UT 11-10
Tax Type: **Use Tax**
Issue: **Use Tax On Property Titled To A Corporation Shareholder**
Use Tax On Watercraft Purchase

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

THE DEPARTMENT OF REVENUE	)	Docket No.	09-ST-0239
OF THE STATE OF ILLINOIS	)	IBT No.	7205-2368
v.	)	NTL No.	SF 0912844941003
ABC BUSINESS,	)		
a/k/a JOHN DOE,	)	John E. White,	
Taxpayer	)	Administrative Law Judge	

RECOMMENDATION FOR DISPOSITION

Appearances: Elliot Wiczer, Wiczer & Zelmar, LLC, appeared for ABC Business and for John Doe; John Alshuler, Special Assistant Attorney General, appeared for the Illinois Department of Revenue.

Synopsis: This matter involves a Notice of Tax Liability (NTL) the Illinois Department of Revenue (Department) issued to ABC Business (ABC BUSINESS) AKA John Doe (John Doe). The NTL assessed Illinois tax to ABC BUSINESS and John Doe (collectively, Taxpayers) regarding the use of a yacht in Illinois. Taxpayers protested the NTL, and asked for a hearing. The issues are whether either or both Taxpayers owe use tax or watercraft use tax regarding the use of the yacht in Illinois, and, if so, whether the Department measured the tax base correctly.

The hearing was held at the Department's offices in Chicago. John Doe was the only witness, and Taxpayers also offered documentary evidence, including books and records. I have reviewed the evidence, and I am including in this recommendation findings of facts and conclusions of law. I recommend that the NTL be revised to take into account the correct purchase price of the yacht, less a reasonable allowance for depreciation during its prior use

outside Illinois, and that it be finalized as so revised and assessed against ABC BUSINESS only. I recommend that no tax be assessed to John Doe, because he did not own the yacht.

Findings of Fact:

1. On January 7, 2005, John Doe signed a document titled, Purchase & Sale Agreement (Purchase Agreement), pursuant to which he "and/or his assigns" agreed to purchase a certain 2001 Neptunus yacht. Taxpayer Ex. 2, pp. 2-3 (copy of Purchase & Sale Agreement), 5 (copy of check drawn as deposit for purchase, signed by John Doe).
2. The seller was not identified on the Purchase Agreement when John Doe signed it, but the identity of the owner of the yacht was known to XYZ Business, Inc. (XYZ BUSINESS), the person that brokered the sale. Taxpayer Ex. 2, pp. 2-3; 9-14 (copy of closing presentation documents, under XYZ BUSINESS letterhead, identifying seller/owner). John Doe knew, when he signed the Purchase Agreement, that XYZ BUSINESS did not own the yacht. *See* Taxpayer Ex. 1 (copy of Taxpayers' protest); Hearing Transcript (Tr.), p. 16.
3. By the date the sale closed, on February 15, 2005, the seller, Deusmaris N.V., was known to the purchaser. Taxpayer Exs. 2-3 (copies of, respectively, closing documents); 5 (copies of vessel registration documents and bills of sale for yacht and related vessels).
4. After signing the Purchase Agreement, and prior to the date the sale closed, ABC BUSINESS was incorporated pursuant to the International Business Companies Act of Saint Vincent and the Grenadines. Taxpayer Ex. 4 (copies of corporate dockets regarding ABC BUSINESS); Tr. pp. 14-15.
5. John Doe was and remains ABC BUSINESS's sole director. Taxpayer Ex. 4, p. 3; Tr. pp. 15-16.

6. John Doe and Jane Doe, as joint tenants with rights of survivorship, own all of ABC BUSINESS's stock. Taxpayer Ex. 6 (copies of insurance, corporate and registration documents regarding the yacht), p. 2 (copy of share certificate for ABC BUSINESS).
7. After ABC BUSINESS was incorporated, John Doe assigned to ABC BUSINESS all rights, title, and interest in and to the Purchase Agreement for the yacht. Taxpayer Ex. 2, p. 8.
8. The Purchase Agreement provided that the purchase price for the yacht was $1,500,000. Taxpayer Ex. 2, p. 2. The Purchaser's Closing Statement identified the purchase price as $1,490,000. Taxpayer Ex. 3 (copy of Purchaser's Closing Statement). The closing of the sale took place on February 15, 2005. Taxpayer Ex. 2.
9. Since being purchased by ABC BUSINESS, the name of the yacht has been John Doe. Taxpayer Ex. 2, p. 9; Taxpayer Ex. 3.
10. John Doe is the also sole shareholder of John Doe Co., a snack food company. Tr. pp. 14-16.
11. ABC BUSINESS was incorporated to be the purchaser/owner of the John Doe to keep any potential liability for acts involving the yacht separate from John Doe Co. *Id*., pp. 15-16.
12. John Doe is a resident of Illinois. Tr. p. 14; *see also* Taxpayer Ex. 4, p. 21.
13. Since being purchased, ABC BUSINESS has obtained annual cruising licenses for the John Doe from the United States Customs and Border Protection, allowing it to cruise in the waters of the United States. *See* Taxpayer Ex. 6, pp. 7-8 (copies of cruising licenses for the John Doe). The copies of the licenses admitted into evidence reflect that they were issued by the United States Customs office in Chicago, Illinois. *Id*.
14. The declarations page of a 2009 global marine insurance policy issued regarding the John Doe identifies its mooring location as Burnham Harbor in Chicago, Illinois. Taxpayer Ex. 6, p. 3.

15. Taxpayers admit that the John Doe is typically at Burham Harbor, Chicago, Illinois, from June 1, through July 1, annually. Taxpayer Ex. 7, p. 2.

16. Following an audit, the Department issued an NTL to Taxpayers, which assessed tax in the amount of $192,580, a late filing penalty in the amount of $250, a late payment penalty in the amount of $38,516, plus interest. Department Ex. 1 (copy of NTL). The NTL reflected the Department's determination that the John Doe was brought into Illinois for use on June 1, 2005. *Id*.

Conclusions of Law

The parties have agreed that the issues include whether both or each of Taxpayers are liable for either use tax or watercraft use tax. This recommendation begins by addressing the parties' arguments regarding use tax.

