

UT 04-6

Tax Type: Use Tax

Issue: Use Tax On Aircraft Purchase

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

THE DEPARTMENT OF REVENUE)	Docket No.	03-ST-0000
OF THE STATE OF ILLINOIS)	IBT No.	0000-0000
v.)	NTL No.	00 0000000000000000
ABC LTD.,)	John E. White,	
Taxpayer)	Administrative Law Judge	

RECOMMENDATION FOR DISPOSITION

Appearances: Lane Gensburg, Dale & Gensburg, P.C., appeared for ABC Ltd., George Foster, Special Assistant Attorney General, appeared for the Illinois Department of Revenue.

Synopsis:

This matter arose when ABC Ltd., (“ABC” or “taxpayer”) protested a Notice of Tax Liability (“NTL”) the Illinois Department of Revenue (“Department”) issued to it to assess use tax regarding its purchase of an aircraft for use in Illinois. The issue is whether taxpayer’s purchase was subject to use tax because it was purchased at retail from a retailer, or whether it was not subject to tax because it was an occasional sale from a person who was not a retailer.

The hearing was held at the Department’s offices in Chicago. ABC presented evidence through two witnesses, and it offered copies of books and records and other documents, including copies of records maintained by the United States Federal Aviation Authority (“FAA”). I have reviewed that evidence, and I am including in this

recommendation findings of fact and conclusions of law. I recommend that the issue be resolved in favor of the Department.

Findings of Fact:

1. ABC is a company that is wholly owned by John Doe, who is an Illinois resident and a licensed pilot. Hearing Transcript, pp 14-15 (testimony of John Doe (“Doe”)).
2. In May 1998, Doe saw a Beechcraft A36TC aircraft advertised for sale in a publication called “Trade-a-Plane.” Tr. pp. 15-17 (Doe).
3. After seeing the ad, Doe telephoned Joe Blow, the person named in the ad, to discuss the aircraft. Tr. p. 17 (Doe). During that discussion, Doe asked Blow for a list of the aircraft’s features, documentation regarding the aircraft, and photographs of the aircraft. Tr. pp. 18-19 (Doe); Taxpayer Ex. 1 (typed letter Doe testified he received from Blow, describing, *inter alia*, the aircraft).
4. On May 18, 1998, Doe, on ABC’s behalf, signed an “Intent to Purchase Agreement” as the purchaser, regarding ABC’s desire to purchase the Beechcraft A36TC aircraft, bearing a serial number of EA-43 (hereinafter, “the aircraft”). Taxpayer Ex. 2 (copy of agreement); Tr. pp. 23-24 (Doe). He then faxed that agreement to Blow. Tr. pp. 23-24 (Doe).
5. Doe knew that purchasing an aircraft from a dealer would subject him to Illinois tax, and he therefore, desired to purchase an aircraft from a private individual. Tr. pp. 17-18 (Doe), 84, 86-87 (Smith).
6. Blow thereafter signed that intent agreement, on behalf of XYZ, Inc., as the seller of the aircraft. Taxpayer Ex. 2; Tr. p. 25 (Doe).

7. The intent agreement was given to ABC by Mr. Smith (“Smith”), of Smith Pilot Services, Inc. (“XXX”), which ABC hired to assist it in its anticipated purchase of the aircraft. Tr. pp. 24, 26-27 (Doe).
8. In addition to giving Doe the intent agreement, XXX assisted ABC by helping it with required FAA paperwork, by conducting a title search of the aircraft, and by arranging for a business loan and associated wire transfers of funds at closing. Tr. pp. 26-27 (Doe); Taxpayer Exs. 2-4.
9. The closing for ABC’s purchase of the aircraft was held on May 20, 1998. Tr. pp. 27 (Doe), 84 (Smith). At the completion of that closing, ABC purchased the aircraft. Taxpayer Ex. 4 (copies of FAA sale and registration documents regarding the aircraft) p. 6 (FAA bill of sale, which provided that, on May 20, 1998, ABC purchased “all rights, title, and interests in and to such aircraft ...” from the seller, XYZ).
10. The closing was held at XXX’s office in Illinois, and the aircraft was in Illinois at the time of the closing. Taxpayer Ex. 2, ¶ 2 (requiring pre-purchase inspection of the aircraft at (Illinois) Airport, where Smith was located); Tr. pp. 34 (Doe), 84 (Smith).
11. At closing, Doe reviewed an aircraft title report showing that XYZ Sales, Inc. (“XYZ”), was the title owner of the aircraft, and had been since December 1996. Taxpayer Ex. 3; Tr. pp. 27-29 (Doe). Taxpayer also had a copy of an FAA registration form showing XYZ’s address and telephone number. Taxpayer Ex. 4, p. 2 (XYZ’s FAA registration for the aircraft, dated 12/11/96).
12. At closing, Doe also viewed an FAA bill of sale which, once signed by the named

