UT 02-1
Tax Type: Sales Tax
Issue: Trade-In Transactions Under Illinois Use Tax Act

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

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS	**No. 99-ST-0000**
v.	**IBT No. 0000-0000** **NTL: S F 199800000000000** **NTL: S F 199800000000001**
DAUNTLESS TENPIN AND 8-BALL CO., Taxpayer	**Charles E. McClellan Administrative Law Judge**

RECOMMENDATION FOR DECISION

Appearances: John Alshuler, Special Assistant Attorney General, for the Department of Revenue; Thomas H. Donohoe of McDermott, Will & Emery for the taxpayer.

Synopsis:

This matter involves Notices of Tax Liability issued to "Dauntless Tenpin and 8-Ball Co." ("DT&8B") and "Dauntless Corporation" ("Dauntless") for taxes assessed under the Illinois Use Tax Act in connection with the purchase of two airplanes. The acquisition of the two aircraft involved the disposition of three other aircraft owned by "DT&8B" in transactions designed to take advantage of the federal income tax deferral provision set forth in Section 1031 of the Internal Revenue Code of 1986, as amended, ("IRC") 26 U.S.C. § 1031**.**

The issue is whether the transactions should be treated as trade-ins under the Illinois Use Tax Act.[1] Such treatment would result in reducing the purchase price of the two new aircraft upon which the use tax is calculated by the value of the three aircraft disposed of. The parties waived an evidentiary hearing and filed a stipulation of facts. Both parties filed briefs. My recommendation is that the Notices of Deficiency be made final.

Findings of Fact:

Procedural Background

1. This consolidated matter consists of the protests to two Notices of Tax Liability. Notice of Tax Liability No. 199800000000 was issued to "DT&8B" on October 9, 1998. It asserts that "DT&8B' is liable for $671,450 in Use Tax, $250 in penalty and $113,913 in interest as a result of its use in Illinois of an aircraft known as a Hawker Model 800 XP, bearing serial number 000000 ("Hawker I"). Stip. ¶

2. Notice of Tax Liability No. 19980000001 was issued to "Dauntless Corporation" on November 2, 1998. It asserts that "Dauntless" is liable for $671,450 in Use Tax, $250 in penalty and $84,321 in interest as a result of its use in Illinois of an aircraft known as a Hawker Model 800 XP, bearing serial number 000001 ("Hawker II"). Stip. ¶ 2.

3. "DT&8B", a Delaware corporation, is a wholly owned subsidiary of "Dauntless", also a Delaware corporation. Stip. ¶¶ 3, 4.

4. On March 29, 1996, "DT&8B" contracted to purchase three Hawker Model 800 XP aircraft from "Rococo Aircraft Company" ("Rococo"). Stip. ¶ 5; Stip. Ex. No. 1.

5. The purchase price of each of the three aircraft was $10,330,000. The total contract price was $30,990,000. *Id*.

[1] Unless otherwise noted, all statutory references are to 35 ILCS 120/1, *et seq*., the Retailers' Occupation Tax Act (ROTA) or 35 ILCS 105/1, *et seq*., the Illinois Use Tax Act (UTA).

6. "DT&8B" made a deposit which totaled $1,200,000 at the time the Hawker purchase agreement was executed. *Id*.

7. The parties agreed that $400,000 of the deposit would be credited to each of the aircraft. *Id*.

8. "DT&8B" intended to acquire two of the three new Hawker aircraft in transactions that would qualify as tax deferred exchanges under the provisions of IRC § 1031. "DT&8B" intended to effect the tax-deferred exchanges by exchanging three aircraft that it owned for the two new Hawker aircraft. Stip. ¶ 6.

Facts Pertaining To NTL 19982734490100

9. "DT&8B" acquired the Hawker I in October 1996 in a transaction that qualified as a tax deferred exchange under IRC § 1031 (the "Hawker I transaction"). Stip. ¶ 7.

10. As part of the Hawker I transaction, "DT&8B" appointed "James P. Lipton" as the qualified intermediary effective October 8, 1996 in a document entitled *Qualified Intermediary Exchange Agreement* between "DT&8B" and "James P. Lipton" (the "Lipton exchange agreement"). Stip. ¶ 8; Stip Ex. 2.

11. Under the "Lipton" exchange agreement, "James P. Lipton" agreed to purchase from "DT&8B" the property that "Dauntless" intended to exchange for The Hawker I. Stip. ¶ 9.

12. "James P. Lipton" also agreed to acquire the Hawker I and transfer it to "DT&8B". *Id*.

13. "DT&8B" designated an aircraft that "DT&8B" had used in its business, known as a Cessna Citation III/650, bearing serial number 000-0000 ("Cessna I"), as the aircraft that it would exchange for the Hawker I. Stip. ¶ 10.

14. Effective October 10, 1996, in a document entitled *Consent To Assignment and Direction To Convey*, "Lipton" directed "DT&8B" to convey, on behalf of and consistent with "DT&8B"'s rights under the "Lipton" exchange agreement, the Cessna I directly to "Excelsior Aircraft Sales, Inc." Stip. ¶ 11; Stip. Ex. No. 2, Exhibit C.

15. "DT&8B" executed a bill of sale for the Cessna I, dated October 10, 1996, to "Excelsior Aircraft Sales, Inc." Stip. ¶ 12; Stip. Ex. No. 3.

16. "Excelsior Aircraft Sales, Inc." was an Illinois corporation, registered with the Department of Revenue as a retailer, engaged in the business of buying and selling airplanes. *Id*.

17. "Excelsior Aircraft Sales, Inc." was aware that its participation in the Hawker I transaction was to effectuate the IRC § 1031 exchange. *Id*.

18. "Excelsior Aircraft Sales, Inc." executed and delivered to "James P. Lipton" a promissory note, dated October 10, 1996, in the amount of $3,950,000 (the "Cessna I promissory note") as payment for the Cessna I. Stip. ¶ 13; Stip Ex. 4.

19. To secure its performance under the Cessna I promissory note, "Excelsior Aircraft Sales, Inc." executed and delivered to "James P. Lipton" a Security Agreement and Chattel Mortgage dated October 10, 1996 (the "Cessna I security agreement"). Stip. ¶ 14; Stip Ex. 5.