The Illinois Use Tax Act (UTA) imposes a tax "upon the privilege of using in this State tangible personal property purchased at retail from a retailer …." 35 ILCS 105/3. The UTA was enacted as a complement to the Retailers' Occupation Tax Act (ROTA), to prevent the evasion of tax monies that occurred when retail purchasers went outside of Illinois to purchase goods, and to thereby protect the local retail merchant against diversion of his business to out-of-state sellers. Turner v. Wright, 11 Ill. 2d 161, 170, 142 N.E.2d 84, 89 (1957). The use tax is imposed on the purchaser-user of the property for the privilege of using, in Illinois, property purchased at retail, regardless of where the sale occurred. 35 ILCS 105/3; Weber-Stephen Products, Inc. v. Department of Revenue, 324 Ill. App. 3d 893, 898, 756 N.E.2d 321, 324-25 (1st Dist. 2001). The UTA makes the retailer a collector of the tax insofar as Illinois purchases are concerned (35 ILCS 105/3-45), but the primary liability for the tax is incurred by the person who purchases for

use. Klein Town Builders v. Department of Revenue, 36 Ill. 2d 301, 303, 222 N.E.2d 482, 484 (1967).

The Illinois General Assembly incorporated into the UTA certain provisions of the complementary ROTA. 35 ILCS 105/12. Among them is § 5 of the ROTA, which provides that, in the event a required return is not filed, the Department shall determine the amount of tax due using its best judgment and information. 35 ILCS 120/5. It also provides that, under such circumstances, the Department's determination of tax due constitutes prima facie proof that tax is due, and in the amount determined by the Department. *Id*. In this case, the Department established its prima facie case when it introduced Department Exhibit 1, consisting of a copy of the NTL, under the certificate of the Director. Department Ex. 1; 35 ILCS 105/12; 35 ILCS 120/5. That exhibit, without more, constitutes presumptive proof that Taxpayer owes Illinois use tax, or watercraft use tax, in the amount determined by the Department. 35 ILCS 105/12; 35 ILCS 120/5; Copilevitz v. Department of Revenue, 41 Ill. 2d 154, 156, 242 N.E.2d 205, 206-07 (1968).

The presumption of correctness that attaches to the Department's prima facie case extends to all elements of taxability. Branson v. Department of Revenue, 68 Ill. 2d 247, 258, 659 N.E.2d 961, 966-67 (1995) (Department's introduction of Notice of Penalty Liability establishes prima facie proof that taxpayer acted with the required mental state); Soho Club, Inc. v. Department of Revenue, 269 Ill. App. 3d 220, 232, 645 N.E.2d 1060, 1068 (1st Dist. 1995) (Department's introduction of Notice of Tax Liability establishes prima facie proof that taxpayer is engaged in the occupation that is subject to taxation). Thus, in this case, the presumption of correctness accorded the Department's prima facie case embraces the Department's determination that the John Doe was purchased in a transaction that met the statutory definition

of a sale at retail. 35 ILCS 105/1; 35 ILCS 120/1; JM Aviation, Inc. v. Department of Revenue, 341 Ill. App. 3d 1, 8-11, 791 N.E.2d 1152, 1158-60 (1st Dist. 2003).

The Department's prima facie case is overcome, and the burden shifts to the Department to prove its case, only after a taxpayer presents evidence that is consistent, probable, and identified with its books and records, to show that the Department's determinations were not correct. Copilevitz, 41 Ill. 2d at 157-58, 242 N.E.2d at 207; Balla v. Department of Revenue, 96 Ill. App. 3d 293, 296, 421 N.E.2d 236, 238 (1st Dist. 1981).

Issue 1: Is John Doe Liable for Tax

During closing argument, Taxpayers referred to and adopted the arguments presented in their protest, a copy of which was admitted into evidence. Taxpayer Ex. 1; Tr. p. 35. In particular, Taxpayers argued that, regardless whether ABC BUSINESS is liable for either use or watercraft use tax, John Doe cannot be liable for either tax since he, individually, was not the purchaser/owner of the John Doe. As to this latter argument, Department counsel responded that he did not believe that the evidence showed that anyone other than John Doe was a shareholder of ABC BUSINESS (*but see* Taxpayer Ex. 6, p. 2), and that, under such circumstances, if ABC BUSINESS were found to be liable for tax, John Doe would be the person who would pay it. Tr. pp. 36-37. On the other hand, counsel also acknowledged that a responsible officer of a corporation could not be held liable, derivatively, for a corporation's unpaid use tax liability, because use tax was not a trust tax, as defined by the Uniform Penalty and Interest Act. Tr. p. 40; *see also* 35 ILCS 735/3-7. I address this issue first.

The identification of the purchaser in a particular sale is a question of fact. *See e.g.* JB4 Air LLC v. Department of Revenue, 388 Ill. App. 3d 970, 977, 905 N.E.2d 310, 316 (2d Dist. 2009) ("In the present case, … the identity of the purchaser was undisputed and there was no

intermediary. The parties stipulated that JB4 acquired the airplane for $350,000."). Here, the Department determined that ABC BUSINESS "AKA [that is, also known as] William V", purchased the John Doe. Department Ex. 1. That factual determination is presumed correct. 35 ILCS 105/12; 35 ILCS 120/5. To rebut that particular determination, John Doe was obliged to offer documentary evidence, closely associated with books and records, to show that he was *not* the purchaser. Copilevitz, 41 Ill. 2d at 157-58, 242 N.E.2d at 207; Balla, 96 Ill. App. 3d at 296, 421 N.E.2d at 238. He did. Taxpayer Exs. 2-7.

The fundamental fact question is, who purchased and owned the John Doe? The Purchase Agreement, closing documents, and other documentary evidence reflect that ABC BUSINESS, and not John Doe, purchased and owned it. Taxpayer Exs. 2-7. What John Doe owned, as one of two joint tenants with rights of survivorship, was all of ABC BUSINESS's stock. Taxpayer Ex. 6, p. 2. But that does not mean that he, or they, owned the John Doe. The Illinois Supreme Court recognized long ago that "[t]he law is well settled that the tangible property of a corporation and its shares of stock held by the shareholders are separate and distinct kinds of property, and belong to different owners, the first being the property of the corporation and the latter the property of the individual shareholder …." Illinois National Bank v. Kinsella, 201 Ill. 31, 43, 66 N.E. 338, 341 (1903); *accord* Central Illinois Public Service Co. v. Swartz, 284 Ill. 108, 111, 119 N.E. 990, 992 (1918) ("The corporation is the legal owner of all its property. The shareholder has a legal right to participate in the earnings of the corporation and the distribution of its property upon its dissolution, but he does not own any part of the property of the corporation.").

Both Kinsella and Swartz involved Illinois' former personal property tax. While the citizens of Illinois have repealed that tax (*see* Client Follow-Up Co. v. Hynes, 75 Ill. 2d 208, 390

N.E.2d 847 (1979)), Illinois law remains clear that "[a] corporation is a legal entity that exists separately and distinctly from its shareholders, officers, and directors, who generally are not liable for the corporation's debts. Fontana v. TLD Builders, Inc., 362 Ill. App. 3d 491, 500, 840 N.E.2d 767, 775 (2nd Dist. 2005); *see also* 13 Ill. Law & Practice *Corporations* § 147 (August 2010) ("Shareholders do not own the property of the corporation. … [footnotes omitted] The title to the corporate property is vested in the corporation itself, and the shareholders own not its property, but the shares of the corporation; … that is, an intangible interest in the corporation, … with a right to share the net profits on distribution and to secure a proportionate share of the net assets on dissolution.") (and cases cited therein).

