

**UT 15-02**

**Tax Type: Use Tax**

**Tax Issue: Use Tax On Watercraft Purchase**

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

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<b>THE DEPARTMENT OF REVENUE</b>	)	Docket No.	XXXX
<b>OF THE STATE OF ILLINOIS</b>	)	Account No.	XXXX
v.	)	NTL No.	XXXX
	)		
<b>John Doe,</b>	)	John E. White,	
Taxpayer	)	Administrative Law Judge	

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**RECOMMENDATION FOR DISPOSITION**

**Appearances:** Bernard Wiczer, Foreman Friedman, PA, appeared 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 John Doe (Taxpayer). The NTL assessed Illinois watercraft use tax to Taxpayer, after determining that Taxpayer acquired ownership of a certain watercraft for use in Illinois. Taxpayer protested the NTL, and asked for a hearing. The issue is whether Taxpayer owned the watercraft for which the Department assessed tax.

The hearing was held at the Department's offices in Anywhere. Taxpayer testified and offered documentary evidence. 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 finalized as issued.

**Findings of Fact:**

1. Taxpayer is an individual resident of Illinois. Department Ex. 1 (copy of NTL); Department Ex. 1 (copy of NTL); Hearing Transcript (Tr.), pp. 11-12 (testimony of Taxpayer).

2. On or about May 9, 2007, Taxpayer sold a 2004 56' Voyager Pilothouse watercraft (Voyager) to ABC Business. Taxpayer Ex. A (copy of Bill of Sale & Acceptance of Boat/Yacht Agreement, dated May 9, 2007) (Bluebird Agreement); Tr. pp. 13-14, 19-21. A bill of sale was prepared to document Taxpayer's sale of the Voyager to ABC Business. Taxpayer Ex. A.
3. Taxpayer used a broker, Bluebird Brokerage, LLC (Bluebird), when selling the Voyager. Taxpayer Ex. A; Tr. p. 20.
4. The Bluebird Agreement provides, in pertinent part:

<p>Bluebird Brokerage L.L.C.  Bill of Sale &amp; Acceptance of Boat/Yacht Agreement</p>	
Boat/Yacht year, make & model:	2004 56' Voyager Pilothouse
	As per Spec Sheet accessories offered with the boat/yacht.
Boat/Yacht hull identification number:	CDRM70005J304
Seller(s) name(s) & address(es):	John Doe
Buyer (s) name(s) & address(es):	ABC Business Development
	Anywhere, Illinois
<p>This boat/yacht is sold free and clear of any liens, bills, encumbrances, or claims; and in accordance with the terms and conditions of the "Yacht Purchase and Sale Agreement dated <u>5/9/2007</u>.</p>	
<p>The selling price is <u>Five hundred Seventy Five thousand and 1997 42' Sea Ray Aft Cabin</u> (<u>\$575,000.00</u>) with the following additional provisions:</p>	
<p>The seller(s) acknowledges his/her responsibility to pay the brokerage commission according to their written and/or verbal agreement.</p>	
<p>The buyer(s) acknowledges that boats/yachts and their accessories may have both apparent and/or hidden defects, and hereby accepts to the boat/yacht in "as is condition".</p>	
<p>***</p>	

Taxpayer Ex. A (copy of Bluebird Agreement).