20. Effective October 10, 1996, "DT&8B" assigned its right to purchase the Hawker I under the Hawker purchase agreement to "James P. Lipton". Stip. ¶ 15; Stip Ex. 2, Ex. E.

21. Effective October 10, 1996, "DT&8B" notified "Rococo" that it had assigned its right to purchase the Hawker I to "James P. Lipton". Stip. ¶ 16; Stip Ex. 2, Ex. F.

22. Effective October 10, 1996, “James P. Lipton” directed “Rococo” to transfer title to the Hawker I to “DT&8B”. Stip. ¶ 17; Stip Ex. 2, Ex. E.

23. “Rococo” executed a bill of sale, dated on or about October 11, 1996, to “DT&8B” for the Hawker I. Stip. ¶ 18; Stip Ex. 6.

24. “DT&8B” executed a document entitled *Affidavit Of Delivery Of A Motor Vehicle, Semi-trailer, Pull-trailer Or Aircraft To A Non-Resident of Kansas And To Be Titled And Based Outside The State Of Kansas*, dated October 11, 1996, relating to the delivery of the Hawker I. Stip. ¶ 19; Stip Ex. 7.

25. “Rococo” issued its invoice No. A49209 to “DT&8B”, dated October 11, 1996, for the Hawker I. Stip. ¶ 20; Stip Ex. 8.

26. Effective October 11, 1997, “James P. Lipton” assigned the Cessna I promissory note to “Rococo” as partial payment for the Hawker I. Stip. ¶ 21; Stip Ex. 4.

27. Effective October 11, 1996, “James P. Lipton” delivered the Cessna I promissory note and an assignment of the Cessna I security agreement to “Rococo”. Stip. ¶ 21; Stip. Ex. No. 9.

28. The Cessna I security agreement was filed with the Federal Aviation Administration. *Id*.

29. On October 11, 1996, “Dauntless”, on behalf of “DT&8B”, wired $5,580,000 to “Rococo”. Stip. ¶ 22; Stip Ex. 10.

30. On October 11, 1996, “DT&8B” purchased the Cessna I promissory note and the Cessna I security agreement from “Rococo” for $3,950,000. Stip. ¶ 23.

31. Effective October 11, 1996, “Rococo” assigned the Cessna I promissory note and the Cessna I security agreement to “DT&8B”. Stip. ¶ 24; Stip Exs. 4, 36.

32. The assignment was filed with the Federal Aviation Administration. *Id*.

33. "Excelsior Aircraft Sales, Inc." registered the Cessna I with the Illinois Department of Transportation. Stip. ¶ 25; Stip. Ex. No. 11.

34. On December 18, 1996, "Excelsior Aircraft Sales, Inc." sold the Cessna I to "Adirondack, Inc." It made the delivery to "Adirondack, Inc." in Kansas. Stip. ¶ 26; Stip. Ex. No. 12.

35. On December 18, 1996, "DT&8B" received from the escrow agent responsible for the closing of the sale of the Cessna I the sum of $3,950,000 in satisfaction of the Cessna I promissory note and the Cessna I security agreement. On December 18, 1996, "DT&8B" released the Cessna I security agreement and chattel mortgage. Stip. ¶ 27; Stip. Ex. No. 13.

36. On or about February 6, 1997, "Dauntless", on behalf of "DT&8B", wired the sum of $376,664 to "Rococo" as partial payment of the outstanding balance for the Hawker I. Stip. ¶ 28

37. On or about February 7, 1997, "James P. Lipton" transferred the sum of $23,336 to "Rococo" as the balance due on the Hawker I. *Id*.

Facts pertaining to NTL 199828044901066

38. "DT&8B" acquired the Hawker II aircraft covered by the Hawker purchase agreement with "Rococo" in May 1997 in a transaction that qualified as a tax deferred exchange under IRC § 1031. The Hawker II bore manufacturer's serial number 000001. The transaction by which it was acquired is referred to as the "Hawker II transaction." Stip. ¶ 30.

39. In January 1997, "DT&8B" owned and used in its business a Challenger 1053 aircraft, bearing manufacturer serial number 000A ("Challenger 1053"). Stip. ¶ 31. "DT&8B"

intended to exchange the Challenger 1053 and another airplane for the Hawker II. Stip. ¶ 32.

40. As part of the Hawker II transaction, "DT&8B" executed an Exchange Agreement with "CDE Corporation" dated January 27, 1997 (the "CDE agreement"). Stip. ¶ 33; Stip. Ex. No. 14.

41. Under the "CDE agreement", "CDE Corporation" was to act as a qualified intermediary in the exchange of the Challenger 1053 for the Hawker II. *Id*.

42. In the "CDE agreement", "DT&8B" agreed to transfer the Challenger 1053 to "CDE Corporation." "CDE Corporation" agreed to exchange the Challenger 1053 for replacement property to be identified by and transferred to "DT&8B". Stip. ¶¶ 32, 33; Stip. Ex. No. 14.

43. "DT&8B" also entered into a Qualified Exchange Trust Agreement, dated January 28, 1997, with "CDE Corporation" and The Chicago Trust Company. Stip. ¶ 34; Stip. Ex. No. 15.

44. "DT&8B" entered into an Aircraft Purchase Agreement, dated January 28, 1997, with "Excelsior Aircraft Sales, Inc." under which "DT&8B" agreed to sell the Challenger 1053 to "Excelsior Aircraft Sales, Inc." Stip. ¶ 35; Stip. Ex. No. 16.

45. "Excelsior Aircraft Sales, Inc." was aware that its participation in the Hawker II transaction was to effectuate the IRC § 1031 exchange. *Id*.

46. On January 30, 1997, "Excelsior Aircraft Sales, Inc." deposited $250,000 with "CDE Corporation" to be applied against the purchase price of the Challenger 1053.

47. The "CDE agreement" was amended to provide that another airplane owned by "DT&8B" and used in its business would be exchanged for the Hawker II in addition to

the Challenger 1053. This aircraft was a Cessna Citation III, bearing the serial number 000-0001, hereafter referred to as the "Cessna II." Stip. ¶ 36; Stip. Ex. No.17.

48. Effective February 21, 1997, "DT&8B" assigned its interest in the Challenger 1053 Purchase Agreement to "CDE Corporation." Stip. ¶ 37; Stip. Ex. No.18.