- parties, showed that, on May 20, 1998, ABC purchased “all rights, title, and interests in and to such aircraft ...” from the seller, XYZ. Taxpayer Ex. 4 p. 6 (FAA bill of sale); Tr. p. 32 (Doe); *see also* Taxpayer Ex. 2, ¶ 2 (requiring the seller to provide at closing “a signed FAA approved bill of sale”).
13. More than a year later, on August 28, 1999, Doe, as ABC’s president and on ABC’s behalf, filed an application with the Illinois Department of Transportation (“IDOT”) to register the aircraft with that agency. Taxpayer Ex. 5 (copy of ABC’s IDOT’s registration application); *see also* Tr. pp. 43-44 (Doe, explaining that the reason for the delay was because it took him over a year to receive ABC’s FAA registration for the aircraft from the FAA).
 14. On that IDOT application, ABC checked the box indicating that the aircraft was purchased from a “Private Party/Individual” and it named Joe Blow as that individual. Taxpayer Ex. 5. ABC also reported on the IDOT application, as the seller’s address and telephone number, information that was different than XYZ’s address and telephone number as listed on XYZ’s FAA registration for the aircraft. *Compare id. with* Taxpayer Ex. 4, p. 2; Tr. pp. 44-45 (Doe).
 15. Following ABC’s registration of the aircraft with the IDOT, a Department auditor was assigned to review the facts of ABC’s purchase. Department Ex. 2 (copy of auditor’s narrative report, in which he states that the seller identified on ABC’s IDOT registration application was not the same as the seller listed on “the Aerofax database”).
 16. The auditor requested and received copies of the FAA title and registration history for the aircraft. Department Ex. 2.

17. The auditor also contacted ABC regarding its purchase, after which ABC tendered to the auditor copies of documents, including a letter from Blow to Doe, dated 8/30/99. Department Ex. 2; Taxpayer Ex. 6 (copy of 8/30/99 letter).

18. The body of Blow's 8/30/99 letter to Doe provided:

I, Joe Blow, sold you my Beech A36TC with serial number EA-43 and tail number XXXXX as a private individual. Although I kept the ownership of the airplane in my company, XYZ Sales, Inc., I am not an aircraft dealer of any type and my company is not engaged in the aircraft sales business. XXXXX was my private aircraft.

Taxpayer Ex. 6.

19. The auditor also sought information from the Florida Department of Revenue ("FDOR") regarding XYZ, after which he received correspondence from the FDOR notifying him that XYZ was registered with the state as an aircraft dealer. Department Ex. 2; Department Ex. 3 (copy of FDOR letter).

20. During the time that XYZ held title to the aircraft, it used the aircraft for approximately 250 hours. *See* Taxpayer Ex. 7 (copies of the aircraft's engine logs and maintenance records, showing repair/maintenance work performed aircraft, with tachometer readings taken for each repair/maintenance performed).

21. When ABC purchased the aircraft, the passenger area had been fitted with a device for holding a small crane and winch, which Blow advised Doe was used to load motorcycles into the aircraft. Taxpayer Ex. 11 (copies of photos of the aircraft's passenger compartment, fitted with the crane and winch); Tr. pp. 68-69 (Doe).

22. After the audit of ABC's purchase, the auditor determined that ABC purchased the aircraft for use in Illinois at retail from a retailer, and thereafter, the

Department issued Notice of Tax Liability number 000000000000000000 to ABC to assess use tax regarding that purchase. Department Ex. 1; Tr. p. 58 (Doe).

