

UT 10-06

Tax Type: Use Tax

Issue: Rolling Stock (Vehicle Used Interstate For Hire)

**STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS**

THE DEPARTMENT OF REVENUE)	Docket No.
OF THE STATE OF ILLINOIS)	IBT No.
)	Tax Periods 1/05 – 3/05
)	NTL Nos.
v.)	
)	
)	
ABC LIMOUSINE, INC.,)	John E. White,
Taxpayer)	Administrative Law Judge

RECOMMENDATION FOR DECISION

Appearances: Fred Marcus, Horwood Marcus & Berk, Chartered, appeared for ABC Limousine, Inc.; George Foster, Special Assistant Attorney General, appeared for the Illinois Department of Revenue.

Synopsis: This matter involves six Notices of Tax Liability (NTLs) the Illinois Department of Revenue (Department) issued to ABC Limousine, Inc. (Taxpayer) to assess use tax regarding Taxpayer's use, in Illinois, of six limousines it purchased on different days during the months of January through March of 2005. Taxpayer protested those NTLs and requested a hearing.

In lieu of hearing, the parties submitted a stipulated record and filed briefs regarding the issue. After considering the stipulated record and the parties' arguments, I am including in the recommendation findings of fact and conclusions of law. I recommend that the Director finalize the NTLs as issued, pursuant to statute.

Statements of Fact Not In Dispute:

1. At all times relevant (and unless otherwise noted, all facts relate to relevant periods), Taxpayer operated as an Illinois business providing a premium level chauffeured car service. Joint Stipulation of Uncontested Facts (Stip.), ¶ 1.
2. Taxpayer operated under Federal interstate commerce authority, as well as State of Illinois and City of Chicago regulations, as a business primarily involved in providing chauffeured car service. Stip. ¶ 2.
3. Taxpayer purchased vehicles described within Exhibit 1 to the parties' Stipulation (Vehicles), on the dates listed in that Exhibit. Stip. ¶ 3.
4. Taxpayer used the Vehicles to transport persons for hire, and the Illinois Secretary of State issued livery license plates for the Vehicles bearing the numbers described within Exhibit 1. Stip. ¶ 4.
5. Each of the Vehicles was used by the Taxpayer more than fifty percent (50%) of the time during each applicable twelve (12) month period to transport persons for hire whose journeys originated or terminated outside the State as measured by a ratio, the numerator of which is the sum of interstate trips plus trips to and from O'Hare International Airport and the denominator of which is total trips all as reflected on Exhibit 1. Stip. ¶ 5.
6. The Department audited Taxpayer and, on December 21, 2007, it issued NTL numbers and to Taxpayer. Stip. ¶ 6; Stip. Exs. 2-3 (copies of NTLs). On December 24, 2007, the Department issued NTL numbers to Taxpayer. Stip. ¶ 6; Stip. Exs. 4-7 (copies of NTLs).
7. The NTLs assessed tax, penalties and interest as set forth immediately below:

<u>Date Issued</u>	<u>Liability Date</u>	<u>Tax Due</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total Amount Due</u>
12/21/2007	1/20/2005	\$8,859.00	\$1,772.00	\$1,516.00	\$12,147.00
12/21/2007	3/18/2005	\$4,816.00	\$ 983.00	\$ 810.00	\$ 6,709.00
12/24/2007	1/20/2005	\$8,859.00	\$1,772.00	\$1,512.00	\$12,143.00
12/24/2007	2/25/2005	\$7,374.00	\$1,475.00	\$1,240.00	\$10,089.00
12/24/2007	3/2/2005	\$4,916.00	\$ 983.00	\$ 823.00	\$ 6,722.00
12/24/2007	3/22/2005	\$7,374.00	\$1,475.00	\$1,214.00	\$10,083.00

Stip. ¶ 7.

8. Prior to June 30, 2004, Taxpayer availed itself of the benefit of the rolling stock exemption from the Illinois retailer's occupation tax, which the Department did not challenge. Stip. ¶ 8.
9. Effective July 1, 2004, Taxpayer lost the benefit of the rolling stock exemption when the Use Tax Act was amended to limit the application of the rolling stock exemption to vehicles with a gross weight exceeding 16,000 pounds. Stip. ¶ 9.
10. As reflected in the Disputed Notices, the Department has assessed use tax on Taxpayer's purchases of those limousines listed on Exhibit 1 which were acquired by the Taxpayer in 2004, 2005 and 2006, after the weight requirement was added to the rolling stock exemption. Stip. ¶ 10.
11. All of the vehicles purchased by the Taxpayer in 2004, 2005 and 2006 and listed on Exhibit 1 are limousines, as that term is defined in Section 1-139.1 of the Illinois Vehicle Code. Stip. ¶ 11.
12. The Department has reviewed Taxpayer's relevant business records and agrees that all of Taxpayer's limousines which were purchased during 2004, 2005 and 2006 and which are listed on Exhibit 1 would satisfy the general requirements of the rolling stock exemption as set forth in 35 ILCS 105/3-61(c) if the effective date of the

amendment to the rolling stock exemption which reincorporated limousines into the rolling stock exemption regardless of weight is effective July 1, 2004. *See* Stip. ¶ 12.

Conclusions of Law:

The parties Stipulation includes, as Exhibits 2 through 7, copies of the NTLs the Department issued to Taxpayer. Stip. Exs. 2-7. Section 3 of the Retailers' Occupation Tax Act (ROTA), which the Illinois General Assembly incorporated into and made part of the Use Tax Act (UTA) (35 ILCS 105/12), provides that the Department's NTL constitutes prima facie proof of the correctness of the amount of tax due. 35 ILCS 120/4. The Department's prima facie case is a rebuttable presumption. Copilevitz v. Department of Revenue, 41 Ill. 2d 154, 157, 242 N.E.2d 205, 207 (1968); DuPage Liquor Store, Inc. v. McKibbin, 383 Ill. 276, 279, 48 N.E.2d 926, 927 (1943). A taxpayer cannot overcome the presumption merely by denying the accuracy of the Department's assessment. A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3d 826, 833, 527 N.E.2d 1048, 1053 (1st Dist. 1988). Instead, a taxpayer must present evidence that is consistent, probable and closely identified with its books and records, to show that the assessment is not correct. Fillichio v. Department of Revenue, 15 Ill. 2d 327, 333, 155 N.E.2d 3, 7 (1958).