49. Also effective February 21, 1997, "CDE Corporation", as assignee of the seller's rights under the Challenger 1053 aircraft purchase agreement, directed "DT&8B" to convey the Challenger 1053 to "Excelsior Aircraft Sales, Inc." Stip. ¶ 38; Stip. Ex. No. 18.

50. "DT&8B" executed a FAA bill of sale for the Challenger 1053, dated February 24, 1997, to "Excelsior Aircraft Sales, Inc." Stip. ¶ 39; Stip. Ex. No.19.

51. Effective February 24, 1997, "Excelsior Aircraft Sales, Inc." sold the Challenger 1053 to "GEC Corporation". Stip. ¶ 40; Stip. Ex. No. 20.

52. On or about February 27, 1997, "Excelsior Aircraft Sales, Inc." transferred funds from the sale of the Challenger 1053 in the amount of $6,011,750 to "CDE Corporation". These funds were deposited in the trust account, and the deposit was confirmed by letter to "DT&8B". Stip. ¶ 41; Stip. Ex. No. 21.

53. Effective April 29, 1997, "DT&8B" gave "Rococo" notice that "DT&8B's" rights under the Hawker purchase agreement with respect to the Hawker II had been assigned to "CDE Corporation". Stip. ¶ 42; Stip. Ex. No. 22.

54. Effective April 30, 1997, "DT&8B" contracted with "Excelsior Aircraft Sales, Inc." for "DT&8B" to sell and "Excelsior Aircraft Sales, Inc." to purchase the Cessna II for $4,100,000 as part of the Hawker II transaction. Stip. ¶ 43; Stip. Ex. No. 23.

55. Effective April 30, 1997, "DT&8B" transferred the Cessna II to "Excelsior Aircraft Sales, Inc." evidenced by an FAA bill of sale from "DT&8B" to "Excelsior Aircraft Sales, Inc." Stip. ¶ 44; Stip. Ex. No. 24.

56. "Excelsior Aircraft Sales, Inc." paid for the Cessna II with a promissory note in the amount of $4.1 million payable to "CDE Corporation" (the "Cessna II promissory note"). *Id*.; Stip. Ex. No. 25.

57. "Excelsior Aircraft Sales, Inc." secured the Cessna II promissory note with a document entitled *Security agreement and Chattel Mortgage* delivered to "CDE Corporation" (the "Cessna II security agreement"). *Id.*; Stip. Ex. No. 26.

58. "Rococo" issued its invoice number A 11111 dated April 29, 1997 for the Hawker II, including a charge for a change ordered by "DT&8B", to "DT&8B". Stip. ¶ 45. Stip. Ex. No. 27.

59. Effective April 30, 1997, "CDE Corporation" paid "Rococo" for the Hawker II by transferring the proceeds from the sale of the Challenger 1053, in the amount of $6,230,775, to "Rococo", and by assigning the Cessna II promissory note for $4,100,000 and the Cessna II Security agreement to "Rococo". Stip. ¶ 46; Stip. Exs. No. 28, 29, 30.

60. On April 30, 1997, "Rococo" returned to "DT&8B" the sum of $400,000 representing an overpayment on the Hawker II. *Id*.

61. "Rococo" executed a FAA bill of sale, dated May 2, 1997, to "DT&8B" for the Hawker II. Stip. ¶ 47; Stip. Ex. No. 31.

62. Effective May 1, 1997, "DT&8B" purchased the Cessna II note and the Cessna II Mortgage and Security agreement from "Rococo" for $4,100,000. Stip. ¶ 48; Stip. Exs. No. 30, 32.

63. "Excelsior Aircraft Sales, Inc." registered the Cessna II with the Illinois Department of Transportation. Stip. ¶ 49; Stip. Ex. No. 33.

64. On October 15, 1997, "Excelsior Aircraft Sales, Inc." sold the Cessna II to "Whips International, Inc." Stip. ¶ 50; Stip. Ex. No. 34.

65. On October 16, 1996, "DT&8B" received $4,100,000 from the escrow agent responsible for the closing of the sale of the Cessna II to "Whips International, Inc". Having been paid in full, "DT&8B" then issued its release of the Cessna II security agreement. Stip. ¶ 51; Stip. Ex. No. 35.

Conclusions of Law:

"Dauntless" is a Delaware corporation. "DT&8B", also a Delaware corporation, is a wholly owned subsidiary of "Dauntless". On March 29, 1996, "DT&8B" contracted to purchase three Hawker Model 800 XP aircraft from "Rococo". At the time of the purchase, "DT&8B" owned three aircraft that it planned to dispose of in connection with the Hawker purchases. If "DT&8B" had sold the three aircraft it owned outright, it would have incurred a gain subject to federal income tax.

To defer that tax liability, "DT&8B" structured exchange agreements to take advantage of the tax deferral provisions of IRC § 1031. IRC § 1031 provides an exception to the general rule of IRC § 1001 that requires a gain on the sale of property to be recognized for federal income tax purposes. Under IRC § 1031(a)(1), no gain or loss is recognized when property held for productive use or investment ("the relinquished property") is exchanged for like kind property held for the same purpose ("the replacement property"). If an exchange meets the requirements of IRC § 1031, the recognition of the gain that would have occurred from a sale of

the relinquished property is deferred until the replacement property is disposed of in a taxable transaction.

The issue in this case is whether the transactions by which the relinquished aircraft were sold and the Hawker aircraft were purchased qualified as trade-ins under Section 2 of the UTA. If the transactions are treated as trade-ins for purposes of calculating the use tax, the base for calculating the amount of use tax assessed in connection with the acquisition of the Hawker aircraft is much less than if they are not treated as trade-ins under the statute because the value of the relinquished aircraft is offset against the purchase price of the Hawker aircraft. For the reasons set forth below, I conclude that the transactions did not constitute trade-ins within the meaning of the statute.

An exchange of qualified property will result in federal income tax deferral under IRC § 1031 if two requirements are met. First, after transferring the relinquished property the taxpayer must identify like kind property, the replacement property, within 45 days. Second, the taxpayer must receive the replacement property by the due date of the taxpayer's federal income tax return or within 180 days of transferring the relinquished property, whichever comes first. IRC § 1031(a)(3); Treas. Reg. § 1.1031(k)(1). Neither the IRC nor the regulation requires that the relinquished property be transferred to the person from whom the replacement property is purchased. Under IRC § 1031, an exchange can involve third parties in addition to the party disposing of the relinquished property and the party from whom the replacement property is obtained.

