a conflict and disregard a recent, on-point case when higher courts have found no conflict. Based upon the law set forth in *AutoAlliance*, Petitioner is entitled to a refund of the motor fuel taxes that are the subject of its refund claims.

Judgment

IT IS ORDERED that Petitioner's refund claims shall be GRANTED.

IT IS FURTHER ORDERED that the parties shall have 20 days from date of entry of this Proposed Opinion and Judgment to file exceptions and written arguments with the Tribunal consistent with Section 81 of the Administrative Procedures Act (MCL 24.281). The exceptions and written arguments shall be limited to the evidence and legal issues involved in the hearing. This Proposed Opinion and Judgment, together with any exceptions and written arguments, shall be considered by the Tribunal in arriving at a final decision pursuant to Section 26 of the Tax Tribunal Act (MCL 205.726).

MICHIGAN TAX TRIBUNAL

Entered: January 28, 2011 By: Thomas A. Halick