The persons who are subject to Illinois use tax are the owners of tangible personal property purchased, at retail, for use in Illinois. Telco Leasing, Inc. v. Allphin, 63 Ill. 2d 305, 309-10, 347 N.E.2d 729, 731 (1976). That manifest intent is reflected within the UTA's definitions of the terms, "use" and "purchaser." "Use" is defined as "the exercise by any person of any right or power over tangible personal property incident to the ownership of that property …." 35 ILCS 105/2. "Purchaser," in turn, is defined as "anyone who, through a sale at retail, acquires the ownership of or title to tangible personal property." *Id*. Based on those definitions, the Illinois Supreme Court has held that "only the owner of property can be a user within the meaning of the Act." Telco Leasing, Inc., 63 Ill. 2d at 309-10, 347 N.E.2d at 731.

The competent documentary evidence admitted at hearing clearly shows that ABC BUSINESS, and not John Doe, was the purchaser/owner of the John Doe. Taxpayer Ex. 2, p. 9; Taxpayer Ex. 3; Taxpayer Ex. 4; Taxpayer Ex. 5, p. 6. That documentary evidence rebuts the Department's determination that John Doe was the purchaser/owner of that property. To the extent that the John Doe was brought into Illinois for use after ABC BUSINESS purchased it,

ABC BUSINESS, and not John Doe, is the owner/purchaser against whom tax ─ use tax or watercraft use tax ─ might properly be assessed. 35 ILCS 105/2; Telco Leasing, Inc., 63 Ill. 2d at 309-10, 347 N.E.2d at 731. Because John Doe did not own the John Doe, he is neither subject to, nor liable for, Illinois use tax regarding the use of that property in Illinois. Telco Leasing, Inc., 63 Ill. 2d at 309-10, 347 N.E.2d at 731. Based on this conclusion, when using the term Taxpayer hereafter in this recommendation, I am referring only to ABC BUSINESS.

Issue 2: Is ABC BUSINESS Liable for Use Tax

The next question is whether ABC BUSINESS owes use tax as assessed in the NTL. In the protest, Taxpayer groups together different arguments based on the two, distinct tax statutes. *See* Taxpayer Ex. 1, *passim*. Taxpayer's first argument why it does not owe use tax is based on its assertion that it acquired the John Doe from a private owner in a non-retail transaction. *See* Taxpayer Ex. 1, p. 1. A purchaser/owner who acquires an item of tangible personal property in a transaction that is not a sale at retail is exempt from paying use tax. 35 ILCS 105/3-65; Mobil Oil Corp. v. Johnson, 93 Ill. 2d 126, 134-35, 442 N.E.2d 846, 850 (1982). However, just because Taxpayer has identified and characterized the seller as a private party does not mean that it has established that the sale was not at retail. *See* Mobil Oil Corp., 93 Ill. 2d at 134-35, 442 N.E.2d at 850. The record here reflects the identity of the seller, and the evidence also includes a certificate stating that the seller "has the corporate power to transact any business within the limits of the corporate purposes set forth in Article 2 of its Articles of Incorporation." Taxpayer Ex. 5, p. 4 (copy of Certificate of Legal Existence for Deusmaris N.V., the seller of the John Doe). But no evidence was offered to show what the seller's corporate purposes included, and it is possible that its corporate purposes might have included selling property.

The presumption afforded to the Department's prima facie case, again, extends to all

elements of taxability. JM Aviation, Inc., 341 Ill. App. 3d at 8-11, 791 N.E.2d 1152, 1158-60. Here, the pre-hearing order stated that the issue to be resolved was whether Taxpayers were liable for use tax. At hearing, the parties stipulated that the issues also included whether they were liable for watercraft use tax. Tr. pp. 3-4. In other words, the parties did not agree to substitute the latter issue for the former. Since Taxpayer continued to have the burden to show that it was not subject to use tax regarding its use of the John Doe in Illinois, it remained crucial for it to show that its purchase of the John Doe was not at retail. Taxpayer has offered no evidence to show that the foreign seller from whom it purchased the John Doe was not a retailer. Therefore, I must conclude that Taxpayer has not rebutted the Department's prima facie case. Arts Club of Chicago v. Department of Revenue, 334 Ill. App. 3d 235, 246, 777 N.E.2d 700, 709 (1st Dist. 2002) (absence of evidence in the record regarding an issue weighs in the Department's favor, because the taxpayer has the burden of proof).

Taxpayer next argues that its use of the John Doe is exempt from tax based on § 3-55 and § 3-70 of the UTA. Taxpayer Ex. 1, pp. 3-5. Section 3-55 provides, in pertinent part, as follows:

> Sec. 3-55. Multistate exemption. To prevent actual or likely multistate taxation, the tax imposed by this Act does not apply to the use of tangible personal property in this State under the following circumstances:
> (a) The use, in this State, of tangible personal property acquired outside this State by a nonresident individual and brought into this State by the individual for his or her own use while temporarily within this State or while passing through this State.
> (b) The use, in this State, of tangible personal property by an interstate carrier for hire as rolling stock moving in interstate commerce or by lessors under a lease of one year or longer executed or in effect at the time of purchase of tangible personal property by interstate carriers for-hire for use as rolling stock moving in interstate commerce as long as so used by the interstate carriers for-hire, and equipment operated by a telecommunications provider, licensed as a common carrier by the Federal Communications Commission, which is permanently installed in or affixed to aircraft moving in interstate commerce.
> (c) The use, in this State, by owners, lessors, or shippers of tangible personal property that is utilized by interstate carriers for hire for use as rolling stock

moving in interstate commerce as long as so used by the interstate carriers for hire, and equipment operated by a telecommunications provider, licensed as a common carrier by the Federal Communications Commission, which is permanently installed in or affixed to aircraft moving in interstate commerce.

(d) The use, in this State, of tangible personal property that is acquired outside this State and caused to be brought into this State by a person who has already paid a tax in another State in respect to the sale, purchase, or use of that property, to the extent of the amount of the tax properly due and paid in the other State.

(e) The temporary storage, in this State, of tangible personal property that is acquired outside this State and that, after being brought into this State and stored here temporarily, is used solely outside this State or is physically attached to or incorporated into other tangible personal property that is used solely outside this State, or is altered by converting, fabricating, manufacturing, printing, processing, or shaping, and, as altered, is used solely outside this State.