Statutory Amendments to UTA § 3-61

This matter does not involve any dispute regarding the facts of Taxpayer's business or the purposes for which it used the limousines it purchased. *See* Stip., *passim*. Rather, it involves the issue of whether the last of a series of three amendments the Illinois General Assembly made to § 3-61 of the UTA should be construed to have been effective on July 1, 2004. Stip. ¶ 12. The three amendments are described below.

Section 5 of Public Act (P.A.) 93-0023 amended different sections of the UTA, including § 3-61. P.A. 93-0023 (§ 5) (P.A. 93-0023 is viewable at the Illinois General Assembly's web site at <http://www.ilga.gov/legislation/publicacts/93/093-0023.htm>) (last viewed on March 9, 2010); Taxpayer's Brief, Appendix Ex. 1 (printed copies of Bill Status for SB-0841 and P.A. 93-0023, from the Illinois General Assembly's web site). That section added the following underlined additions to the existing text of UTA § 3-61:

Sec. 3-61. Motor vehicles; use as rolling stock definition.
Through June 30, 2003, "use as rolling stock moving in interstate commerce" in subsections (b) and (c) of Section 3-55 means for motor vehicles, as defined in Section 1-146 of the Illinois Vehicle Code, and trailers, as defined in Section 1-209 of the Illinois Vehicle Code, when on 15 or more occasions in a 12-month period the motor vehicle and trailer has carried persons or property for hire in interstate commerce, even just between points in Illinois, if the motor vehicle and trailer transports persons whose journeys or property whose shipments originate or terminate outside Illinois. This definition applies to all property purchased for the purpose of being attached to those motor vehicles or trailers as a part thereof. On and after July 1, 2003, "use as rolling stock moving in interstate commerce" in paragraphs (b) and (c) of Section 3-55 occurs for motor vehicles, as defined in Section 1-146 of the Illinois Vehicle Code, when during a 12-month period the rolling stock has carried persons or property for hire in interstate commerce for 51% of its total trips and transports persons whose journeys or property whose shipments originate or terminate outside Illinois. Trips that are only between points in Illinois shall not be counted as interstate trips when calculating whether the tangible personal property qualifies for the exemption but such trips shall be included in total trips taken.

P.A. 93-0023 (§ 5); Taxpayer's Brief, Appendix Ex. 1.

Section § 99 of P.A. 93-0023 contains the effective date for the legislation, and it provided that "This Act takes effect upon becoming law." P.A. 93-0023 (§ 99); Taxpayer's Brief, Appendix Ex. 1. The Governor signed P.A. 93-0023 on June 20, 2003, making that its effective date. Taxpayer's Brief, Appendix Ex. 1.

The second of the three amendments to UTA § 3-61 was made by § 10 of P.A.

93-1033, which provided as follows:

Section 10. The Use Tax Act is amended by changing Sections 3-5 and 3-61 as follows:

Sec. 3-61. Motor vehicles; trailers; use as rolling stock definition.

(a) Through June 30, 2003, “use as rolling stock moving in interstate commerce” in subsections (b) and (c) of Section 3-55 means for motor vehicles, as defined in Section 1-146 of the Illinois Vehicle Code, and trailers, as defined in Section 1-209 of the Illinois Vehicle Code, when on 15 or more occasions in a 12-month period the motor vehicle and trailer has carried persons or property for hire in interstate commerce, even just between points in Illinois, if the motor vehicle and trailer transports persons whose journeys or property whose shipments originate or terminate outside Illinois. This definition applies to all property purchased for the purpose of being attached to those motor vehicles or trailers as a part thereof.

(b) On and after July 1, 2003 and through June 30, 2004,”use as rolling stock moving in interstate commerce” in paragraphs (b) and (c) of Section 3-55 occurs for motor vehicles, as defined in Section 1-146 of the Illinois Vehicle Code, when during a 12-month period the rolling stock has carried persons or property for hire in interstate commerce for 51% of its total trips and transports persons whose journeys or property whose shipments originate or terminate outside Illinois. Trips that are only between points in Illinois shall not be counted as interstate trips when calculating whether the tangible personal property qualifies for the exemption but such trips shall be included in total trips taken.

(c) Beginning July 1, 2004, “use as rolling stock moving in interstate commerce” in paragraphs (b) and (c) of Section 3-55 occurs for motor vehicles, as defined in Section 1-146 of the Illinois Vehicle Code, when during a 12-month period the rolling stock has carried persons or property for hire in interstate commerce for greater than 50% of its total trips for that period or for greater than 50% of its total miles for that period. The person claiming the exemption shall make an election at the time of purchase to use either the trips or mileage method. Persons who purchased motor vehicles prior to July 1, 2004 shall make an election to use either the trips or mileage method and document that election in their books and records. If no election is made under this subsection to use the trips or mileage method, the person shall be deemed to have chosen the mileage method. Any election

to use either the trips or mileage method will remain in effect for that motor vehicle for any period for which the Department may issue a notice of tax liability under this Act.

For purposes of determining qualifying trips or miles, motor vehicles that carry persons or property for hire, even just between points in Illinois, will be considered used for hire in interstate commerce if the motor vehicle transports persons whose journeys or property whose shipments originate or terminate outside Illinois. The exemption for motor vehicles used as rolling stock moving in interstate commerce may be claimed only for motor vehicles whose gross vehicle weight rating exceeds 16,000 pounds. This definition applies to all property purchased for the purpose of being attached to those motor vehicles as a part thereof.