The transactions at issue in this matter began on March 26, 1996, when "DT&8B" contracted to purchase three Hawker Model 800 XP aircraft from "Rococo". The purchase price of each aircraft was $10,300,000 for a total of $30,900,000. In transactions related to the

acquisition of two of the Hawker aircraft, "DT&8B" disposed of three aircraft it owned, the Cessna I, the Cessna II, and the Challenger 1053, the relinquished property.

To qualify the transactions as exchanges under IRC § 1031, "DT&8B" assigned certain contractual rights to sell the relinquished property and to purchase the Hawker aircraft, the replacement property, to third party intermediaries. The Cessna I was disposed of in a series of transactions in connection with the acquisition of the Hawker I aircraft from "Rococo". The Cessna II and the Challenger 1053 were disposed of in a series of transactions in connection with the acquisition of the Hawker II aircraft from "Rococo". Although both transactions involved the assignment of contractual rights to third party intermediaries, the third party intermediaries never took title to the relinquished property or to the replacement property. The purchase of the third Hawker aircraft by "DT&8B" from "Rococo" is not involved in this case.

Hawker I

Four parties were involved in the transaction by which "DT&8B" acquired the Hawker I. "DT&8B" was the seller of the Cessna I (Stip. ¶ 12) and the purchaser of the Hawker I. "Rococo" was the seller of the Hawker I. Stip. ¶ 5. "James P. Lipton" was the qualified intermediary appointed as such by "DT&8B". Stip.¶ 8. "Excelsior Aircraft Sales, Inc.", a registered retailer engaged in the business of buying and selling airplanes, purchased the Cessna I from "DT&8B" (Stip. ¶ 12) and sold it to "Adirondack, Inc.", the ultimate buyer of the Cessna I. Stip. ¶ 26.

The purchase of the Hawker I began on March 29, 1996 when "DT&8B" signed the contract to purchase three Hawker aircraft from "Rococo". "DT&8B" made a deposit at that time of $1,200,000 with "Rococo", $400,000 of which was credited to the purchase of each aircraft. The contract anticipated that the aircraft would be acquired in transactions structured to qualify

for tax deferral under IRC § 1031, but neither party's obligation to go forward with the contract was contingent upon transactions that qualified for such tax deferral. Stip. Ex. No. 1.

Next, so that the transaction would qualify as an exchange under IRC § 1031, BBC entered into an agreement with "James P. Lipton" ("Lipton") to act as an intermediary to whom specified contract rights, but not obligations, would be assigned. Stip. ¶ 8; Stip. Ex. No. 2. Under the terms of this agreement, the "Lipton" agreement", "Lipton" agreed to purchase from "DT&8B" the relinquished property that "Dauntless" intended to exchange for the Hawker I and "DT&8B" designated the Cessna I as that relinquished property. Stip. ¶ 10. "Lipton" never took title to the relinquished property, however.

Acting under the terms of the "Lipton" agreement, "Lipton" directed "DT&8B" to convey the Cessna I directly to "Excelsior Aircraft Sales, Inc." Stip. ¶¶ 11, 12. In consideration for the conveyance of the Cessna I, "Excelsior Aircraft Sales, Inc." executed, as of October 10, 1996, a promissory note, a security agreement and a chattel mortgage to "Lipton" for $3,950,000 (the "Cessna I promissory note"). Stip. ¶¶ 13, 14. "DT&8B" then executed a Federal Aviation Administration form bill of sale dated October 10, 1996, to "Excelsior Aircraft Sales, Inc.", a retailer of aircraft registered as such in Illinois, for the Cessna I. Stip. ¶ 12. In the bill of sale, "DT&8B" warranted title to the Cessna I aircraft to the purchaser. Stip. Ex. No. 3.

Effective October 10, 1996, "DT&8B" assigned its right to purchase the Hawker I under the Hawker purchase agreement to "Lipton" and notified "Rococo" of that fact. Stip. ¶¶ 15, 16. Also on that date, "Lipton" directed "Rococo" to transfer title to the Hawker I to "DT&8B". Stip. ¶ 17.

Either on or effective October 11, 1996, a number of events took place. "Lipton" assigned the Cessna I promissory note and security agreement to "Rococo". Stip. Ex. No. 4;

Stip. ¶ 21[2]. "DT&8B" purchased the Cessna I promissory note and the Cessna I security agreement from "Rococo" for $3,950,000. Stip. ¶ 23. "Dauntless" wired $5,580,000 to "Rococo". Stip. ¶ 22.

Also on October 11, 1996, "Rococo" issued an invoice, Stip. Ex. No. 8, and a Federal Aviation Administration form bill of sale, Stip. Ex. No. 6, to "DT&8B" for the Hawker I. Stip. ¶ 18. In the bill of sale, "Rococo" warranted title to the Hawker I aircraft to "DT&8B". Stip. Ex. No. 6. The invoice, but not the bill of sale, contained a statement of account substantially as follows:

Aircraft purchase price		$10,330,000
Less: Deposit	400,000	
Trade-in value	4,350,000	4,750,000
Balance due		$5,580,000
Cash balance due		$5,580,000

Stip. Ex. No. 8.

On December 18, 1996, a number of events took place. "Excelsior Aircraft Sales, Inc." sold the Cessna I to "Adirondack, Inc." Stip. ¶ 26. "DT&8B" received, from the escrow agent responsible for the closing of the sale of the Cessna I, the sum of $3,950,000 in satisfaction of the Cessna I promissory note and the Cessna I security agreement. "DT&8B" released the Cessna I security agreement and chattel mortgage. Stip. ¶ 27; Stip. Ex. No. 13.

When all of these transactions were completed, "DT&8B" had realized $3,950,000 in cash from the sale of the Cessna I. It paid "Rococo" cash in the amount of $10,300,000 as consideration for the purchase of the Hawker I. The following table shows the various cash payments made by "DT&8B" and "Dauntless" for the purchase of the Hawker I:

[2] Stip. ¶ 21 indicates that October 11, 1997 was the date of the "Lipton" assignment to "Rococo". However, Stip. Ex. No. 4 shows that this was a typographical error and that the correct date was October 11, 1996.