***

35 ILCS 105/3-55. Section 3-70 provides, in pertinent part:

> Sec. 3-70. Property acquired by nonresident. The tax imposed by this Act does not apply to the use, in this State, of tangible personal property that is acquired outside this State by a nonresident individual who then brings the property to this State for use here and who has used the property outside this State for at least 3 months before bringing the property to this State.
>
> Where a business that is not operated in Illinois, but is operated in another State, is moved to Illinois or opens an office, plant, or other business facility in Illinois, that business shall not be taxed on its use, in Illinois, of used tangible personal property, other than items of tangible personal property that must be titled or registered with the State of Illinois or whose registration with the United States Government must be filed with the State of Illinois, that the business bought outside Illinois and used outside Illinois in the operation of the business for at least 3 months before moving the used property to Illinois for use in this State.
>
> ***

35 ILCS 105/3-70; *see also* 86 Ill. Admin. Code § 150.315.

The documented facts, however, show that the John Doe was

not purchased by a non-resident individual — it was purchased by a corporation. Taxpayer Exs. 2-5; JB4 Air LLC v. Department of Revenue, 388 Ill. App. 3d 970, 974-75, 905 N.E.2d 310, 314 (2d Dist. 2009) (holding that UTA § 3-70's exemption for property acquired outside Illinois by a nonresident individual does not apply to a single member LLC's purchase of an aircraft used in Illinois, court reasoned that, "Because the Use Tax Act [§ 3-70] refers to individuals and businesses separately, we believe the legislature intended that "individual" assume its most common meaning of a "human being."). And even if John Doe had purchased the John Doe, he admitted, in his sworn hearing testimony, that he was an Illinois resident. Tr. p. 14; *see also* Taxpayer Ex. 4, p. 21. The evidence, therefore, shows that neither the first paragraph of UTA § 3-70, nor § 3-55(a), apply.

Similarly, no documentary evidence establishes that ABC BUSINESS ever moved to, or opened an office, plant, or other business facility in Illinois. The bills of sale for the John Doe, and for the other watercraft it carried onboard, reflect that ABC BUSINESS's office and business address remained in St. Vincent — that is, outside of the United States — from 2005 onward. Taxpayer Ex. 5, pp. 6-8; *see also* Taxpayer Exs. 2-3. ABC BUSINESS did not move to Illinois; nor did it store the John Doe here temporarily, and then never again bring it into Illinois. Taxpayer Exs. 2-3, 5, 7. Rather, it concedes that it used the John Doe, in Illinois' waters, by causing to have that property enter and dock here during the watercraft's regular, annual visits from 2005 onward. Taxpayer Ex. 7, p. 2; Tr. pp. 22-27. Similarly, Taxpayer has offered no evidence to show that it was a carrier for hire, and that it was

using the John Doe in Illinois as rolling stock. *See* 35 ILCS 105/3-55(a)-(c), (e); 86 Ill. Admin. Code § 130.340. Taxpayer has failed, therefore, to bear its heavy burden of showing that its regular use of the John Doe, in Illinois, was exempt pursuant to UTA § 3-55(a)-(c), (e) or § 3-70. *E.g.*, Thermos v. Department of Revenue, 37 Ill. App. 3d 410, 414, 346 N.E.2d 47, 50 (2d Dist. 1976) ("tax exemption is strictly construed in favor of taxation and … one seeking the protection of the exemption has the burden of clearly proving that he is entitled to it ….").

Taxpayer has, however, established that it is entitled to a credit in the amount of $600, which it documented that it paid to the state of Florida regarding the John Doe. Taxpayer Ex. 3; Tr. pp. 29-30. That credit is authorized by UTA § 3-55(d), "to the extent of the amount of the tax properly due and paid in the other State." 35 ILCS 105/3-55(d); Allemed, Inc. v. Department of Revenue, 101 Ill. App. 3d 746, 751-52, 428 N.E.2d 714, 718-19 (4th Dist. 1981). The Department, moreover, did not challenge the evidence offered on this point, or the propriety of the tax shown to have been paid. *See* Tr. p. 30.

Taxpayer also argues, summarily, that its use of the John Doe is exempt from tax because of the Commerce and Due Process Clauses of the United States Constitution, and because of Article 9, § 2 of the Illinois Constitution. Taxpayer Ex. 1, p. 3. At hearing, Taxpayer argued that, if its use of the John Doe is determined to be subject to use tax, tax should be apportioned based on the relative length of time the John Doe was present in Illinois versus outside Illinois. Tr. pp. 34-35 (closing argument). When making this argument, counsel referred to a case that was then pending before the Illinois Supreme Court involving a similar issue. *Id*. In the case counsel referred to, however, the Court very recently upheld the appellate court's determination that Illinois' use tax scheme complied with the test enunciated in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 51 L.Ed.2d 326, 97 S.Ct. 1076 (1977), since that scheme provided a credit

to the extent of the amount of tax properly paid to another state. Irwin Industrial Tool Co. v. Department of Revenue, No. 109300, pp. 11-16 (Ill. Sup. Ct. September 23, 2010) *affirming* Irwin Industrial Tool Co. v. Department of Revenue, 394 Ill. App. 3d 1002, 915 N.E.2d 789 (1st Dist. 2009).

Taxpayer bases its due process argument on its assertion that ABC BUSINESS lacked contacts with Illinois that are sufficient for Illinois to impose tax on its use of property purchased outside Illinois. Taxpayer Ex. 1, pp. 7-8. Specifically, Taxpayer asserts that:

> In this case, the seller of the vessel, a non-retailer, had no contacts with the State of Illinois and the sale having taken place outside of the United States, would not have been subject to any tax whatever. The vessel was used outside of the United States and then subsequently used in Florida for three months after the purchase[ ] by a foreign corporation. Under these circumstances, there were not sufficient minimum contacts with the State of Illinois to authorize either a sales or use tax. Chemed Corp., Inc. v. State. 186 Ill. App. 3d 402.

Taxpayer Ex. 1, pp. 7-8.

Here again, however, neither the evidence nor the law supports Taxpayer's due process argument. For example, the Department has not contended that the sale in which ABC BUSINESS purchased the John Doe took place in Illinois, or that the seller owes tax as measured by a percentage of the gross receipts it obtained from ABC BUSINESS. *See* Department Ex. 1. Instead, tax is being imposed on ABC BUSINESS's use of the John Doe, in Illinois. *Id*.; 35 ILCS 105/3; Philco Corp. v. Department of Revenue, 40 Ill. 2d 312, 322, 239 N.E.2d 805, 811 (1968) (tax was imposed on owner/lessor's use of property in Illinois, once its lessee took possession of such property in Illinois).