Conclusions of Law:

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 Illinois General Assembly incorporated into the UTA certain provisions of the Retailers' Occupation Tax Act ("ROTA"). 35 ILCS 105/11. 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 105/12; 35 ILCS 120/4. In this case, the Department established its prima facie case when it introduced Department Exhibit 1, consisting of a copy of the NTL and of the auditor's determination of tax due, under the certificate of the Director. Department Ex. 1; Tr. p. 13. That exhibit, without more, constitutes prima facie proof that ABC owes Illinois use tax in the amount determined by the Department. 35 ILCS 105/12; 35 ILCS 120/4.

The presumption of correctness that attaches to the Department's prima facie case, moreover, 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). Here, therefore, Department exhibit 1 not only constitutes prima facie proof that ABC is subject to use tax, but also that it purchased the aircraft at retail, from a

retailer. 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 legislature provided definitions of terms used in the UTA, and the following definitions are pertinent here. First, a "purchase at retail" is defined as "the acquisition of the ownership of or title to tangible personal property through a sale at retail." 35 ILCS 105/2. A "sale at retail" is defined as "any transfer of the ownership of or title to tangible personal property to a purchaser, for the purpose of use, ... for a valuable consideration" 35 ILCS 105/2. Finally, a "retailer" is defined as:

... every person engaged in the business of making sales at retail as defined in this Section.

A person who holds himself or herself out as being engaged (or who habitually engages) in selling tangible personal property at retail is a retailer hereunder with respect to such sales

The isolated or occasional sale of tangible personal property at retail by a person who does not hold himself out as being engaged (or who does not habitually engage) in selling such tangible personal property at retail ... does not make such person a retailer hereunder.

35 ILCS 105/2. The UTA's definition of a "sale at retail" is consistent with the ROTA's definition of the same term. *Compare* 35 ILCS 105/2 with 35 ILCS 120/1.

ABC claims that its purchase of the aircraft was not a purchase at retail because it was not sold by a retailer, and was instead an isolated sale by someone who was not a retailer. Tr. p. 110 (closing argument). ABC first argues that XYZ was not an aircraft dealer. Tr. pp. 111-12. ABC asserts that, even if XYZ were a dealer, its purchase is still

not taxable because the sale was an isolated one by Blow, a private individual who is not an aircraft dealer. Tr. p. 112. I address each of these arguments, beginning with the question of whether XYZ or Blow was the seller of the aircraft.

Was XYZ or Blow The Owner & Seller of the Aircraft on 5/20/98

ABC argues that Joe Blow was the real owner and seller of the aircraft. To support this argument, ABC offered the testimony of Doe and Smith. Doe testified about a conversation he had with Blow & Smith, on May 20, 1998, during the closing. That conversation took place at XXX's Illinois office. Doe testified that, after he and Smith saw that XYZ was named as the seller on the FAA bill of sale, and named as the owner of the aircraft on the title report XXX had requested and obtained regarding the aircraft, they both asked Blow about the aircraft's ownership. Doe testified that he then learned that Blow was the real owner of the aircraft, and that Blow put the aircraft in the corporation's name for liability and tax reasons. Tr. pp. 34-35, 41 (Doe).

Additionally, ABC introduced a copy of a letter Doe identified as having been written by Blow, and that Blow sent to him after Doe contacted Blow to obtain documentation regarding Blow's claimed ownership of the aircraft. Taxpayer Ex. 6. That letter, dated 8/30/99, expresses substantially the same out-of-court statements that Doe testified that Blow made at the closing. Again, however, both the oral and written statements of Blow were objected to at hearing as being hearsay. Tr. pp. 35-41, 46-49 (Doe) 96 (Smith). The Department's hearsay objections were sustained, and such testimony and the letter were not admitted for the truth of the matters asserted. *Id.*

The truth of Blow's statements in his 8/30/99 letter to Doe and ABC, moreover, are patently inconsistent with much of the documentary evidence admitted at hearing,

including documents ABC offered into evidence. Indeed, several documents included in Taxpayer Exhibit 4 demonstrate the unreliability of Blow's 8/30/99 letter to ABC, in which Blow states that he, and not XYZ, owned and sold the aircraft when ABC purchased it on 5/20/98. Page 5 of Taxpayer Exhibit 4 is a copy of a Set-Aside Statement between XYZ and XYZ, Inc., which provides:

This form will serve as notice that the aircraft bill of sale executed 12/22/97, filed with the Federal Aviation Administration and pending filing, showing the seller as XYZ Sales, Inc., and the purchaser as XYZ, Inc. [sic] should be declared null and void as the sale was never consummated.