(d) Beginning July 1, 2004, “use as rolling stock moving in interstate commerce” in paragraphs (b) and (c) of Section 3-55 occurs for trailers, as defined in Section 1-209 of the Illinois Vehicle Code, semitrailers as defined in Section 1-187 of the Illinois Vehicle Code, and pole trailers as defined in Section 1-161 of the Illinois Vehicle Code, when during a 12-month period the rolling stock has carried persons or property for hire in interstate commerce for greater than 50% of its total trips for that period or for greater than 50% of its total miles for that period. The person claiming the exemption for a trailer or trailers that will not be dedicated to a motor vehicle or group of motor vehicles shall make an election at the time of purchase to use either the trips or mileage method. Persons who purchased trailers prior to July 1, 2004 that are not dedicated to a motor vehicle or group of motor vehicles shall make an election to use either the trips or mileage method and document that election in their books and records. If no election is made under this subsection to use the trips or mileage method, the person shall be deemed to have chosen the mileage method. Any election to use either the trips or mileage method will remain in effect for that trailer for any period for which the Department may issue a notice of tax liability under this Act.

For purposes of determining qualifying trips or miles, trailers, semitrailers, or pole trailers that carry property for hire, even just between points in Illinois, will be considered used for hire in interstate commerce if the trailers, semitrailers, or pole trailers transport property whose shipments originate or terminate outside Illinois. This definition applies to all property purchased for the purpose of being attached to those trailers, semitrailers, or pole trailers as a part thereof. In lieu of a person providing documentation regarding the qualifying use of each individual trailer, semitrailer, or pole trailer, that person may document such qualifying use by providing documentation of the following:

(1) If a trailer, semitrailer, or pole trailer is dedicated to a motor vehicle that qualifies as rolling stock moving in interstate commerce under subsection (c) of this Section, then that trailer, semitrailer, or pole trailer qualifies as rolling stock moving in interstate commerce under this subsection.

(2) If a trailer, semitrailer, or pole trailer is dedicated to a group of motor vehicles that all qualify as rolling stock moving in interstate commerce under subsection (c) of this Section, then that trailer, semitrailer, or pole trailer qualifies as rolling stock moving in interstate commerce under this subsection.

(3) If one or more trailers, semitrailers, or pole trailers are dedicated to a group of motor vehicles and not all of those motor vehicles in that group qualify as rolling stock moving in interstate commerce under subsection (c) of this Section, then the percentage of those trailers, semitrailers, or pole trailers that qualifies as rolling stock moving in interstate commerce under this subsection is equal to the percentage of those motor vehicles in that group that qualify as rolling stock moving in interstate commerce under subsection (c) of this Section to which those trailers, semitrailers, or pole trailers are dedicated. However, to determine the qualification for the exemption provided under this item (3), the mathematical application of the qualifying percentage to one or more trailers, semitrailers, or pole trailers under this subpart shall not be allowed as to any fraction of a trailer, semitrailer, or pole trailer.

P.A. 93-1033 (§ 10) (P.A. 93-1033 is viewable at the Illinois General Assembly's web site at <http://www.ilga.gov/legislation/publicacts/93/093-1033.htm>) (last viewed on March 9, 2010); Taxpayer's Brief, Appendix Ex. 2 (printed copies of Bill Status for HB-711 and P.A. 93-1033, from the Illinois General Assembly's web site). Section 99 of P.A. 93-1033 provides, "This Act takes effect on July 1, 2004." P.A. 93-1033 (§ 99); Taxpayer's Brief, Appendix Ex. 2.

There are two parts of the amendments made by P.A. 93-0023 to UTA § 3-61 that are relevant to the parties' dispute. From Taxpayer's perspective, the critical change is the one the legislature made to the first paragraph of newly sectioned UTA § 3-61(c), when it introduced that subsection with the words, "[b]eginning July 1, 2004," P.A.

93-1033 (§ 10); Taxpayer's Brief, p. 10. From the Department's perspective, after the enactment of P.A. 93-1033, the second paragraph of UTA § 3-61(c) provided, in pertinent part: "The exemption for motor vehicles used as rolling stock moving in interstate commerce may be claimed only for motor vehicles whose gross vehicle weight rating exceeds 16,000 pounds." P.A. 93-1033 (§ 10); Department's Brief, pp. 6-7. This change to UTA § 3-61 had the effect of eliminating all motor vehicles other than those with a gross weight rating in excess of 16,000 pounds from the class of motor vehicles for which a purchaser could claim the statutory exemption for rolling stock. P.A. 93-1033 (§ 10). Taxpayer has stipulated to the effect P.A. 93-0023 had on its business. Stip. ¶ 9 ("Effective July 1, 2004, Taxpayer lost the benefit of the rolling stock exemption when the Use Tax Act was amended to limit the application of the rolling stock exemption to vehicles with a gross weight exceeding 16,000 pounds.").

The final amendment, and the one whose effective date is in dispute here, was part of § 5 of P.A. 95-0528. P.A. 95-0528 (§ 5) (viewable at <http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=095-0528&GA=95>) (last viewed on March 9, 2010); 35 ILCS 105/3-61; Taxpayer's Brief, Appendix Ex. 3 (printed copies of Bill Status for HB-811 and P.A. 95-0528, from the Illinois General Assembly's web site). Section 5 of P.A. 95-0528 amended UTA § 3-61(c), and only that subsection of the UTA, by adding the following underlined text to the second paragraph:

(c) Beginning July 1, 2004, "use as rolling stock moving in interstate commerce" in paragraphs (b) and (c) of Section 3-55 occurs for motor vehicles, as defined in Section 1-146 of the Illinois Vehicle Code, when during a 12-month period the rolling stock has carried persons or property for hire in interstate commerce for greater than 50% of its total trips for that period or for greater than 50% of its total miles for that period. The person

claiming the exemption shall make an election at the time of purchase to use either the trips or mileage method. Persons who purchased motor vehicles prior to July 1, 2004 shall make an election to use either the trips or mileage method and document that election in their books and records. If no election is made under this subsection to use the trips or mileage method, the person shall be deemed to have chosen the mileage method. Any election to use either the trips or mileage method will remain in effect for that motor vehicle for any period for which the Department may issue a notice of tax liability under this Act.