Regarding 2005, Taxpayer claims that Illinois lacks minimum contacts with the John Doe because it was physically present in Illinois for only 15 days. Tr. pp. 7 (opening statement), 33 (closing argument). But that claim is not supported by any documentary evidence, closely

associated with books and records. Rather, the claim is supported solely by John Doe's mere and generalized testimony that, in 2005, the John Doe only "passed through Illinois." Tr. p. 24. The amount of time the John Doe was physically present in Illinois is a fact question upon which competent, credible evidence would be probative. *See* Novicki v. Department of Finance, 373 Ill. 342, 345, 26 N.E.2d 130, 131 (1940) (the amount of gross receipts received by a retailer is purely a question of fact which is susceptible of accurate computation). Mere testimony, however, is not sufficient to rebut the Department's prima facie case. Balla, 96 Ill. App. 3d at 296-97, 421 N.E.2d at 239 (uncontroverted testimony that was not corroborated with documentary evidence was insufficient to show that taxpayer was entitled to claimed exemption).

Moreover, Taxpayer concedes that, typically, the John Doe is physically present in Illinois from June 1st through July 1st during each calendar year. Taxpayer Ex. 7, p. 2. This fact concession completely undercuts Taxpayer's argument that it lacked minimum contacts with Illinois. Even if I were inclined to accept John Doe's mere testimony as being sufficient to find that ABC BUSINESS only used the John Doe for 15 days during 2005 ─ and I do not ─ its admitted regular use of the property in Illinois during subsequent years would still subject it to Illinois use tax on that privilege. 35 ILCS 105/3; Philco Corp., 40 Ill. 2d at 315-16. 239 N.E.2d at 807-08 (affirming use tax assessment imposed on owner/purchaser of property leased by owner to lessees for use in Illinois, after property had been previously leased to others for use outside Illinois).

In sum, Taxpayer provides no competent, documentary evidence to support its arguments that the Department's imposition of tax on its regular use of the John Doe, within Illinois, should be held unconstitutional. *See* Tr. pp. 32-40 (closing argument); Taxpayer Ex. 1, *passim*. Further, statutes are presumed constitutional (Geja's Cafe v. Metropolitan Pier & Exposition Authority,

153 Ill. 2d 239, 248, 606 N.E.2d 1212, 1216 (1992), and Illinois courts have repeatedly upheld the constitutionality of the UTA in the face of Commerce and Due Process Clause challenges. Irwin Industrial Tool Co. v. Department of Revenue, No. 109300 (Ill. Sup. Ct. September 23, 2010); Philco Corp., 40 Ill. 2d at 322, 239 N.E.2d at 811;[1] Town Crier, Inc. v. Department of Revenue, 315 Ill. App. 3d 286, 733 N.E.2d 780 (1st Dist. 2000); Square D Co. v. Johnson, 233 Ill. App. 3d 1070, 599 N.E.2d 1235 (1st Dist. 1992). Finally, 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). Taxpayer has not persuaded that, under the circumstances, the assessment of tax on its regular use of property, in Illinois, was improper.

Issue 3: Is ABC BUSINESS Liable for Watercraft Use Tax

The Watercraft Use Tax Act (WUTA) imposes a tax "on the privilege of using, in this State, any watercraft acquired by gift, transfer, or purchase after September 1, 2004." 35 ILCS 158/15-10. The WUTA's tax rate is imposed at the same rate as the use tax, 6.25%. 35 ILCS 158/15-15. The WUTA is the more recent of two tax statutes the General Assembly enacted ─ the other being the Aircraft Use Tax Act (AUTA) ─ which were modeled after the previously enacted Vehicle Use Tax Act (VUTA). *Compare* 625 ILCS 5/3-1001 *et seq*. (*formerly*

---

[1] In Philco, the Court wrote:

> *** It is now well established … that a State may tax the owner of property 'having a situs within its limits, whether (the property is) employed in interstate commerce or not ***' (Helson v. Commonwealth of Kentucky (1928), 279 U.S. 245, 249, 49 S.Ct. 279, 280, 73 L.Ed. 683, 686), and whether the owner is a resident or not. (Pullman's Palace-Car Co. v. Commonwealth of Pennsylvania (1891), 141 U.S. 18, 11 S.Ct. 876, 35 L.Ed. 613.) Just as unassailable is the power of a State to levy a tax on the privilege of using such property within the State. Henneford v. Silas Mason Co. (1937), 300 U.S. 577, 57 S.Ct. 524, 81 L.Ed. 814.
>
> ***

Philco Corp., 40 Ill. 2d at 322, 239 N.E.2d at 811.

Ill.Rev.Stat. ch. 95½, ¶¶ 3-1001 to 3-2006 (1980)) *with* 35 ILCS 157/10-1 *et seq*. (effective June 20, 2003) *and* 35 ILCS 158/15-1 *et seq*. (effective July 30, 2004). Each of those respective statutes impose a tax on the privilege of using, in Illinois, certain types of tangible personal property that were acquired in transactions that would not constitute a sale at retail, as that phrase is defined within the ROTA and the UTA. *Id*.; 35 ILCS 105/2; 35 ILCS 120/1; *see also* Greenwalt v. Department of Revenue, 198 Ill. App. 3d 129, 555 N.E.2d 775 (2d Dist. 1990) (MVUT upheld as constitutional). The tax imposed by each of those statutes (that is, the VUTA, the AUTA and the WUTA), is not applicable where the use is otherwise taxable under the UTA. 625 ILCS 5/3-1001(i); 35 ILCS 157/10-15(i); 35 ILCS 158/15-10(i).

I have already recommended that the Director finalize the Department's determination that ABC BUSINESS owed Illinois use tax regarding its use of the John Doe in Illinois. Under these circumstances, and pursuant to the plain language of the WUTA, ABC BUSINESS is not liable for watercraft use tax. 35 ILCS 158/15-10(i). However, should it be determined that the UTA did *not* apply to ABC BUSINESS's purchase and use of the John Doe, in Illinois, I consider here whether ABC BUSINESS might be liable for watercraft use tax, instead.

With regard to the respective burdens of the parties in contested cases arising under the WUTA, § 15-35 of that act provides:

> *** In the administration of, and compliance with, this Law, the Department and persons who are subject to this Law have the same rights, remedies, privileges, immunities, powers, and duties, and are subject to the same conditions, restrictions, limitations, penalties, and definitions of terms, and employ the same modes of procedure, as are prescribed in the Use Tax Act (except for the provisions of Section 3-70), that are not inconsistent with this Law, as fully as if the provisions of the Use Tax Act were set forth in this Law. ***

35 ILCS 158/15-35. Thus, the same presumption of correctness that attaches to an NTL issued pursuant to the UTA applies to those issued to assess watercraft use tax. *Id*. Similarly, the

persons who are liable for watercraft use tax are the owners of watercraft used in Illinois, regardless of how they acquired ownership of the watercraft. *Id.*; 35 ILCS 105/2.