Date	Payment Source	Amount
3-29-96	"DT&8B" deposit	$400,000
10-11-96	Wire transfer of funds by "Dauntless"	5,580,000
12-18-96	Disbursement by escrow agent of funds from the sale of the Cessna I to Executive Aircraft, Inc. and ultimately to "Adirondack, Inc."	3,950,000
2-6-97	Payment by "Dauntless" on behalf of "DT&8B"	376,664
2-6-97	Disbursement by "Lipton"	23,336
	Cost, "selling price" [3], of the Hawker I	$10,330,000

Thus, the selling price or base for calculating the use tax on the purchase of the Hawker I is the $10,330,000, cash paid, not $5,980,000 as claimed by "DT&8B".

Hawker II

Six parties were involved in the transaction by which "DT&8B" acquired the Hawker II. "DT&8B" was the seller of the Challenger 1053 aircraft and the Cessna II aircraft. Stip. ¶¶ 32, 36. "DT&8B" was the purchaser of the Hawker II. "Rococo" was the seller of the Hawker II. Stip. ¶¶ 4, 5. "CDE Corporation" was the intermediary "DT&8B" contracted with to act as the qualified intermediary. Stip.¶ 33; Stip. Ex. No. 14. Chicago Trust Company was the escrow agent engaged by "DT&8B". "Excelsior Aircraft Sales, Inc." was the company that agreed to buy the Challenger 1053 and the Cessna II from "DT&8B". Stip. ¶¶ 35, 39, 43, 44; Stip. Exs. No. 16, 19, 24. "GEC Corporation" was the purchaser of the Challenger 1053 from "Excelsior Aircraft Sales, Inc." Stip. ¶ 40; Stip. Ex. No. 20. "Whips International, Inc." was the purchaser of the Cessna II form "Excelsior Aircraft Sales, Inc." Stip. ¶, 50; Stip. Ex. No. 34.

"DT&8B" entered into a Qualified Deferred Exchange Agreement with the "CDE Corporation", dated January 27, 1997, under the terms of which "DT&8B" agreed to transfer the Challenger 1053 to "CDE Corporation" and "CDE Corporation" agreed to acquire the Hawker II

[3] The term "selling price" is a term of art defined in the UTA, 35 ILCS 105/2 set forth below.

from “Rococo” and transfer it to “DT&8B”. Stip. ¶ 33. Title to the Challenger 1053 was never transferred to “CDE Corporation”, however.

In a contract dated January 28, 1997, “DT&8B” agreed to sell the Challenger 1053 to “Excelsior Aircraft Sales, Inc.” for $6,261,750. Stip. ¶ 35; Stip. Ex. No. 16. The contract anticipated an IRC § 1031 exchange, but completion of the contract was not contingent upon such an exchange. Stip. Ex. No. 16. The contract prohibited either party from assigning its rights under the contract except in connection with an IRC § 1031 exchange. *Id*. In the contract, “DT&8B” warranted that it would have good and marketable title to the aircraft free and clear of all liens and encumbrances on the date of closing. *Id*. On January 30, 1997, “Excelsior Aircraft Sales, Inc.” deposited $250,000 with “CDE Corporation” as a down payment on the purchase of the Challenger 1053. *Id*.

The exchange agreement was amended, effective February 27, 1997, to provide that the Cessna II, in addition to the Challenger 1053 would be exchanged for the Hawker II. Stip. ¶ 36; Stip. Ex. No. 17. Effective February 21, 1997, “DT&8B” assigned its interest in the Challenger 1053 to “CDE Corporation”, and that corporation, as assignee, directed “DT&8B” to convey the Challenger 1053 to “Excelsior Aircraft Sales, Inc.” Stip. ¶¶ 37, 38. “DT&8B” executed a Federal Aviation Administration form bill of sale dated February 24, 1997 for the Challenger 1053 to “Excelsior Aircraft Sales, Inc.” Stip. ¶ 39. In the bill of sale, “DT&8B” warranted title to the Challenger 1053 aircraft to the purchaser “Excelsior Aircraft Sales, Inc.” Stip. Ex. No. 19. Effective February 24, 1997, “Excelsior Aircraft Sales, Inc.” executed a Federal Aviation Administration form bill of sale to “GEC Corporation” for the Challenger 1053. Stip. ¶ 40; Stip. Ex. No. 20. Then “Excelsior Aircraft Sales, Inc.” transferred $6,011,750 from the sale of the Challenger 1053 to “CDE Corporation”. Stip. ¶ 41.

With "Rococo's" knowledge, "DT&8B" assigned its rights under the Hawker II purchase agreement to "CDE Corporation" effective April 29, 1997. Stip. ¶ 42. On April 30, 1997, "DT&8B" contracted to sell the Cessna II to "Excelsior Aircraft Sales, Inc." for a minimum price of $4,100,000. Stip. ¶ 43; Stip. Ex. No. 23. The contract anticipated an IRC §1031 exchange, but the parties' obligations to complete the contract were not contingent upon the parties being able to arrange an IRC § 1031 exchange. In the contract, "DT&8B" warranted that it would have good and marketable title, to the Cessna II, free and clear of all claims, on the date of closing. Stip. Ex. No. 23.

"DT&8B" then transferred the Cessna II to "Excelsior Aircraft Sales, Inc." In consideration for the Cessna II, "Excelsior Aircraft Sales, Inc." gave "DT&8B" a promissory note and a security agreement for $4,100,000 payable to "CDE Corporation". Stip. ¶ 44. "Rococo" issued its invoice for the Hawker II to "DT&8B" dated April 29, 1997. Stip. ¶ 45; Stip. Ex. No. 27. "DT&8B" gave a Federal Aviation Administration form bill of sale for the Cessna II to "Excelsior Aircraft Sales, Inc." dated April 30, 1997. In the bill of sale, "DT&8B" warranted title to the purchaser. Stip. Ex. No. 24. The invoice, but not the bill of sale, contained a statement of account substantially as follows:

Aircraft purchase price	$10,330,000
Add: Contract Change Order 8321-C	775
	$10,330,775
Less: Deposit	(400,000)
Less: Trade-in values from like kind exchange:	
Challenger 1053	(6,230,775)
Cessna II	(4,100,000)
Overpayment	$400,000

Stip. Ex. No. 27.