The purchaser hereby also disclaims and [sic] right, title or interest they may have in aircraft N236RM, Beach, Bonanza A36TC, serial #EA-43, as evidenced by the bill of sale or any other pertinent documents transferring title into the purchaser's name.

Taxpayer Ex. 4, page 5.¹ That agreement was submitted to the FAA, and recorded by it on 3/9/99. *Id.*

If, in fact, the statements in Blow's 8/30/99 letter to Doe and ABC were true, then why didn't Blow say the same thing to the FAA? Why didn't Blow tender to the FAA documents showing that he (Blow) was the real owner of the aircraft on 5/20/98? At a minimum, if the facts asserted in Blow's 8/30/99 letter were true, then the title trail of the aircraft was certainly in need of correction. Instead, when Blow had a chance, after the sale to ABC, to notify the FAA of the true and correct owner of the aircraft at the time it was sold to ABC, Blow submitted documents that substantially repeated the fact that was clearly stated on the 5/20/98 bill of sale — that it was XYZ that owned the aircraft on the

¹ This statement corrects the error presented in the second title history search paid for by ABC, which, at first blush, seems to show that XYZ, Inc. was the title-holder of the aircraft on the date ABC purchased it. Taxpayer Ex. 13, p. 2.

date ABC purchased it. Taxpayer's own exhibit strongly corroborates the Department's presumptively correct determination that XYZ sold the aircraft to ABC on 5/20/98.

ABC suggested at closing argument, however, that Blow "scammed" ABC and the State of Florida by his statements at closing, since if XYZ was a dealer it should have collected Florida sales tax when it sold the aircraft to ABC. Tr. pp. 116-17. It argues that the Department should not allow Blow to scam the State of Illinois as well, by making ABC pay use tax unjustly. *Id.* p. 117. But where the retailer does not fulfill its statutory obligation to collect use tax from a purchaser, Illinois is fully entitled to seek payment of that use tax directly from a purchaser for use in Illinois. Town Crier, Inc. v. Department of Revenue, 315 Ill. App. 3d 286, 291, 733 N.E.2d 780, 784 (1st Dist. 2000). There is nothing unjust about collecting use tax from a retail purchaser of property for use in Illinois. 35 **ILCS** 105/10 (purchasers of motor vehicles and aircraft for use in Illinois, from an out-of-state retailer, must file a return and pay use tax within 30 days of their purchase). More importantly, the ultimate incidence for Illinois use tax falls on the user. Brown's Furniture, Inc. v. Wagner, 171 Ill. 2d 410, 418, 665 N.E.2d 795, 800 (1996).

ABC's argument that ABC was somehow scammed here similarly focuses on its suggestion that its purchase was not at retail because it *thought* that it was purchasing the aircraft from a private individual. The evidence tends to corroborate that ABC may have been under that impression at the beginning of its investigation of the aircraft. But by the time of the closing, ABC had actual notice that XYZ had been the aircraft's title-holder since 1996, and that that corporation — and not Joe Blow — was named as the aircraft's seller on the prepared FAA bill of sale. Taxpayer Ex. 3 (copy of title report prepared for closing); Taxpayer Ex. 4, p. 6 (copy of FAA bill of sale form).

Nor do the circumstances surrounding Blow's alleged statements at closing lead me to conclude that ABC, through its agent, Doe, actually believed them. Doe testified that he made it known to Smith and to Blow, at the closing, that ABC did not want to buy a plane from a retailer, because that would mean that it would have to pay use tax. Tr. pp. 27, 33-35 (Doe). If Doe's and Smith's testimonies are to be believed, then Blow, upon being so advised, must have known that he stood to either make a \$200,000.00 sale, or potentially lose it. At that point, Doe indicated that Blow told him and Smith, in effect, not to believe what was printed on both the title report and the bill of sale, but to believe, instead, his (Blow's) words. Indeed, one perfectly rational explanation for Blow's oral statements at the closing — assuming they were, in fact, made — is that they were puffery by an agent of the seller, and were made to placate a purchaser that began to exhibit cold feet when it came time to close the deal.