For purposes of determining qualifying trips or miles, motor vehicles that carry persons or property for hire, even just between points in Illinois, will be considered used for hire in interstate commerce if the motor vehicle transports persons whose journeys or property whose shipments originate or terminate outside Illinois. The exemption for motor vehicles used as rolling stock moving in interstate commerce may be claimed only for the following vehicles: (i) motor vehicles whose gross vehicle weight rating exceeds 16,000 pounds; and (ii) limousines, as defined in Section 1-139.1 of the Illinois Vehicle Code. This definition applies to all property purchased for the purpose of being attached to those motor vehicles as a part thereof.

P.A. 95-0528 (§ 5); Taxpayer's Brief, Appendix Ex. 3. Section 99 of P.A. 95-0528 provided, "This Act takes effect upon becoming law" (P.A. 95-0528 (§ 99)), and the Governor signed it on August 28, 2007. Taxpayer's Brief, Appendix Ex. 3.

Issue and Arguments

The primary issue is whether P.A. 95-0528, which amended § 3-61(c) of the UTA to expressly include limousines (as defined in § 1-139.1 of the IVC) within the exemption for motor vehicles used as rolling stock, should be considered as having been effective beginning July 1, 2004. *See* Stip. ¶¶ 3-5, 12. If so, the limousines Taxpayer purchased during January through March 2005 are exempt; if not, the NTLs properly assessed tax and interest regarding those purchases. Again, this is a purely legal issue, and there are no facts in dispute.

Taxpayer contends that the amendments P.A. 95-0528 made to UTA § 3-61(c) were technical, and were made to correct the drafting of the 2004 amendments (that is, those made by P.A. 93-1033) to the statutory rolling stock exemption. Taxpayer's Brief, p. 10. Taxpayer asserts that, when the legislature inserted the amended text of P.A. 95-0528 within subsection (c) of UTA § 3-61, where it had previously declared that that subsection would "[begin] July 1, 2004," that action "clearly and unambiguously demonstrate[d] the General Assembly's intent to have the technical changes apply 'beginning July 1, 2004.'" Taxpayer's Brief, p. 10. Taxpayer relies on the Illinois Supreme Court's decision in Allegis Realty Investors v. Novak 223 Ill. 2d 318, 860 N.E.2d 246 (2006), to support its arguments that the amendment made by P.A. 95-0528 applies retroactively to July 1, 2004. Taxpayer's Brief, pp. 2, 8-10, 14.

The Department counters that the amendment the Illinois General Assembly made to § 3-61(c) through P.A. 95-0528 cannot be given retroactive effect. Department's Brief, p. 4. To support its argument, it cites Caveney v. Bower, 207 Ill. 2d 82, 797 N.E.2d 596 (2003), and it distinguishes the ruling in that case from the ruling in Allegis Realty. Department's Brief, pp. 2-6. It argues that the General Assembly did not include, within P.A. 95-0528 itself, any clear expression of the temporal reach of the amendment made to UTA § 3-61(c). Department's Brief, p. 5. It contends, moreover, that no such intent should be implied from the fact that the additions made to § 3-61 were included within subsection (c) of that statutory provision. *Id.* It further urges that statements made during legislative sessions when the bill that became P.A. 95-0528 was discussed reflect that P.A. 95-0528 was not meant to be applied retroactively. *See id.*, pp. 7-8. Finally, the Department cites to the Retailers' Occupation Tax regulation it adopted, after P.A. 95-

0528 was enacted into law, which interprets P.A. 95-0528 as authorizing the exemption of limousines purchased *after* the date the amendment became law. *Id.*, pp. 8-9 (*quoting* 86 Ill. Admin. Code § 130.340(k)).

Analysis

The three principle cases cited in the parties' briefs are Caveney v. Bower, 207 Ill. 2d 82, 797 N.E.2d 596 (2003), Allegis Realty Investors v. Novak 223 Ill. 2d 318, 860 N.E.2d 246 (2006), and Doe v. Diocese of Dallas, 234 Ill. 2d 393, 917 N.E.2d 475 (2009). Each of those cases involved an issue of whether a certain statutory amendment should be given retroactive effect. Since the Court, in Diocese of Dallas, reviewed both of its prior decisions in Caveney and Allegis Realty, I quote from that case here to summarize the Court's own description of Illinois law regarding the retroactivity of statutes:

The principles governing our analysis of whether a statute applies retroactively were summarized by this court in Allegis Realty Investors v. Novak, 223 Ill.2d 318, 330-32, 307 Ill.Dec. 592, 860 N.E.2d 246 (2006). As discussed in that opinion, we have adopted the approach set forth by the United States Supreme Court in Landgraf v. USI Film Products, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994). See Commonwealth Edison Co. v. Will County Collector, 196 Ill.2d 27, 37-39, 255 Ill.Dec. 482, 749 N.E.2d 964 (2001).

The Landgraf analysis consists of multiple steps. The threshold inquiry is whether the legislature has expressly prescribed the temporal reach of a statute. If it has, the expression of legislative intent must be given effect absent a constitutional prohibition. If, however, the statute contains no express provision regarding its temporal reach, the court must determine whether the new statute would have retroactive effect, keeping in mind the general principle that prospectivity is the appropriate default rule. In making this determination, a court will consider whether retroactive application of the new statute will impair rights a party possessed when acting, increases a party's liability for past conduct, or impose new duties with respect to transactions already completed. If retrospective application of the new law has inequitable consequences, a court will presume that the statute does not govern absent clear legislative intent favoring such a

result. *Allegis Realty Investors v. Novak*, 223 Ill.2d at 330-31, 307 Ill.Dec. 592, 860 N.E.2d 246 (citing *Landgraf*, 511 U.S. at 280, 114 S.Ct. at 1505, 128 L.Ed.2d at 262, and *Commonwealth Edison Co.*, 196 Ill.2d at 38, 255 Ill.Dec. 482, 749 N.E.2d 964).