"CDE Corporation" then transferred $6,230,775 it received on the sale of the Challenger 1053 to "Rococo" in partial payment for the Hawker II. Stip. ¶ 46. "CDE Corporation" then assigned the Cessna II promissory note for $4,100,000 to "Rococo" in payment for the Hawker II. *Id.* At this point, "Rococo" had been overpaid by approximately $400,000, that it returned to "DT&8B". *Id.* Effective May 1, 1997, "DT&8B" purchased the Cessna II promissory note and security agreement from "Rococo" for the face amount, $4,100,000. Stip. ¶ 48. "Rococo" executed a bill of sale to "DT&8B" for the Hawker II to "DT&8B" dated May 2, 1997. Stip. ¶ 47.

On October 15, 1997, "Excelsior Aircraft Sales, Inc." sold the Cessna II to "Whips International, Inc." Stip. ¶ 50. On October 16, 1997, "DT&8B" received the sum of $4,100,000 from the sale of the Cessna II that had been deposited with the escrow agent responsible for closing the sale of the Cessna II to "Whips International, Inc." "DT&8B" then issued a release of the mortgage and the security agreement for the note. Stip. ¶ 51.

When all of these transactions were completed, "DT&8B" had paid $10,330,775 in cash for the purchase of the Hawker II. The following table shows the various cash payments made to purchase the Hawker II:

Date	Payment Source	Amount
3-29-96	"DT&8B" deposit	$400,000
4-30-97	Proceeds from the sale of the Challenger 1053 routed through "CDE Corporation"	6,230,775
5-1-97	Purchase by "DT&8B" from "Rococo" of the Cessna II promissory note due from "Excelsior Aircraft Sales, Inc." assigned to "Rococo" on 4-30-97	4,100,000
4-30-97	Refund of overpayment from "Rococo"	(400,000)
	Cost, "selling price", of the Hawker II including	

contract change order for $775 $10,330,775

Thus, the purchase price ("selling price") for the Hawker II is $10,330,775, the cash paid, not $0 as claimed by "DT&8B".

The admission into evidence of the corrected returns of the Department under the certification of the Director at a hearing before the Department or any legal proceeding establishes the Department's *prima facie* case. 35 ILCS 120/4[4], 120/8; Copilevitz v. Department of Revenue, 41 Ill.2d 154, 242 N.E.2d 205 (1968); Central Furniture Mart v. Johnson, 157 Ill.App. 3d 907 (1st Dist. 1987). Thus, when the Department introduced the corrected returns (Dept. Group Ex. No. 10) the Department's *prima facie* case was established.

Once the Department has established its *prima facie* case, the burden of proof shifts to the taxpayer. To overcome the Department's *prima facie* case, the taxpayer must present consistent, probable evidence identified with its books and records. Copilevitz v. Department of Revenue, *supra*; Central Furniture Mart v. Johnson, *supra*. Testimony alone is not enough. Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill.App.3d 203, (1st Dist. 1991); A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3d 826, 833-34 (1st Dist. 1988). The record in this case establishes that the taxpayer has failed to submit sufficient probable evidence to overcome the Department's *prima facie* case.

The tax at issue in this matter is the use tax imposed by the UTA. It is a tax upon the privilege of using within Illinois personal property purchased at retail from a retailer. 35 ILCS 105/3; United Air Lines, Inc. v. Johnson, 84 Ill. 2d 446, 419 N.E. 2d 899 (1981). The purpose of the use tax is to complement the ROTA. Boye Needle Co. v. Dept. of Revenue, 45 Ill.2d 484, 259 N.E.2d 278 (1970); Turner v. Wright, 11 Ill.2d 161, 142 N.E.2d 84 (1957). The intent of the

[4] The Use Tax Act, at 35 ILCS 105/12, makes numerous sections of the Retailers' Occupation Tax Act (35 ILCS 120/1 *et seq.*) applicable to the Use Tax, including Sections 2, 4 & 8.

two statutes is that one tax, and only one, shall be paid to the Department with regard to each purchase of property for use within the State, whether or not the purchase is made in Illinois. Turner v. Wright, 11 Ill.2d 161, 167-168. Accordingly, the responsibility of collecting the use tax from the purchaser is on the retailer. 35 ILCS 105/3. The retailer retains the tax to the extent that he has paid the Retailers' Occupation Tax on the same transaction. 35 ILCS 105/8; Turner v. Wright, 11 Ill.2d 161, 142 N.E.2d 84 (1957); see also United Air Lines, Inc. v. Johnson, 84 Ill. 2d 446, 450, 419 N.E. 2d 899 (1981). Howard Worthington, Inc. v. Department of Revenue, 96 Ill.App.3d 1132, 421 N.E.2d 1030) (2nd Dist. 1981). When the retailer fails to collect and report the tax, the purchaser has the obligation to report and pay the tax. 35 ILCS 105/10. In the instant case, "Rococo", the seller of the Hawker aircraft, did not collect and report the tax, so "DT&8B" was obligated to report and pay the use tax.

The amount of use tax imposed on a purchase is determined by multiplying the "selling price" of the tangible personal property by the prescribed rate. 35 ILCS 105/3-10. The determination of the "selling price" of the two Hawker aircraft is the issue in this case. The term "selling price" is defined in the UTA as follows:

> "Selling price" means 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, ...** 35 ILCS 105/2. [emphasis added.]

Taxpayer asserts that the exchanges it made to acquire the two Hawker aircraft should be treated as trade-ins under the statute. The Department's regulation regarding property that is traded-in provides as follows:

> The "selling price", which is subject to the Use Tax when a **sale at retail** is made, includes the consideration for the 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, 86 Admin Code ch. I, § 150.1101(a) [emphasis added].

The term "sale at retail" is defined in ROT § 2, and that definition is adopted as the definition under the UTA. 35 ILCS 105/12. The statute defines a "sale at retail" to be "any transfer of ownership or title to tangible personal property to a purchaser . . .." 35 ILCS 120/2. The language of the statute and the regulation make it clear that the trade-in of property must occur in a single retail transaction between a buyer and the seller from whom the buyer is buying the new property, without third party involvement. The statute does not contemplate any intervention by third party intermediaries as in the transactions by which the Hawker I and the Hawker II aircraft were acquired in this case. O'Brien v. Isaacs, 32 Ill.2d 105, 203 N.E.2d 890 (1965) (Delivery of flowers to an Illinois resident by an Illinois florist to fulfill and order made through an out-of-state florist is a taxable sale between the Illinois resident and the Illinois florist because the Illinois florist transferred the title and the possession to the buyer for a price.)