5. This contested case does not involve the Department's assessment of tax regarding Taxpayer's ownership of the Voyager. *See* Department Ex. 1. Rather, it involves the Department's determination that Taxpayer owed watercraft use tax regarding the other watercraft referred to on the Bluebird Agreement, the 1997 42' Sea Ray Aft Cabin, which was named ABC Business's Crib (hereafter, the Crib). *Id.*; Taxpayer Ex. A.
6. The Department conducted a limited scope audit of watercraft physically present within Illinois waters, and more specifically, within Anywhere's harbors. Department Ex. 3 (copy of auditor's comments). Teena Coffey (Coffey) conducted that audit. *Id.*
7. In the report Coffey wrote describing her audit, she noted that, after Taxpayer sold the Voyager, Anywhere Park District records showed that the Crib was physically present in a slip, numbered XXXX, located at Anywhere's Harbor. Department Ex. 3; Tr. pp. 21-22 (Taxpayer).
8. Taxpayer rents slip number XXXX, and rented it when the Crib was physically present there, shortly after Taxpayer sold the Voyager. Tr. pp. 21-22 (Taxpayer); *see also* Department Ex. 3;
9. After Taxpayer sold the Voyager, and after the Crib was physically present at Taxpayer's slip in Harbor, a United States Coast Guard (USCG) form CG-1340, titled, Bill of Sale, was prepared to reflect that ABC Business sold the Crib to a resident of Ontario, Canada (hereafter, the Canadian). Taxpayer Ex. B-1 (copy of USCG Bill of Sale).
10. The USCG Bill of Sale showing transfer of the Crib from ABC Business to the Canadian is signed and sealed by a notary public that Taxpayer identified as the representative of Bluebird, the broker. Taxpayer Ex. B-1; Tr. pp. 13-16, 19-20.

11. Although the Bluebird Agreement refers to a “Yacht Purchase and Sale Agreement dated 5/9/2007,” that agreement was not offered at hearing, so the terms of that agreement are not known. Taxpayer Ex. 1.

### **Conclusions of Law**

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 Illinois’ 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 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 are acquired in transactions that would not constitute a sale at retail, as that phrase is defined within the Retailers’ Occupation Tax Act (ROTA) and the Use Tax Act (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).

Section 15-35 of the WUTA 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. The Illinois General Assembly incorporated into the UTA certain provisions of the complementary ROTA. 35 ILCS 105/12. Among them is § 4 of the ROTA, which provides that the Department's determination of tax due constitutes prima facie proof that tax is due in the amount determined by the Department. 35 ILCS 120/4; 35 ILCS 105/12.

In this case, the Department established its prima facie case when it introduced Department Exhibit 1, consisting of a copy of the NTL, into evidence under the certificate of the Director. Department Ex. 1; 35 ILCS 158/15-35; 35 ILCS 105/12; 35 ILCS 120/4. That exhibit, without more, constitutes prima facie proof that Taxpayer owes Illinois watercraft use tax in the amount determined by the Department. 35 ILCS 158/15-35; 35 ILCS 105/12; 35 ILCS 120/4. 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 v. Department of Revenue, 41 Ill. 2d 154, 157-58, 242 N.E.2d 205, 207 (1968).

The UTA also defines "use" 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. The definition excludes some uses from taxation (*id.*), but none of the uses described as being not subject to taxation apply to this case. Specifically, I am referring to the statutory exclusion that "[u]se" ... does not include the sale of such property in any form as tangible personal property in the regular course of business ...." *Id.* That exclusion pertains to rights and powers exercised by retailers or resellers over property purchased for resale. *Id.*, see also 86 Ill. Admin. Code § 130.120(c); 86 Ill. Admin. Code § 130.210(c). In other words, a person who is not a registered retailer or reseller, and who purchases an item of tangible personal property with the intention to offer it, hold it out, or otherwise make it available for sale, is exercising rights or powers over the

property incident to his ownership of that property. 35 ILCS 105/2; 86 Ill. Admin. Code § 130.120(c); 86 Ill. Admin. Code § 130.210(c). Taxpayer offered no evidence to show that he was registered with Illinois as a retailer or reseller, or that he engaged in such a business.

Since the WUTA incorporates the UTA's definition of terms (35 ILCS 158/15-35), the word "using," within the sentence, "the privilege of using, in this State, any watercraft acquired by gift, transfer, or purchase after September 1, 2004," should be construed consistent with the UTA's definition of use. Thus, when considering whether Taxpayer was using the Crib in Illinois, I will take into account whether he exercised any rights or powers over it, in Illinois, incident to his ownership of that property. 35 ILCS 105/2.