Following our adoption of the *Landgraf* approach, we considered the effect of section 4 of the Statute on Statutes (5 ILCS 70/4 (West 1998)) on our retroactivity analysis. *Allegis Realty Investors v. Novak*, 223 Ill.2d at 331, 307 Ill.Dec. 592, 860 N.E.2d 246. Section 4, known as the general saving clause of Illinois (see *People v. Glisson*, 202 Ill.2d 499, 505, 270 Ill.Dec. 57, 782 N.E.2d 251 (2002)), provides:

“No new law shall be construed to repeal a former law, whether such former law is expressly repealed or not, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued, or claim arising before the new law takes effect, save only that the proceedings thereafter shall conform, so far as practicable, to the laws in force at the time of such proceeding.” 5 ILCS 70/4 (West 2006).

We have held that section 4 is a clear legislative directive as to the temporal reach of statutory amendments and repeals when none is otherwise specified: those that are procedural may be applied retroactively, while those that are substantive may not. *Caveney v. Bower*, 207 Ill.2d 82, 92, 278 Ill.Dec. 1, 797 N.E.2d 596 (2003). This principle applies to civil as well as criminal enactments. *Caveney v. Bower*, 207 Ill.2d at 92-93, 278 Ill.Dec. 1, 797 N.E.2d 596. We have further held that, in light of section 4, Illinois courts need never go beyond the threshold step of the *Landgraf* test. That is because the legislature will always have clearly indicated the temporal reach of an amended statute, either expressly in the new legislative enactment or by default in section 4 of the Statute on Statutes. *Allegis Realty Investors v. Novak*, 223 Ill.2d at 331-32, 307 Ill.Dec. 592, 860 N.E.2d 246, citing *Caveney v. Bower*, 207 Ill.2d at 95, 278 Ill.Dec. 1, 797 N.E.2d 596.

Because section 4 of the Statute on Statutes operates as a default standard, it is inapplicable to situations where the legislature has clearly indicated the temporal reach of a statutory amendment. Whenever a court is called upon to assess the applicability of a statutory change, it must therefore still make an initial determination as to whether the legislature has clearly indicated the temporal reach of the amended statute. If the temporal reach of a statute has been clearly indicated, there is no

need to invoke section 4. Pursuant to *Landgraf*, the expression of legislative intent must be given effect absent constitutional prohibition. *Allegis Realty Investors v. Novak*, 223 Ill.2d at 332, 307 Ill.Dec. 592, 860 N.E.2d 246.

Diocese of Dallas, 234 Ill. 2d at 405-07, 917 N.E.2d at 482-83.

In Caveney, the Court held that the text of the amending Act at issue did not contain an express statement regarding the temporal reach of the amendments made. Caveney, 207 Ill. 2d at 95, 797 N.E.2d at 603 (“Unlike in *Commonwealth Edison*, however, the legislature's clear indication is not found in the amendatory act itself.”). In Allegis Realty, in contrast, the Court held that the amending Act's text *did* include such a statement. Allegis Realty, 223 Ill. 2d at 333, 860 N.E.2d at 254. The Court further held that giving the Act retroactive effect would not violate the Illinois constitution. *Id.*, at 341, 860 N.E.2d at 258-59. Finally, in Diocese of Dallas, the Court again found that the text of the amending Act at issue contained an express statement that it would apply to cases currently pending in Illinois courts. Diocese of Dallas, 234 Ill. 2d at 407, 917 N.E.2d at 483. In that case, however, the Court held that giving the amendment retroactive effect would deprive the defendant of a critical, and vested, due process right. *Id.* (“In our view, the 2003 amendment to section 13-202.2 ... could not be applied to plaintiff's cause of action without running afoul of this state's constitution.”); M.E.H. v. L.H., 177 Ill. 2d 207, 685 N.E.2d 335 (1997).

Guided by these three Illinois Supreme Court decisions, the threshold inquiry here is to determine whether the Illinois General Assembly included within P.A. 95-0528 a clear indication of the temporal reach of the amendments made by that Act. Diocese of Dallas, 234 Ill. 2d at 405, 917 N.E.2d at 482. Intuitively, this seems to call only for an examination of the words the legislature used in the particular amending Act. Indeed,

this was the approach taken by the Illinois Supreme Court in each of the three cases cited by the parties. Diocese of Dallas, 234 Ill. 2d at 407, 917 N.E.2d at 483; Allegis Realty, 223 Ill. 2d at 333, 860 N.E.2d at 254; Caveney, 207 Ill. 2d at 90-91, 797 N.E.2d at 600-01.

Taxpayer, however, does not look for the legislature’s expression of the temporal reach of P.A. 95-0528 within the text of the amendment, itself. Instead, Taxpayer focuses on the text of the first paragraph within UTA § 3-61(c), which remained unchanged by that amendment. Taxpayer’s Brief, p. 10. In other words, Taxpayer asserts that the clearest expression of the temporal reach of P.A. 95-0528 is to be found within the legislature’s expression of the temporal reach of a *prior* amendment to the same statutory provision.

I cannot agree with Taxpayer’s argument. First of all, this approach is inconsistent with the approach taken by the Illinois Supreme Court in its most recent decisions regarding the retroactivity of statutory amendments. *See* Diocese of Dallas, 234 Ill. 2d at 407, 917 N.E.2d at 483; Allegis Realty, 223 Ill. 2d at 333, 860 N.E.2d at 254; Caveney, 207 Ill. 2d at 90-91, 797 N.E.2d at 600-01.