Section 15-10 of the WUTA provides:

> Sec. 15-10. Tax imposed. A tax is hereby imposed on the privilege of using, in this State, any watercraft acquired by gift, transfer, or purchase after September 1, 2004. This tax does not apply if: (i) the use of the watercraft is otherwise taxed under the Use Tax Act; (ii) the watercraft is bought and used by a governmental agency or a society, association, foundation, or institution organized and operated exclusively for charitable, religious, or educational purposes and that entity has been issued an exemption identification number under Section 1g of the Retailers' Occupation Tax Act; (iii) the use of the watercraft is not subject to the Use Tax Act by reason of subsection (a), (b), (c), (d), or (e) of Section 3-55 of that Act dealing with the prevention of actual or likely multi-state taxation; (iv) the transfer is a gift to a beneficiary in the administration of an estate and the beneficiary is a surviving spouse; or (v) the watercraft is exempted from the numbering provisions of Section 3-12 of the Boat Registration and Safety Act. However, the exemption from tax provided by item (v) shall not apply to a watercraft exempted under paragraphs A, B, C, F, and G of Section 3-12 of the Boat Registration and Safety Act if such watercraft are used upon the waters of this State for more than 30 days in any calendar year.

35 ILCS 158/15-10. The separately designated subsections (i) through (v) set forth the Illinois General Assembly's description of users or uses that would be exempt from watercraft use tax. ***Id.; see also*** 35 ILCS 158/15-35. Therefore, the task is to decide whether any of the exemptions apply.

Here, I assume — for purposes of this issue only — that ABC

BUSINESS's purchase was not subject to use tax. 35 ILCS 158/15-10(i). Next, there is no claim that Taxpayer was organized and operated exclusively for charitable, religious, or educational purposes, or that it had been issued an exemption identification number pursuant to ROTA § 1g. 35 ILCS 158/15-10(ii). As previously discussed (*see supra*, pp. 10-13), neither Taxpayer nor its use of the John Doe is exempt under UTA § 3-55, other than having available to it a credit in the amount of $600, as authorized by § 3-55(d). Taxpayer Ex. 3; 35 ILCS 158/15-10(iii); 35 ILS 105/3-55(d). Continuing, Taxpayer it is not a surviving spouse who acquired the John Doe in a transaction described in WUTA § 15-10(iv). 35 ILCS 158/15-10(iv).

The last exemption set forth in 35 ILCS 158/15-10 requires that a taxpayer show that the watercraft is exempt from the numbering provisions of § 3-12 of the Boat Registration and Safety Act (BRSA). 35 ILCS 158/15-10(v). This last tax exemption, however, does not apply to the use of a watercraft that is exempt under BRSA § 3-12(A)-(C), or (F)-(G), *if* such watercraft is used upon the waters of Illinois for more than 30 days in any calendar year. *Id*. Thus, the next step here is to determine whether the John Doe is exempt from the numbering provisions of the BRSA, and, if so, to then determine whether it is present in Illinois for more than 30 days in any calendar year.

The BRSA requires the registration and numbering of certain watercraft present in Illinois. 625 ILCS 45/3-1 *et.seq*. Specifically, § 3-1 of the BRSA provides:

> Sec. 3-1. Unlawful operation of unnumbered watercraft. Every watercraft other than sailboards, on waters within the jurisdiction of this State shall be numbered. No person may operate or give permission for the operation of any such watercraft on such waters unless the watercraft is numbered in accordance with this Act, or in accordance with applicable Federal law, or in accordance with a Federally-approved numbering system of another State, and unless (1) the certificate of number awarded to such watercraft is in full force and effect, and (2) the identifying number set forth in the certificate of number is displayed on each side of the bow of such watercraft.

625 ILCS 45/3-1. The legislature, however, exempted certain types of watercraft, or watercraft owners, from the system of numbering by, and registration with, Illinois, pursuant to § 3-12, which provides:

> Sec. 3-12. Exemption from numbering provisions of this Act. A watercraft shall not be required to be numbered under this Act if it is:
>
> A. A watercraft which has a valid marine document issued by the United States Coast Guard, provided the owner of any such vessel used upon the waters of this State for more than 60 days in any calendar year shall be required to comply with the registration requirements of Section 3-9 of this Act.
>
> B. Already covered by a number in full force and effect which has been awarded to it pursuant to Federal law or a Federally-approved numbering system of another State, if such boat will not be within this State for a period in excess of 60 consecutive days.
>
> C. A watercraft from a country other than the United States temporarily using the waters of this State.
>
> D. A watercraft whose owner is the United States, a State or a subdivision thereof, and used solely for

> official purposes and clearly identifiable.
>
> E. A vessel used exclusively as a ship's lifeboat.
>
> F. A watercraft belonging to a class of boats which has been exempted from numbering by the Department after such agency has found that an agency of the Federal Government has a numbering system applicable to the class of watercraft to which the watercraft in question belongs and would be exempt from numbering if it were subject to the Federal law.
>
> G. Watercraft while competing in any race approved by the Department under the provisions of Section 5-15 of this Act or if the watercraft is designed and intended solely for racing while engaged in navigation that is incidental to preparation of the watercraft for the race. Preparation of the watercraft for the race may be accomplished only after obtaining the written authorization of the Department.
>
> H. Non-powered, owned and operated on water completely impounded on land belonging to the owner of the watercraft. This Section does not apply to water controlled by a club or association.
>
> I. A canoe or kayak which is owned by an organization which is organized and conducted on a not-for-profit basis with no personal profit inuring to anyone as a result of the operation.

625 ILCS 45/3-12. Here, there is no dispute that the John Doe meets the exemption set forth in § 3-12(C) of the BRSA, since it is a "watercraft from a country other than the United States temporarily using the waters of this State." Taxpayer Exs. 2, 4-5.