And that leads directly to Taxpayer's argument at hearing. He contends that he never owned the Crib, or possessed it. Tr. pp. 12, 20-23. The question of ownership is critical for purposes of the UTA, because mere use of property, without the incidents of ownership, is not subject to tax. 35 ILCS 105/2; Telco Leasing, Inc. v. Allphin, 63 Ill. 2d 305, 309-10, 347 N.E.2d 729, 731 (1976) ("only the owner of property can be a user within the meaning of the Act."). The Department determined that Taxpayer owned the Crib, and was using it in Illinois. Department Ex. 1. Taxpayer bore the burden to show that either of those determinations was not correct. Copilevitz, 41 Ill. 2d at 157-58, 242 N.E.2d at 207. To support his argument that he never owned the Crib, Taxpayer offered his own testimony. Tr. pp. 12, 21-23. He also offered the USCG Bill of Sale form, showing ABC Business's transfer of title to the Crib to the Canadian. Taxpayer Ex. B-1.

The other item of documentary evidence that Taxpayer offered, however, undercuts Taxpayer's argument. Taxpayer Exhibit A shows that the purchase price ABC Business paid to Taxpayer for the Voyager included both money and the Crib — that is, the boat, itself. Taxpayer

Ex. A; Tr. p. 20. The documentary evidence shows that ABC Business gave the Crib to Taxpayer, not as a gift, but as partial payment for the Voyager. Taxpayer Ex. A. Taxpayer signed the Bluebird Agreement, manifesting his agreement with the statements made in that document. Taxpayer Ex. A; Tr. p. 17. Taxpayer offered the Bluebird Agreement into evidence (Tr. p. 17), and the text of that document is inconsistent with his position at hearing, which is that he never owned the Crib. Tr. pp. 12, 20-23. Taxpayer Exhibit A is an admission by Taxpayer, and constitutes substantive evidence that Taxpayer acquired ownership of the Crib by transfer from ABC Business. In re Cook County Treasurer, 166 Ill. App. 3d 373, 379, 519 N.E.2d 1010, 1014 (1<sup>st</sup> Dist. 1988) (“Generally, any statement made by a party or on his behalf which is inconsistent with his position in litigation may be introduced into evidence against him.”); 35 ILCS 158/15-10.

Taxpayer testified that Bluebird was the broker for his sale of the Voyager, and that Bluebird also sold the Crib. Tr. p. 12. Taxpayer also said that ABC Business gave the Crib to Bluebird, or that Bluebird received the Crib, which Bluebird, thereafter, sold to the Canadian. Tr. pp. 12-13, 20. But no documentary evidence shows that anyone ever transferred ownership of the Crib to Bluebird. *See* Taxpayer Exs. A, B-1. The USCG Bill of Sale names ABC Business, not Bluebird, as the seller. *Compare* Taxpayer Ex. B-1 *with* Tr. p. 12. Further, the Bluebird Agreement does not reflect any agreement that the selling price for the Voyager — either the money or the Crib — was to be physically delivered to Bluebird. Taxpayer Ex. A. Taxpayer was specifically asked by the fact-finder what fee he paid to Bluebird for handling the sale of the Voyager, to explore whether the related contracts, that is, the Bluebird Agreement and the Yacht Purchase and Sale Agreement dated 5/9/2007, actually included a provision that ABC Business was to transfer the Crib to Bluebird, as Bluebird’s fee for brokering the sale of the Voyager. Tr.

p. 24. But Taxpayer responded that Bluebird's fee was simply a percentage of the price ABC Business paid. Tr. p. 24.

What I infer from Taxpayer's testimony is that, in addition to using Bluebird to broker the sale of the Voyager, Taxpayer also used it to broker the sale of the Crib. *See* Tr. pp. 12, 20. But the sale of the Crib to the Canadian took place after ABC Business transferred the Crib itself to Taxpayer, as partial payment for the Voyager. Taxpayer Exs. A, B-1; Tr. pp. 12, 22. Moreover, if Bluebird acted as the broker to sell the Crib, after it brokered the sale of the Voyager, in both cases it was acting to help Taxpayer sell *his* property — it was not selling its own property. Taxpayer Ex. A, B-1.