"DT&8B" argues that the value of the Challenger and Cessna aircraft should be treated as trade-ins under Section 2 of the UTA so that the selling prices of the Hawker aircraft would be reduced by the amount of the proceeds realized on the sales of the Challenger and Cessna aircraft. However, taxpayer's argument runs contrary to basic rules of statutory construction. Those rules require that taxing statutes be strictly construed. Their language cannot be extended by implication beyond its clear meaning. Van's Material Co. v. Dept. of Revenue, 131 Ill. 2d 196, 202 (1989). The primary rule is to determine and give effect to the intention of the legislature. That inquiry begins with the language of the statute. *Id.* The language of a statute generally provides the best evidence of the legislature's intent. Board of Education of Rockford School District No. 205 v. Illinois Educational Labor Relations Board, 165 Ill. 2d 80, 87 (1995).

In this case, the taxpayer would extend the trade-in provision language, that clearly refers to a single transaction between a buyer and a seller in which the buyer gives the seller tangible personal property as part of the purchase price for new tangible personal property, to a series of transactions involving third party intermediaries where the buyer sells property to someone other than the retailer from whom he is buying the new property. The effect of that interpretation would be to imply an exclusionary provision in the language of the UTA that its clear meaning does not warrant. That would be an improper extension of the language of the statute. Chet's Vending Service, Inc. v. Dept. of Rev., 71 Ill.2d 38, 374 N.E.2d 468 (1978) (The terms "gross receipts" and "selling price" do not encompass a fixed fee or guaranteed payment received by vending machine service operator from employer upon whose premises food vending machines are located.)

In this case, the invoices that "Rococo" gave to "DT&8B" for the purchases of the Hawker two aircraft show allowances for trade-in values in contemplation of IRC § 1031 exchanges. However, most importantly, "Rococo" never accepted trade-in property in exchange for the Hawker aircraft and "Rococo" was not involved in the sales of the relinquished property. Rather, entities not related to either the intermediaries or to "Rococo" purchased the relinquished aircraft from "DT&8B", and those transactions provided "DT&8B" with the funds it needed to pay "Rococo" the contract price for the replacement aircraft. The only consideration "Rococo" received for the sale of the two Hawker aircraft was cash. Title to the relinquished aircraft passed directly from "DT&8B" to "Excelsior Aircraft Sales, Inc." Title to the Hawker aircraft passed directly from "Rococo" to "DT&8B".

Taxpayer acknowledges that the intermediaries never held title to the aircraft. However, taxpayer asserts that this fact is not relevant to the issue in this case. Taxpayer asserts that the

intermediaries had ownership of the aircraft and that the substance of both transactions is that three aircraft were exchanged for two Hawker aircraft. Taxpayer's attempt to disregard the fact that the intermediaries never had title to the aircraft is incorrect. The statute, the Department's regulations and the Illinois courts all rely on the transfer of title to determine if a sale has been made. Section 1 of the ROT defines "sale at retail" to be "any transfer of ownership **or title** to tangible personal property to a purchaser . . .." 35 ILCS 120/2. The same definition applies to the UTA. 35 ILCS 120/12. The Department's regulation reiterates the definition of the phrase "sale at retail" to mean a transfer of ownership **or title**.

The courts have also relied on the transfer of title as determining that a transaction is a taxable sale. Weber-Stephen Products, Inc. v. Dept. of Revenue, 324 Ill.App.3d 893, 756 N.E.2d 321 (1st Dist. 2001). At issue in Weber-Stephen Products, Inc., *supra*, was a use tax assessment on an aircraft acquired in a series of transactions designed to qualify for deferral of gain under IRC § 1031. In its decision, the court relied on the transfer of title reflected in a bill of sale for an aircraft as being evidence of a taxable sale. Citing several earlier cases, the court noted that the Illinois courts have historically looked to the transfer of title by the execution of a bill of sale as proof that a taxable sale at retail has taken place. Weber-Stephen Products, Inc. v. Dept. of Revenue, 756 N.E.2d at 326. Further, as the court noted, there is no statutory provision or case precedent for excusing use tax liability because a taxpayer has received a federal tax benefit in the same transaction. 756 N.E. 2d at 328.

Taxpayer relies heavily on the fact that ownership and title are not the same and that the trade-in provision should apply because the intermediaries had control of the aircraft as a result of the assignments of the contractual rights to the intermediaries. This argument is also incorrect for a number of reasons. The argument ignores the fact that the purchase agreement for the

Hawkers was between "DT&8B" and "Rococo" and only the right to purchase was assigned. The obligations under the purchase agreements were never assigned. The exchange of most of the documents to complete each of the Hawker transactions all occurred within a few days in each case. The intermediaries never had title or possession of the aircraft. They functioned more as escrow agents holding consideration from two parties to a contract until all conditions of the contract are fulfilled. The intermediaries never had the degree of control that allowed them the use of the aircraft. To the extent they had any control, it was minimal and fleeting and did not equate with the degree of ownership that results from the transfer of title.

In real property law, it is recognized that the concept of title refers to the legal relationship to land, while the attributes of ownership are comparable to control. See, In re Application for Tax Deed, 646 N.E.2d 621 (5th Dist. 1995); Abbington House, Inc. v. State, 44 IL.Ct.Cl. 47 (1992). However, taxpayer cites no authority in which that distinction has been considered in construing the ROTA or the UTA with regard to transfers of tangible personal property and there appears to be none.

Taxpayer also maintains that the Department's position on the issue results in double taxation of the used aircraft disposed of by "DT&8B". Taxpayer's rationale is that if the value of the used aircraft is not allowed as a trade-in offset to the selling price of the Hawker aircraft, the effect is that tax would be assessed on those aircraft once when the aircraft are transferred to the qualified intermediaries in trade and again when the qualified intermediaries transfer them to the end user. Taxpayer's rationale is incorrect. The tax is triggered when the retailer passes title to the buyer. Brevoort Hotel Co. v. Ames, 360 ILL. 485, 196 N.E. 461 (1935) (Title passes and a taxable sale occurs in a restaurant when food is served to a customer for consumption.) In this case, title to the relinquished aircraft never passed to the intermediaries or to "Rococo".