Taxpayer argues that watercraft use tax is not due because the John Doe is not required to be registered in Illinois pursuant to the BRSA, since the John Doe was not physically present in Illinois for longer than 60 consecutive days in any calendar year. Tr. p. 33; *see also* 625 ILCS 45/3-12(A)-(B). But this argument ignores the legislature's express exception to the tax exemption

authorized by WUTA § 15-10(v). 35 ILCS 158/15-10(v) ("However, the exemption from tax provided by item (v) shall not apply to a watercraft exempted under paragraphs A, B, C, F, and G of Section 3-12 of the Boat Registration and Safety Act if such watercraft are used upon the waters of this State for more than 30 days in any calendar year."). On this point, Taxpayer has stated, in writing, that in a typical year, the John Doe is physically present at Burnham Harbor from June 1st to July 1st. Taxpayer Ex. 7, p. 2; Tr. pp. 25-27. Since the period beginning June 1st through July 1st consists of 31 days, Taxpayer has admitted that the John Doe is present in Illinois for more than 30 days in a calendar year. *See* In re Cook County Treasurer, 166 Ill. App. 3d 373, 379, 519 N.E.2d 1010, 1014 (1st Dist. 1988) (contradictory statements of a party constitute substantive evidence against the party of facts stated). Thus, the statutory tax exemption for watercraft that are exempt from registration under BRSA § 3-12(C) does not apply to ABC BUSINESS's regular use of the John Doe, in Illinois. 35 ILCS 158/15-10(v).

In sum, and assuming that ABC BUSINESS's use of the John Doe was not subject to Illinois use tax, the evidence admitted clearly supports the Department's prima facie correct determination that ABC BUSINESS's use of the watercraft in Illinois would be subject to watercraft use tax. 35 ILCS 158/15-10(v); Taxpayer Ex. 7, p. 2; Tr. pp. 25-27.

Issue 4: What Is the Correct Amount of the Tax Base

Taxpayer argues that, if any tax is due, the Department erred in its calculation of the tax base. Tr. pp. 35-37. First, it contends that the Department's calculation of the watercraft's fair

market value was in excess of its actual purchase price. Second, it argues that, if fair market value is the appropriate tax base, the John Doe' fair market value is much less than the value used by the Department. Taxpayer Ex. 1, pp. 35-36; Taxpayer Ex. 8.

Use tax is measured as a percentage of the selling price of the property purchased at retail. 35 ILCS 105/2. The UTA defines selling price, in part, to mean:

> *** the consideration for a sale valued in money whether received in money or otherwise, including cash, credits, property other than as hereinafter provided, and services, but not including the value of or credit given for traded-in tangible personal property where the item that is traded-in is of like kind and character as that which is being sold, and shall be determined without any deduction on account of the cost of the property sold, the cost of materials used, labor or service cost or any other expense whatsoever …. ***

35 ILCS 105/2.

The NTL assessed tax in the amount of $192,580, for the period beginning June 1, 2005. Department Ex. 1. That amount of tax is 6.25% of 3,081,280 (192,580/.0625 = 3,081,280). During hearing, John Doe referred to a document counsel identified as the auditor's report, and testified that the auditor determined that the purchase price of the John Doe was 2.75 million dollars. Tr. pp. 17-19. That document was never offered or admitted into evidence. The documentary evidence that *was* offered at hearing, in contrast, shows that ABC BUSINESS purchased the John Doe for $1,490,000. Taxpayer Ex. 3. The purchase occurred on February 15, 2005 (*id.*), which is 3½ months prior to the date the Department determined that the John Doe was brought into Illinois for use. Department Ex. 1.

Based on the competent documentary evidence admitted at hearing, I conclude that ABC BUSINESS has rebutted the Department's determination of the tax base. ***Compare*** Department Ex. 1 ***with*** Taxpayer Ex. 3. Notwithstanding that

conclusion, I cannot agree with Taxpayer's argument that the tax base should be determined by an appraiser's written opinion of the fair market value of the John Doe in 2006. Taxpayer Ex. 8; Tr. pp. 35-36. The reasons for this conclusion follow.

The first reason why I reject Taxpayer's argument, and give no weight to its appraiser's written report, is that I have already concluded that ABC BUSINESS brought the John Doe into Illinois for use on June 1, 2005. ***See supra***, pp. 9-16; 35 ILCS 105/3-10; Department Ex. 1. Next, fair market value (hereafter, FMV) is a phrase the legislature used in the WUTA's definition of purchase price (35 ILCS 158/15-15), but which it did not use in the definition of selling price in § 1 of the UTA § 1, or in UTA § 3-10. 35 ILCS 105/1, 35 ILCS 105/3-10. Since the evidence reflects that use tax, and not watercraft use tax, is the correct tax to assess here, if there is to be any deduction based on the difference between the date ABC BUSINESS purchased the John Doe, and the date it brought it into Illinois for use — a scant 3½ months later — I recommend that that deduction should be calculated pursuant to UTA § 3-10. 35 ILCS 105/3-10.

Department regulation § 150.110 contains the Department's description of how it would administer the depreciation deduction authorized by UTA § 3-10. That regulation provides:

> Section 150.110 How To Compute Depreciation
> a) For the purpose of determining the "reasonable allowance for depreciation" in the case of motor vehicles, the Department will presume that the average life

> expectancy of a motor vehicle is 50 months and that the rate of depreciation that is therefore allowable is 2% of the selling price each month for such period of period out-of-State use. A fraction of a month (including any period which is less than a month after the date of purchase) will be disregarded.
> b) In this connection, a "month" does not mean a calendar month, but means a period of one month from the date of purchase. For example, if the motor vehicle were bought on the fifth day of one month, one month of depreciation will be considered to have accrued on the fifth day of the following month. In no case will depreciation be allowed for any period of time before the physical possession of the motor vehicle is delivered to the purchaser.
> c) Effective January 1, 1968, as to tangible personal property other than motor vehicles, a "reasonable allowance for depreciation" is deemed by the Department to be the amount of depreciation determined by use of the straight line method of depreciation.

86 Ill. Admin. Code § 150.110. Read together, subparagraphs (a) and (c) create a useful fiction that, when using this particular straight line method of depreciation, an item of tangible personal property will have a value of zero dollars at the end of its average life expectancy. 86 Ill. Admin. Code § 150.110(a), (c). It is useful because it provides a very simple formula for measuring the amount by which the selling price of an item of tangible personal property may be reduced for any month(s) of prior use outside Illinois (that is, by dividing the selling price by the number of months in the property's average life expectancy); it is a fiction because ordinary human experience proves that some items of tangible personal property retain significant value even after their presumed or designated average life expectancy. For purposes of calculating the deduction authorized by UTA § 3-10, what matters is the average life expectancy of the property whose use is at issue. 86 Ill. Admin. Code § 150.110.

The property whose use is being taxed here is not a motor vehicle, so its average life expectancy is not presumed to be 50 months. 86 Ill. Admin. Code § 150.110(a). And while Taxpayer did not offer any evidence of the average life expectancy of the John Doe, or of like property, the Internal Revenue Service (IRS) has published a revenue procedure that details the class life, in years, of different classes of property that may be depreciated. Rev. Proc. 87-56, 1987-2 C.B. 674 (October 19, 1987). That publication reflects that the IRS categorizes "vessels, barges, tugs, and similar water transportation equipment, except those used in marine construction" as a specific property class with a class life of 18 years. *Id*.