On the other side of the table, once ABC saw that the title report and bill of sale showed that a corporation that chose to call itself XYZ Sales, Inc. was the owner and seller of the aircraft, ABC must have known that its desire to purchase an aircraft from an individual could not be satisfied by concluding this particular transaction. At that point, it too had a choice. It could either walk away from the purchase and look for an aircraft being sold by an individual — or it could purchase the plane and be prepared to testify, if ever questioned, that the bill of sale that it signed and had recorded with the FAA did not, in fact, accurately identify the parties to the agreement. According to Doe and Smith's testimonies, and from the evidence adduced at hearing, ABC made the latter choice. But I do not believe Doe and Smith when they testified, in effect, that they

believed Blow's words instead of the written conveyance and other documents each reviewed at the closing.

There is another reason why I reject ABC's claim that it was scammed by Blow's statements and actions at closing. Doe testified that, at the closing, Blow said that he kept title of the aircraft in a corporation for tax and liability purposes. Tr. pp. 34-35 (Doe). Now, if Blow was telling the truth when he said that he (Blow) owned the aircraft, then the written statements he (Blow) made to the FAA, as XYZ's agent, regarding XYZ's ownership of the aircraft, were not true. The same must be the case for any other written statements that Blow might have made when he described XYZ as the owner of the aircraft to any state or federal agency, or to any corporation regarding the depreciability, taxability, insurability, etc. of the aircraft.

Thus, if Doe, and therefore ABC, really thought that Blow owned the aircraft, then it must have also known that, to limit his potential tax and other personal liabilities arising from his individual ownership and/or use of the aircraft, Blow was making false written statements to others to conceal the true ownership of that highly regulated item of property. Yet after receiving such information at the closing, ABC knowingly went along with Blow's false concealment of the truth — to the extent that such false concealment actually occurred — by signing the FAA bill of sale, and by having that instrument recorded with the FAA. If, indeed, Blow was concealing the aircraft's true ownership to perpetrate some type of scam, ABC materially and knowingly assisted Blow by maintaining that concealment. Again, I do not believe that there was any scam involved in this transaction, but if there was, ABC was a willing participant and not a dupe.

Finally, by signing the bill of sale showing that XYZ was the person that sold it the aircraft, and then submitting that bill of sale for recordation with the FAA, ABC acted as though it accepted the truth of such statements, which it now characterizes as erroneous or mistaken. In that way, ABC ratified that it purchased the aircraft from XYZ, and it should not now be allowed to claim that the material facts stated on that recorded document were in error. Doe's own acts, as ABC's agent, of signing the bill of sale and submitting it to the FAA for recordation, constitute admissions by ABC that XYZ was the seller of the aircraft. That is, they are prior acts by ABC or on its behalf that are inconsistent with ABC's claim at hearing that Blow, and not XYZ, was the owner and seller of the aircraft. In re Cook County Treasurer, 166 Ill. App. 3d 373, 379, 519 N.E.2d 1010, 1014 (1st Dist. 1988) *aff'd* 131 Ill. 2d 541 (1989).

Was XYZ a Retailer?

The next fact issue is whether XYZ was a retailer. ABC argues that it was not, and supports that argument through Doe's and Smith's testimonies regarding Blow's hearsay statements at the closing, and through Blow's 8/30/99 letter. Taxpayer Ex. 6. Additionally, ABC offered circumstantial evidence to show that XYZ was not a retailer. That evidence consisted of Doe's testimony and a letter from an agent of "Trade-a-Plane," an aircraft advertiser. Taxpayer Ex. 12; Tr. pp. 70-72 (Doe). The letter provided that the paper's records showed that no classified ads had been placed for publication in that paper by XYZ, and that those same records showed that ads had been placed by "Joe Blow." Taxpayer Ex. 12. Doe also testified that he searched the FAA's web site to see whether Joe Blow Aircraft, Inc., XYZ, Inc., and/or XYZ Sales, Inc. were registered with that agency as aircraft dealers. Taxpayer Ex. 10; Tr. pp. 64-67 (Doe). After performing

that search, Doe printed out the results, which revealed that the agency had no records that any of those entities were registered as aircraft dealers. Taxpayer Ex. 10. The print-outs were all dated 4/19/04, which is to say, that was the date Doe printed the results of his searches. *Id.*