Second, the statutory phrase Taxpayer focuses on — “[b]eginning July 1, 2004,” — which introduces the first paragraph of UTA § 3-61(c), was inserted into that brand new subsection to identify the date the 93rd General Assembly intended its newly changed definition of when “use as rolling stock moving in interstate commerce” in paragraphs (b) and (c) of Section 3-55” would occur. P.A. 93-1033 (§ 10); Taxpayer’s Brief, Appendix Ex. 2. When the 95th General Assembly passed P.A. 95-0528, in 2007, that Act amended § 3-61(c) in a way that retained the precise language the 93rd General Assembly had

already made to the first paragraph of that subsection. *See* P.A. 93-1033 (§ 10); Taxpayer’s Brief, Appendix Ex. 2. As a result, when the 95th General Assembly passed P.A. 95-0528, it clearly intended to continue Illinois law regarding when “use as rolling stock moving in interstate commerce” in paragraphs (b) and (c) of Section 3-55” would occur. Apex Motor Fuel Co. v. Barrett, 20 Ill. 2d 395, 399, 169 N.E.2d 769, 772 (1960) (“Portions of old law which are repeated in an amending act are regarded as a continuation of the existing law rather than the enactment of new law on the subject; ...”). But the subject of the new change made to UTA § 3-61(c) via P.A. 95-0528 had nothing to do with the definition included in the first paragraph of that subsection. Instead, the 95th General Assembly amended only the second paragraph of that subsection, so as to add to the class of motor vehicles entitled to the rolling stock exemption.

In short, before P.A. 95-0528 became law, the second paragraph of UTA § 3-61(c) limited the statutory rolling stock exemption to motor vehicles having a gross vehicle weight rating in excess of 16,000 pounds. After P.A. 95-0528 became law, the class of eligible motor vehicles had been expanded to include *both* motor vehicles whose gross vehicle weight rating exceeded 16,000 pounds, *and* limousines as defined by § 1-139.1 of the IVC. *Compare* P.A. 93-1033 (§ 10); Taxpayer’s Brief, Appendix Ex. 2 *with* P.A. 95-0528 (§ 5); Taxpayer’s Brief, Appendix Ex. 3. In Caveney, the Court held that “[c]learly, the 1999 amendment to section 201(k) is a substantive change in the law, as it establishes an income tax credit for S corporation shareholders that previously did not exist.” Caveney, 207 Ill. 2d at 95, 797 N.E.2d at 604. Just so here. The amendment P.A. 95-0528 made to the second paragraph of UTA § 3-61(c) substantively changed the

statutory rolling stock exemption for motor vehicles, by creating an exemption for limousines that did not exist under P.A. 93-1033.

Thus, and contrary to Taxpayer's characterization, the amendment made by P.A. 95-0528 was not a technical change to the statutory rolling stock exemption. *See* People v. Foy, 61 Ill. App. 3d 137, 377 N.E.2d 1282 (1st Dist. 1978) (describing as a "technical" change in the law an amendment that changed the spelling of a substance included within, and the possession of which was proscribed by, the Illinois Controlled Substances Act); People v. Holmes, 292 Ill. App. 3d 855, 860, 686 N.E.2d 1209, 1213 (2d Dist. 1997) (distinguishing between "procedural law" and "substantive law", the latter being that which "establishes rights and duties that may be redressed through the rules of procedure.") (internal quotation marks omitted). Rather, it was a substantive enlargement of the class of motor vehicles eligible for the statutory rolling stock exemption. Caveney, 207 Ill. 2d at 95, 797 N.E.2d at 604; Holmes, 292 Ill. App. 3d at 860, 686 N.E.2d at 1213.

The text added to UTA § 3-61(c) by P.A. 95-0528 contains no clear expression of when the legislature intended the rolling stock exemption to be available for newly eligible limousine purchasers. *Id.* The Department, therefore, is correct that the amendment made by P.A. 95-0528 is not like the amendment at issue in Allegis Realty (Department's Brief, p. 5), nor is it like the one at issue in Diocese of Dallas, to which Taxpayer cited in its reply brief. Since there is no clear indication, within the text of P.A. 95-0528 itself, of the temporal reach of the amendment made by that Act, the legislature's clear indication of the Act's temporal reach is to be found, instead, within § 4 of Illinois' Statute on Statutes. Allegis Realty, 223 Ill. 2d at 331-32, 860 N.E.2d at 253; Caveney, 207 Ill. 2d at 95, 797 N.E.2d at 603-04. That section "forbids retroactive

application of substantive changes to statutes.” Caveney, 207 Ill. 2d at 95, 797 N.E.2d at 603-04 (quoting People v. Glisson, 202 Ill. 2d 499, 507, 782 N.E.2d 251 (2002)). Under these circumstances, and consistent with the rule recognized in Caveney, “[i]t is to be assumed the amendatory act was framed in view of the provisions of said section 4 ***, and that it was the legislative intent the amendatory act should have prospective operation, only.” Caveney, 207 Ill. 2d at 95-96, 797 N.E.2d at 604.

Both Caveney and Allegis Realty advise that it is never necessary to proceed past the initial inquiry of whether a statutory amendment contains the passing legislature’s clear expression of the temporal reach to be given to a change in law made by the amending act. Allegis Realty, 223 Ill. 2d at 331-32, 860 N.E.2d at 253; Caveney, 207 Ill. 2d at 94, 797 N.E.2d at 603. Since P.A. 95-0528 contains no clear expression of when the legislature intended purchasers of limousines to be eligible to claim such property as being exempt from use tax, there is no reason to address the parties’ arguments regarding the value of evidence that might be derived from other sources of legislative intent, including the regulation the Department adopted after P.A. 95-0528 became effective. *See* Department’s Brief, pp. 7-9; Taxpayer’s Reply, pp. 4-6.

Abatement/Reduction of Penalties

Although no issue related to penalties was identified in the Pre-Hearing order, in its brief, Taxpayer prays for an abatement of the 20% penalties assessed in the NTLs, citing § 3-8 of the Uniform Penalty and Interest Act (UPIA). Taxpayer’s Brief, p. 16. Section 3-8 authorizes abatement of certain penalties for reasonable cause. 35 ILCS 735/3-8. In the alternative, Taxpayer asked that the 20% penalties, which were imposed pursuant to UPIA § 3-3(b-20)(b)(2), and which were assessed regarding each of its six

purchases of a limousine, be reduced to 15%. Taxpayer's Brief, p. 16; 35 ILCS 735/3-3(b-20)(2). It argues that imposing the additional 5% penalty upon a taxpayer for invoking its appeal rights would violate its due process rights. Taxpayer's Brief, p. 16. The Department did not respond to either of Taxpayer's arguments. *See* Department's Brief, *passim*. I address first Taxpayer's request for abatement of the entire penalty amount assessed.