Using the straight-line method of depreciation described in use tax regulation § 150.110, the John Doe will be deemed to have zero value after its average life expectancy of 216 months. (18 x 12 = 216). During each of those 216 months, therefore, the value of the John Doe' would be deemed to be reduced by approximately $6,898.15. (1,490,000/216 ≈ 6,898.148). Since ABC BUSINESS purchased the John Doe on February 15, 2005 and brought it into Illinois on June 1, 2005, it is entitled to three full months of the statutory deduction from its actual purchase price, for a total of deduction of $20,967.45. *See* 86 Ill. Admin. Code § 150.110(b) (partial month deduction not allowed). The evidence, therefore, reflects that the correct tax base is $1,469,032.55. (1,490,000 ─ 20,967.45 = 1,469,032.55). By multiplying the John Doe' selling price, less the statutory deduction for prior use outside Illinois, by the statutory 6.25% tax rate, the use tax due would be $91,814.53. 35 ILCS 3-10 (1,469,032.55 x .0625 = 91,814.534375). But here, since ABC BUSINESS is entitled to a credit for the $600 of

tax it previously paid to Florida, the amount of use tax properly due is $91,214.53.

But just as this recommendation took into account the possibility that the UTA might not apply to ABC BUSINESS's use of the John Doe in Illinois, it will also take into account the possibility that any difference in the value of the John Doe on the date it was purchased and the date it was brought into Illinois for use, should be determined under the provisions of the WUTA. Therefore, I now address in more detail the evidence ABC BUSINESS offered to show the FMV of the John Doe.

Like the UTA, the WUTA also authorizes a deduction in the purchase price of a watercraft that is based on the time the watercraft was used outside Illinois before being brought into Illinois for use. 35 ILCS 158/15-5. The authority for the deduction is found within the definition of "purchase price," which provides:

> "Purchase price" means the reasonable consideration paid for a watercraft whether received in money or otherwise, including, but not limited to, cash, credits, property, and services, and including the value of any motor sold with, or in conjunction with, the watercraft. Except in the case of transfers between immediate family members, reasonable consideration ordinarily means the fair market value on the date the watercraft or the share of the watercraft was acquired or the date the watercraft was brought into this State, whichever is later, unless the taxpayer can demonstrate that a different value is reasonable. In the case of transfers between immediate family members, reasonable consideration ordinarily means the consideration actually paid, unless it appears from the facts and circumstances that the primary motivation of the transfer was the avoidance of tax.

35 ILCS 158/15-5.

This record discloses no evidence that the purchase price stated on the closing documents was motivated primarily to avoid tax. Thus, I have no hesitancy at all in concluding that the

John Doe' actual FMV on February 15, 2005, was $1,490,000. Taxpayer Ex. 3. The task, however, is to determine what its FMV was on June 1, 2005, when ABC BUSINESS brought it into Illinois for use.

In its Exhibit 8, Taxpayer claims a FMV for the John Doe that is significantly less than the amount it actually paid for the watercraft, and there are several reasons to reject the correctness of its appraiser's opinion of that FMV. If anything, the appraisal report constitutes evidence of the appraiser's opinion of the fair market value of the vessel in March 2010. *See* Maercker Point Villas Condo. Assoc. v. Szymski, 275 Ill. App. 3d 481, 486, 655 N.E.2d 1192, 1195 (3d Dist. 1995) ("The weight to be assigned an expert's opinion depends on the factual basis for that opinion, as an expert's opinion is only as valid as the reasons for it."). The appraiser's written report stating his opinion of the John Doe' FMV on March 31, 2010 is clearly based on his documented investigation and description of the physical condition of the watercraft's component parts as of that date. Taxpayer Ex. 8, pp. 2-16. The report, however, says nothing about the actual cost of the vessel on its purchase date, nor does it describe in any detail the factual bases for his opinion of the vessel's FMV four years prior to his inspection of it. *See* Taxpayer Ex. 8, *passim*.

Further, and in sharp contrast to the detailed bases for his opinion of the John Doe' FMV in March 2010, the entire

factual bases for his opinion of its FMV in 2006, is as follows: "Assuming it was equipped the same as I found it today and in the same general condition, my professional opinion is that the vessel was worth approximately $1,095,000 in 2006." *Id.*, p. 1.

The fundamental problem with the appraiser's opinion that the John Doe had a FMV of $1,095,000 in 2006 is the documented fact that ABC BUSINESS paid $1,490,000 for it less than ten months prior to 2006. Taxpayer Ex. 3. In other words, giving weight to the appraiser's opinion requires one to accept that the John Doe' FMV fell by $178,000 in the four years between some date in 2006 and March 31, 2010 (Taxpayer Ex. 8, pp. 1, 5, 15 (1,095,000 — 917,000 = 178,000)), but that its FMV fell by almost $400,000 between February 15, 2005 and 2006. Taxpayer Exs. 3, 8 (1,490,000 — 1,095,000 = 395,000). This opinion, in other words, has the boom/bust market periods reversed. It is perfectly understandable why, in late March 2010, the FMV of a 70 foot yacht might be much lower than it had previously been a few years earlier. After the real estate bubble burst in 2008, it became a buyer's market for many different types of property. And by that I mean that different types of property had, by that time, begun selling for much less than they had been selling previously. But the issue here is the difference between the John Doe' documented FMV on February 15, 2005, and its FMV on June 1, 2005, when ABC BUSINESS brought it into Illinois for

use. Since the appraiser never once takes into account the documented FMV of the John Doe 3½ months before it was brought into Illinois for use, I give that opinion no weight whatever.

Even though Taxpayer has failed to offer credible evidence of what the John Doe' FMV was when Taxpayer brought it into Illinois on June 1, 2005, it is not unreasonable to conclude that § 15-35 of the WUTA grants to the Department the authority to use the depreciation method authorized by UTA § 3-10 under such circumstances. 35 ILCS 158/15-35 (*quoted supra*, p. 18). Therefore, if the WUTA, and not the UTA, applies to ABC BUSINESS's use of John Doe, I would still recommend that the Director revise the NTL to reflect that watercraft use tax is due in the amount of $91,214.53. 35 ILCS 158/15-10; 35 ILCS 158/15-15.

Conclusion:

I recommend that the Director revise the NTL to reflect that tax, in the amount of $91,214.53, is due from ABC BUSINESS only. The penalties and interest assessed should also be revised to take into account the corrected and revised amount of tax due. The NTL shall be finalized as so revised to ABC BUSINESS. The NTL should be cancelled to the extent it purports to assess any amounts of tax, penalty of interest to John Doe, individually.

February 25, 2011

John E. White
Administrative Law Judge