The last items of circumstantial evidence ABC offered on this issue include records and Smith's opinion testimony regarding the extent of the aircraft's use before ABC purchased it. Specifically, Smith testified that the aircraft had been used for approximately 250 hours during the approximately 18-month period before ABC purchased it. Tr. pp. 97-98 (Smith). He testified that each hour of use would depreciate the value of the aircraft by \$35. *Id.* pp. 99-102 (Smith). He opined that it would be very unusual for an aircraft dealer to reduce the potential resale value of an aircraft held for resale, by using it for the number of hours this aircraft had been used. *Id.* p. 102 (Smith).

After ABC rested, the Department offered a letter to it, dated 11/10/99, from a disclosure officer of the Florida Department of Revenue ("FDOR"). Tr. pp. 103-04. That letter stated, in pertinent part, "XYZ Sales, Inc. is registered for Sales and Use Tax as an Aircraft Dealer, SIC: 5599. ... We have no record that shows sales tax was paid on any particular aircraft sold by any aircraft dealer. Sales are reported to the Department on an aggregate basis." Department Ex. 3. Notwithstanding its introduction under the certificate of the Director, the letter from the FDOR is not a department record. That is to say, it does not consist of the "books, papers, records ... [or] memoranda of the Department, or parts thereof" 35 ILCS 120/8. Instead, it is a written statement by an officer or employer of the FDOR, an out-of-court declarant. The declarant's out-of-court written statement, moreover, was offered to prove the truth of the matter asserted, that is,

it was offered to prove that XYZ was, in fact, a retailer. Thus, the FDOR letter is hearsay, but it was admitted without any objection. Tr. p. 104.

When hearsay evidence is admitted without an objection, it is to be considered and given its natural probative effect. Jackson v. Department of Labor, 105 Ill. 2d 501, 508, 475 N.E.2d 879, 883 (1985). With regard to this particular fact issue, I conclude that the FDOR's statement that XYZ was registered with it as an aircraft dealer is entitled to considerable weight. First, the letter constitutes evidence of a type that is commonly relied upon by reasonably prudent men in the conduct of their affairs. That is the statutory standard for what the Illinois Administrative Procedures Act ("IAPA") treats as being "reliable" hearsay. 5 ILCS 100/10-40(a).²

The letter constitutes reliable hearsay because it is authored by an agent of the FDOR, the agency that, under Florida law, is charged with administering the tax acts that require the registration of "[e]very person desiring to engage in or conduct business in [Florida] as a dealer" Fla. Stat. § 212.18(3)(a) (1998). Further, the FDOR's statement that XYZ is registered as an aircraft dealer is not the type of agency determination that involves interpretation or adjudication. Rather, the statement involves a ministerial duty that requires, at most, a review of the agency's records of registered aircraft dealers, and a communication to the Department as to whether XYZ was included in such records. *See Steward v. Crissel*, 289 Ill. App. 3d 66, 69-71, 681 N.E.2d 1040, 1042-432 (1st Dist. 1997) (discussing why the latter type of record is more reliable than the former).

² Section 10-40(a) of the IAPA provides: "Irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The rules of evidence and privilege as applied in civil cases in the circuit courts of this State shall be followed. Evidence not admissible under those rules of evidence may be admitted, however, (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs." 5 ILCS 100/10-40(a).

Finally, Doe confirmed that the letter was evidence of a type that a reasonable person would rely in the conduct of its business affairs when he testified that he, too, tried to ascertain from the State of Florida whether XYZ, or Blow, was registered as an aircraft dealer. *See* Tr. pp. 45, 107-08 (Doe). Thus, Doe also knew what the auditor knew — that the reasonable course of action to take when presented with a question as to whether a particular person is a retailer, is to ask the tax agency in the state in which the person is located. The critical problem with the way ABC approached the question, however, is that it sought information from the FDOR regarding XYZ’s status only *after* ABC purchased the aircraft, when the Department was auditing its purchase of the aircraft. *See* Tr. pp. 59-61 (Doe), 107-08 (Smith).