Furthermore, “DT&8B” is not in the business of selling aircraft, so the sale of the relinquished aircraft by “DT&8B” was an occasional sale that would not be taxable under the ROTA, and, therefore, also not taxable under the UTA. 35 ILCS 120/1, 35 ILCS 105/3-65. Therefore, the Department’s position does not result in double taxation as asserted by the taxpayer.

Taxpayer’s argument is also incorrect because it ignores the nature of the UTA. The UTA and the complementary ROTA, are both transactional taxes. The taxes apply on a transaction by transaction basis between a buyer and a seller. In the case of the ROTA and UTA, whether the tax applies to a transaction between a buyer and a seller does not depend on whether it applies to any related transactions with third parties. In this case, the involvement of intermediaries notwithstanding, whether the UTA applied to the sale of the Cessna aircraft and to the sale of the Challenger 1053 aircraft in separate and discrete transactions does not determine whether it applies or how it applies to the purchase of the Hawker aircraft that are also separate and discrete transactions. Transfer of title to the relinquished property ran directly from “DT&8B” to “Excelsior Aircraft Sales, Inc.” Title to the Hawker aircraft ran directly from “Rococo” to “DT&8B”. These were separate and discrete transactions. Furthermore, the issue in this case is not whether the ROTA or the UTA applies to the sale of the three aircraft by “DT&8B”. The issue is the determination of the “selling price”, the base for calculating the use tax on the purchase of the two Hawker aircraft from “Rococo”.

Taxpayer also argues that the substance of the transactions rather than the form should govern the issue of how the UTA applies. Taxpayer argues that the substance of each Hawker aircraft purchase and the disposition of the Cessna aircraft and Challenger 1053 were unified transactions in which “DT&8B” received credit for the value of these aircraft. The documents of record show otherwise. Neither the contracts to sell the relinquished aircraft nor the contract to

purchase the Hawker aircraft were contingent upon the parties being able to structure IRC § 1031 exchanges. As noted previously, the bills of sale establish that the Cessna aircraft and the Challenger 1053 were sold by "DT&8B" to "Excelsior Aircraft Sales, Inc.", a registered retailer. Neither "Rococo" nor the intermediaries ever held title to these aircraft, and "Rococo" did not take these aircraft as trade-ins. The entire consideration "Rococo" received for the Hawker aircraft consisted of cash.

However, assuming that taxpayer's version of the substance of the transaction is economically sound, it still does not carry the day. The statute clearly looks to title transfer and negates the application of the "substance over form" doctrine to transactions involving the ROTA and the UTA. In re Stoecker, 179 F. 2d 546, 550. (7th Cir. 1999), Weber-Stephen Products, Inc. v. Dept. of Revenue, *supra*.

Taxpayer argues that the transactions involved in this matter should be treated as trade-ins because they qualified for tax deferral under IRC § 1031. Taxpayer relies on the background and a commentator's analysis of IRC § 1031. The substance and purpose of IRC § 1031 are not relevant to an analysis of transactions involving the ROTA and the UTA. The ROTA and the UTA are transactional taxes. They are imposed on a transaction by transaction basis. The federal income tax is not a transactional tax. It taxes a stream of income earned over the period of a year. The income tax is based on the computation of taxable income derived from numerous income and expense transactions that are incurred and taken into account during the year being measured. As demonstrated by the provisions of IRC § 1031, the relationship of a series of transactions may determine how or to what extent the tax is calculated. There is no similar concept in the ROTA or the UTA.

Comparing an income tax statutory provision to a sales and use tax statutory provision is like comparing apples to oranges. The ROTA and the UTA are fundamentally different from the federal income tax in the manner in which they impose tax. Although the parties to the transactions structured them to qualify as tax deferred exchanges for federal income tax purposes, that does not qualify them as trade-in transactions under Section 2 of the UTA. Weber-Stephen Products, Inc. v. Dept. of Revenue, 756 N.E.2d at 328.

Finally, taxpayer argues that there is no difference between the transactions at issue than the typical vehicle transaction in which a buyer takes his old car to a dealer and trades it in on a new car he purchases from that dealer. This argument fails because there is a difference. In the typical vehicle transaction the trade-in of the old vehicle and the purchase of the new one are consummated in a single transaction between a buyer and a seller.

In the instant case, the dispositions of the old aircraft by "DT&8B" were sales to the retailer "Excelsior Aircraft Sales, Inc." The acquisition of the Hawker aircraft was between "DT&8B" as purchaser and "Rococo" as seller. By executing exchange agreements and assignments, "DT&8B" routed some contract provisions through intermediaries, but the intermediaries never took title to the aircraft. However, "DT&8B" was always obligated to purchase the Hawker aircraft. "DT&8B's" obligations under both Hawker contracts were never transferred to the intermediaries.

"DT&8B" would have reaped the benefits of the typical trade-in transaction if it had traded in the Cessna and Challenger 1053 aircraft to "Rococo" in transactions in which the only parties were "DT&8B" as buyer of the Hawker aircraft and "Rococo" as seller of the Hawker aircraft. It did not do that, however. Instead, it sold the relinquished aircraft to a third party and used the proceeds to purchase the replacement aircraft.

In addition, although the record is not clear as to all of the risk "Excelsior Aircraft Sales, Inc." may have assumed in these transactions, one possibility is the risk of a decrease in the value of the Cessna and Challenger 1053 aircraft between the dates that "Excelsior Aircraft Sales, Inc." acquired title and the dates it sold these aircraft to the ultimate purchasers. The record is clear that "Rococo", the seller of the Hawker aircraft, did not bare any of that risk. "Excelsior Aircraft Sales, Inc." did.

In the typical vehicle trade-in transaction, the retailer of the replacement property assumes the risk of a decrease in value of the traded in property. Alternatively, the retailer also reaps the benefit of selling the traded-in property for more than the trade-in value should that be the end result. In this case, "Excelsior Aircraft Sales, Inc.", not "Rococo", had the opportunity of benefiting in this way. Therefore, the economics of the transaction at issue are not the same as the economics of the typical vehicle purchase and trade-in transaction.

For the reasons set forth above, taxpayer has failed to overcome the Department's *prima facie* case. Therefore, I recommend that the Notices of Tax Liability be made final.

Date: 1/2002

Charles E. McClellan
Administrative Law Judge