Pursuant to UTA § 9, purchases of motor vehicles are reported on a transaction-by-transaction basis. 35 ILCS 105/9. Transaction reporting returns are required to be filed by a retailer not later than 20 days after the date the retailer delivers the motor vehicle sold at retail. *Id.* If a purchaser acquires a motor vehicle from a retailer doing business outside Illinois, the purchaser is required to file a transaction reporting return not later than 30 days after it brings the vehicle into Illinois for use. 35 ILCS 105/10. Section 12 of the UTA incorporates several sections of the ROTA. 35 ILCS 105/12. One of them is ROTA § 5, which authorizes the Department to assess a penalty in accordance with UPIA § 3-3 where an NTL is issued due to the taxpayer's failure to file a required return. 35 ILCS 120/5; 35 ILCS 105/12.

Here, the parties stipulated to the admissibility of the NTLs, each of which included a penalty equal to 20% of the tax assessed. Stip. ¶ 7; Stip. Exs. 2-7. The 20% penalty assessed regarding those NTLs is consistent with the statutory penalty in effect for returns required to be filed after January 1, 2005, pursuant to UPIA § 3-3(b-20)(2). *Compare* Stip. ¶ 7; Stip. Exs. 2-7 *with* 35 ILCS 3-3(b-20)(2). Further, each of the NTLs states that it was issued after the Department "processed the Form EDA-95, Auditor Prepared Motor Vehicle Use Tax Return, which we prepared for you for a vehicle ... you

purchased or sold.” Stip. Exs. 2-7. Thus, the stipulated evidence supports a determination that Taxpayer did not file a required return regarding each of its purchases of the limousines at issue. *See id.* That is the factual backdrop against which I view Taxpayer’s request to abate the 20% penalties assessed here.

Section 3-8 of the UPIA provides:

Sec. 3-8. No penalties if reasonable cause exists. The penalties imposed under the provisions of Sections 3-3, 3-4, 3-5, and 3-7.5 of this Act shall not apply if the taxpayer shows that his failure to file a return or pay tax at the required time was due to reasonable cause. Reasonable cause shall be determined in each situation in accordance with the rules and regulations promulgated by the Department. A taxpayer may protest the imposition of a penalty under Section 3-3, 3-4, 3-5, or 3-7.5 on the basis of reasonable cause without protesting the underlying tax liability.

35 ILCS 735/3-8.

The Department has adopted a regulation regarding reasonable cause which provides that, “[t]he determination of whether a taxpayer acted with reasonable cause shall be made on a case by case basis taking into account all pertinent facts and circumstances. The most important factor to be considered in making a determination to abate a penalty will be the extent to which the taxpayer made a good faith effort to determine his proper tax liability and to file and pay his proper liability in a timely fashion.” 86 Ill. Admin. Code § 700.400(b). The regulation further provides that, “[a] taxpayer will be considered to have made a good faith effort to determine and file and pay his proper tax liability if he exercised ordinary business care and prudence in doing so. A determination of whether a taxpayer exercised ordinary business care and prudence is dependent upon the clarity of the law or its interpretation and the taxpayer’s experience, knowledge, and education. Accordingly, reliance on the advice of a professional does not necessarily establish that a taxpayer exercised ordinary business care and prudence, nor does reliance on incorrect facts such as an erroneous information

return.” 86 Ill. Admin. Code § 700.400(c).

“The existence of reasonable cause justifying abatement of a [tax] penalty is a factual determination that will be decided only on a case-by-case basis.” PPG Industries, Inc. v. Department of Revenue, 328 Ill. App. 3d 16, 21, 765 N.E.2d 34, 39 (1st Dist. 2002) (*quoting* Kroger Co. v. Department of Revenue, 284 Ill. App. 3d 473, 484, 673 N.E.2d 710 (1996)). Here, however, in its brief, Taxpayer cites to no facts showing that it made a good faith effort to determine its proper tax liability and to pay its proper liability in a timely fashion. 86 Ill. Admin. Code § 700.400(b). Nor are any of the facts stipulated by the parties relevant to such a determination. *See* Stip., *passim*. Since the person seeking a penalty abatement is required to present facts showing that its failure to file a return or pay tax at the required time occurred despite having acted with ordinary business care and prudence (35 ILCS 735/3-8; 86 Ill. Admin. Code § 700.400), and since Taxpayer offered no evidence of such facts here, I cannot recommend that the penalties be abated. PPG Industries, Inc., 328 Ill. App. 3d at 21, 765 N.E.2d at 39; 35 ILCS 735/3-8; 86 Ill. Admin. Code § 700.400.

I now address Taxpayer’s claim that the Department’s assessment of the full 20% penalty authorized by § 3-3(b-20)(2) should be reduced to 15%, because imposing the additional 5% would violate its due process rights. Taxpayer’s Brief, p. 16. Section 3-3(b-20) of the UPIA provides:

Sec. 3-3. Penalty for failure to file or pay.

(b-20) This subsection (b-20) is applicable to returns due on and after January 1, 2005.

(1) A penalty shall be imposed for failure to pay, prior to the due date for payment, any amount of tax the payment of which is required to be made prior to the filing of a return or without a return (penalty for late payment or nonpayment of estimated or accelerated tax). The amount of penalty imposed under this

paragraph (1) shall be 2% of any amount that is paid no later than 30 days after the due date and 10% of any amount that is paid later than 30 days after the due date.