Next, Taxpayer's argument that the USCG Bill of Sale proves that he never owned the Crib confuses title and ownership. Illinois law is clear that title to an item of tangible personal property is presumptive evidence of ownership, but that the presumption may be overcome by other evidence. In re Estate of Holmgren, 237 Ill. App. 3d 839, 842, 604 N.E.2d 1092, 1095 (3<sup>rd</sup> Dist. 1992) (“Under Illinois law, a *prima facie* presumption of ownership arises from a certificate of title; however, this presumption may be rebutted by competent evidence of actual ownership.”); Dan Pilson Auto Center, Inc. v. DeMarco, 156 Ill. App. 3d 617, 620-21, 509 N.E.2d 159, 161 (4<sup>th</sup> Dist. 1987) (“although the Illinois Vehicle Code requires a transfer of certificate of title to effectuate the sale of a vehicle [all citations omitted], it is not necessarily determinative of the passage of ownership. It is the intent of the parties involved, and not such statutory prerequisites which determine ownership. ... Consequently, it is possible that one can own an automobile even though the certificate of title is in the name of another.”).

Here, the USCG Bill of Sale shows that ABC Business transferred title to the Crib to the Canadian, but the Bluebird Agreement, and Taxpayer's own testimony, show that ABC Business

did so only after ABC Business had first transferred the Crib itself to Taxpayer. Taxpayer Ex. A; Tr. pp. 12, 20-22. The Bluebird Agreement constitutes documentary evidence sufficient to show that — between the date Taxpayer sold the Voyager and the date the Crib was sold to the Canadian — Taxpayer had acquired ownership of the Crib, by transfer from ABC Business. Taxpayer Ex. A; 35 ILCS 158/15-10. The evidence confirms that the Department correctly determined that Taxpayer owned the Crib.

Although I am not convinced that the question of whether Taxpayer possessed the Crib is required when determining whether he owned it, the evidence does show that Taxpayer had possession of it. Department Ex. 3; Tr. pp. 21-22. Taxpayer testified, and his attorney acknowledged, that Taxpayer caused or allowed the Crib to be physically present at the slip Taxpayer rented at Anywhere’s Burnham Harbor. Tr. pp. 21 (“The complications that I have with the whole process is it seems with Westrec any boat that goes into my slip there, they just claim that I own.”), 22 (“His [Taxpayer’s] explanation is fairly common and, what he’s saying is that he owned a slip in one of the harbors of Anywhere, Harbor. ... Subsequent to the sale of the boat [the Crib] and before delivery [to the Canadian], it was in that slip on behalf of the buyer, who took it to Canada.”). Counsel then argued that, “the whole basis of the tax is that this boat was in a slip.” Tr. p. 22.

But that is not correct. The bases for the assessment include the combination of Taxpayer’s acquisition of ownership of the Crib, via transfer from ABC Business, followed by Taxpayer’s exercise of rights and powers over the Crib, incident to his ownership of it. Department Exs. 1, 3. Putting a watercraft that one owns into a slip one rents, or having another person put it there, is a readily apparent *use* of a watercraft. 35 ILCS 105/2; 35 ILCS 158/15-10; 35 ILCS 158/15-35. The Department did not assess tax merely because the Crib was in

Taxpayer's slip, it assessed tax because Taxpayer owned the Crib, and used it in Illinois. Department Ex. 3; Taxpayer Ex. A; Tr. pp. 21-22.

Finally, I accept the truth of Taxpayer's assertion, and counsel's argument, that the Crib was physically present at his slip in Anywhere only so long as it took for Bluebird to broker its sale to the Canadian, or until the Crib could be transported from Anywhere, following its sale. Tr. pp. 12, 21-22. But Taxpayer's acts of keeping and holding the Crib for sale, at Taxpayer's slip, constituted an exercise of rights or powers over the Crib that was incident to Taxpayer's ownership of it. 35 ILCS 105/2; 35 ILCS 158/15-10. The evidence is clear that, on or about May 9, 2007, Taxpayer acquired ownership of the Crib by transfer from ABC Business (Taxpayer Ex. A; 35 ILCS 158/15-10), and used it in Illinois, by causing or allowing it to be physically present at the slip Taxpayer rented in Anywhere's Harbor. Department Ex. 3; Taxpayer Ex. A; Tr. p. 22.

**Conclusion:**

I recommend that the Director finalize the NTL as issued.

June 27, 2014

John E. White

Administrative Law Judge