The evidence ABC offered on the issue of whether XYZ was a retailer, on the other hand, is not sufficient to rebut the Department’s *prima facie* correct determination that XYZ was a retailer. Doe’s and Smith’s testimony regarding Blow’s statements at the time of the closing, and the letter later written by Blow when ABC was contemplating registering the plane in Illinois, are both rank hearsay. Blow’s out-of-court statements, moreover, and regardless whether written or oral, are not hearsay of the reliable sort. Specifically, prudent purchasers do not ordinarily accept as true oral, or after-the-fact written, statements that contradict material parts of agreement, and which material parts are included on a writing that both the buyer and seller signed to commemorate the transaction. *See* 17A Am. Jur. 2d *Contracts* § 208 (“The identity of the parties to a contract is, as a general rule, a ‘material’ part of the contract, as an element for allowing the rescission of the contract, [footnote omitted] particularly where the mistake is induced by fraud or imposition.”); 810 **ILCS** 5/201(1), (3).

Additionally, the circumstantial evidence ABC offered to show that XYZ was not a retailer does not persuade. That XYZ might not have purchased classified ad information in a particular newspaper does not mean that it did not engage in business as a retailer. Nor do I find persuasive Doe's testimony that one simply does not sell airplanes without placing an ad in that particular newspaper. *See* Tr. pp. 16-17. Further, the letter from "Trade-a-Plane" does not reveal how the publisher conducted its search, how long it kept such records, what information the publisher ordinarily received and retained from an advertiser, etc. Similarly, the evidence ABC offered regarding Doe's search of the FAA database to see whether XYZ was registered as an aircraft dealer with that agency shows that Doe searched the database immediately before the hearing date. *See* Taxpayer Ex. 10 (showing that the exhibit pages were printed on 4/19/04). Yet this sale occurred in May of 1998, almost six years before ABC's search of the FAA web site. Such evidence does not support a conclusion that XYZ was not a retailer at the time ABC purchased the aircraft.

Finally, I reject ABC's argument that its purchase was not from a retailer because a retailer would not use its inventory of goods held for resale as much as this aircraft was used before ABC purchased it. *See* Tr. pp. 97-102 (Smith). The evidence ABC offered to support this particular argument, in fact, proves too much. That the aircraft was used extensively before ABC acquired it, when it was titled in the name of a corporation, just as strongly suggests that the aircraft was used for business purposes, instead of being used by an individual, for personal use. ABC's argument, moreover, seems to presume that a corporation may conduct only one business or activity, and no others. *But see, e.g., Mobil Oil Corp. v. Johnson*, 93 Ill. 2d 126, 134-35, 442 N.E.2d 846, 850 (1982) ("It

matters not that the seller holds himself out as a wholesaler [citation omitted] nor that he is engaged in a business not typically associated with retail sales. [I]f one purchases a product for use or consumption from a seller who is in the business of selling that product, one has purchased the product at retail from a retailer for purposes of the Retailers' Occupation Tax Act and the Use Tax Act.”).

Regardless how or the extent to which XYZ might have used the aircraft during the period before ABC purchased it, what matter is the seller's status as a retailer. 35 ILCS 105/2; Mobil Oil Corp., 93 Ill. 2d at 134-35, 442 N.E.2d at 850. Here, the evidence shows that the Department made a prima facie correct determination that XYZ was a retailer, and that its determination was based on the written notification from the State in which XYZ conducted business that XYZ was registered with it as an aircraft dealer. Department Exs. 1-2.

Conclusion:

ABC has not introduced documentary evidence sufficient to rebut the Department's prima facie correct determinations that XYZ Sales, Inc. was a retailer, and that the transaction whereby ABC purchased an aircraft for use in Illinois from XYZ Sales, Inc. was a purchase at retail. I recommend, therefore, that the Director finalize the NTL as issued, with penalties and interest to accrue pursuant to statute.

Date: 7/13/2004

John E. White
Administrative Law Judge