(2) A penalty shall be imposed for failure to pay the tax shown due or required to be shown due on a return on or before the due date prescribed for payment of that tax or an amount that is reported in an amended return other than an amended return timely filed as required by subsection (b) of Section 506 of the Illinois Income Tax Act (penalty for late payment or nonpayment of tax). The amount of penalty imposed under this paragraph (2) shall be 2% of any amount that is paid no later than 30 days after the due date, 10% of any amount that is paid later than 30 days after the due date and prior to the date the Department has initiated an audit or investigation of the taxpayer, and 20% of any amount that is paid after the date the Department has initiated an audit or investigation of the taxpayer; provided that the penalty shall be reduced to 15% if the entire amount due is paid not later than 30 days after the Department has provided the taxpayer with an amended return (following completion of an occupation, use, or excise tax audit) or a form for waiver of restrictions on assessment (following completion of an income tax audit); provided further that the reduction to 15% shall be rescinded if the taxpayer makes any claim for refund or credit of the tax, penalties, or interest determined to be due upon audit, except in the case of a claim filed pursuant to subsection (b) of Section 506 of the Illinois Income Tax Act or to claim a carryover of a loss or credit, the availability of which was not determined in the audit. For purposes of this paragraph (2), any overpayment reported on an original return that has been allowed as a refund or credit to the taxpayer shall be deemed to have not been paid on or before the due date for payment and any amount paid under protest pursuant to the provisions of the State Officers and Employees Money Disposition Act shall be deemed to have been paid after the Department has initiated an audit and more than 30 days after the Department has provided the taxpayer with an amended return (following completion of an occupation, use, or excise tax audit) or a form for waiver of restrictions on assessment (following completion of an income tax audit).

(3) The penalty imposed under this subsection (b-20) shall be deemed assessed at the time the tax upon which the penalty is computed is assessed, except that, if the reduction of the penalty imposed under paragraph (2) of this subsection (b-20) to 15% is rescinded because a claim for refund or credit has been filed, the increase in penalty shall be deemed assessed at the time the claim for refund or credit is filed.

35 ILCS 3-3(b-20).

Where a taxpayer claims that the application of a specific statute violates rights guaranteed to it by the Illinois or United States Constitutions, it has the burden of demonstrating its invalidity. Schultz v. Lakewood Electric Corp., 362 Ill. App. 3d 716, 720, 841 N.E.2d 37, 42 (1st Dist. 2005). The burden is high; statutes are presumed constitutional, and a reviewing court must construe a statute so as to uphold its constitutionality and validity. *Id.* More to the point, the Department, as a state agency, is not empowered to declare a legislative act unconstitutional (*see* 20 ILCS 2505/39b (Powers of the Department)), as is a court, pursuant to Article VI of the Illinois Constitution. *See* Ill. Const., art. VI, § 1. Texaco-Cities Service Pipeline Co. v. McGaw, 182 Ill. 2d 262, 278, 695 N.E.2d 481, 489 (1998); 2 Am. Jur. 2d Administrative Law § 70 (“it is axiomatic that an administrative agency has no power to declare a statute void or otherwise unenforceable and has no authority to invalidate a statute on constitutional grounds or to question its validity.”).

But even if the Director had the authority to do so, I would not recommend that he conclude that imposing the penalty assessed in this case violates Taxpayer’s due process rights. In an administrative setting, the essence of due process is fundamental fairness. Van Harken v. City of Chicago, 305 Ill. App. 3d 972, 983, 713 N.E.2d 754, 762 (1st Dist. 1999) (“the essence of due process is based on the concept of fundamental fairness. Illinois courts have consistently held that, under due process of law, a person is entitled to receive a fair hearing before a fair tribunal.”).

Again, the facts here are not in dispute, and the text of the different amendments to the statutory rolling stock exemption is equally agreed upon. After July 1, 2004, which

was the effective date of P.A. 93-1033, the law in Illinois was that “The exemption for motor vehicles used as rolling stock moving in interstate commerce may be claimed only for motor vehicles whose gross vehicle weight rating exceeds 16,000 pounds.” P.A. 93-1033 (§§ 10, 99); Taxpayer’s Brief, Appendix Ex. 2. Taxpayer concedes that “Effective July 1, 2004, Taxpayer lost the benefit of the rolling stock exemption when the Use Tax Act was amended to limit the application of the rolling stock exemption to vehicles with a gross weight exceeding 16,000 pounds.” Stip. ¶ 9. Notwithstanding Taxpayer’s concession regarding the effect of that prior amendment to its business, Taxpayer failed to timely pay the use tax due regarding its purchases of limousines, during January through March of 2005, for use in Illinois. Stip. ¶ 4; Stip. Exs. 1, 2-7. It appears, from the state of this record, that the tax remains unpaid.

Under these circumstances, there is nothing fundamentally unfair about either the assessment, or the measure, of the penalties issued here. When it amended UPIA § 3-3 to add new subsection (b-20), the legislature clearly expressed that this most recent version of the statutory late payment penalty “shall be imposed for failure to pay the tax shown due or required to be shown due on a return on or before the due date prescribed for payment of that tax” 35 ILCS 735/3-3(b-20)(2). The legislature further expressly provided for gradually higher penalty rates to be imposed depending upon the due date of the tax and upon the extent of the State’s efforts associated with investigating the circumstances surrounding a transaction that is ordinarily subject to one of Illinois’ tax Acts. *Id.* The legislature had previously used a similar sliding scale for late payment penalties within the same section of the UPIA, which scale also increased the measure of the penalty depending on the length of time the tax remained unpaid after the due date. 35

ILCS 735/3-3(b-5)-(b-15). Structuring the most recent statutory penalty scheme in a similar way, and using the same top measure used within the versions in place for prior years, hardly seems irrational. *See Lakewood Electric Corp.*, 362 Ill. App. 3d at 720, 841 N.E.2d at 42-43 (“the rational basis test applies to determine whether the statute comports with due process.”). Finally, Illinois courts have upheld different statutory costs associated with exercising one’s right to challenge agency action. *See e.g., McLean v. Department of Revenue*, 184 Ill. 2d 341, 704 N.E.2d 352 (1998).

Based on the foregoing, I do not recommend that the 20% late payment penalties assessed here be reduced.

Conclusion:

I recommend that the NTLs be finalized as issued.

March 26, 2010
Date

John E. White, Administrative Law Judge