

UT 11-04

Use Tax

Issue: Use Tax Assessment On Boat Purchase

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

THE DEPARTMENT OF REVENUE)	Docket No.	XXXXXX
OF THE STATE OF ILLINOIS)	Account No.	XXXXXX
v.)	NTL No.	XXXXXX
JOHN DOE,)	John E. White,	
Taxpayer)	Administrative Law Judge	

RECOMMENDATION FOR DISPOSITION

Appearances: John Sheldon, Foreman Friedman, PA, appeared for John Doe; Shepard Smith, 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 (John Doe or Taxpayer). The NTL assessed Illinois use tax to John Doe regarding the purchase of a watercraft for use in Illinois. Taxpayer protested the NTL and asked for a hearing. In a pre-hearing order, the parties identified the issues as whether Taxpayer owes Illinois use tax regarding the purchase and use of the property in Illinois; whether the Department measured the tax base correctly; and whether the late filing and late payment penalties assessed should be abated for reasonable cause.

The hearing was held at the Department's offices in Chicago. 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

applicable amounts of tax and penalties stated on the NTL be revised to take into account the correct selling price of the watercraft, and that it be finalized as so revised.

Findings of Fact:

1. On or about February 26, 2008, a bill of sale was prepared to document the sale of a 1988 Hatteras yacht by XYZ Business to “John Doe DBA ABC Business[.]” Taxpayer Ex. 3 (copy of bill of sale without buyer’s signature); Department Ex. 2, p. 4 (copy of bill of sale with buyer’s signature). The bill of sale specifically identified the yacht using its registration number of XXXXX, and its hull identification number of XXXXX. Department Ex. 2, p. 4.
2. XYZ Business is a retailer of watercraft. *See* Department Ex. 2, p. 4.
3. John Doe signed that bill of sale as the buyer, using his name, followed by the handwritten words, “DBA ABC Business.” Department Ex. 2, p. 4. The buyer’s address is listed as Anywhere USA. *Id.*
4. The purchase price stated on the bill of sale is \$. Department Ex. 2, p. 4.
5. On the same date the bill of sale was signed, a United States Coast Guard form titled, Application For Initial Issue, Exchange, Or Replacement Of Certificate Of Documentation; Redocumentation (hereafter, Coast Guard form), was completed. Taxpayer Ex. 4; Department Ex. 2, pp. 5-6 (copy of completed Coast Guard form); *see also generally* 46 CFR §§ 67.1 – 67.550 (federal regulations regarding documentation of vessels).

6. The Coast Guard form included different sections, and many of those sections allowed preparers to check applicable boxes to report facts regarding the nature of the owners and the vessel. Department Ex. 2, pp. 5-6.
7. The completed Coast Guard form identified the new name of the vessel that was the subject of the bill of sale as the “XXXX.” Department Ex. 2, pp. 4, 5 (§§ A-B).
8. The form named John Doe as the managing owner of the XXXXX, and identified his address as Anywhere USA. Department Ex. 2, p. 5 (§§ C-D). The form named Kristin John Doe as the other owner of the XXXXXX. *Id.* (§ E).
9. The form had the box checked to show that the XXXXXX was owned “BY ONE OR MORE INDIVIDUALS[.]” Department Ex. 2, p. 5 (§ G). That section had six other boxes available to be checked, depending on the type of owning entity. *Id.*
10. Both John Doe and Jane Doe signed § K of the form, which provided as follows:

K. CERTIFICATION: I (WE) CERTIFY THAT:		
(A) I AM (WE ARE) A CITIZEN(S) OF THE UNITED STATES AND LEGALLY AUTHORIZED TO EXECUTE THIS APPLICATION IN THE CAPACITY SHOWN;		
(B) THAT THE VESSEL(S) TO WHICH THIS APPLICATION APPLIES;		
(i) <input type="checkbox"/> HAS (HAVE) BEEN MARKED OR <input checked="" type="checkbox"/> WILL BE MARKED IN ACCORDANCE WITH THE DIRECTIONS IN THE INSTRUCTION SHEET (CG-1258-A) FOR THIS APPLICATION;		
(ii) WILL AT ALL TIMES REMAIN UNDER THE COMMAND OF A U.S. CITIZEN, UNLESS DOCUMENTED SOLELY WITH A RECREATIONAL ENDORSEMENT.		
(iii) WILL NOT BE OPERATED IN A TRADE NOT AUTHORIZED BY THE ENDORSEMENT(S) ON THE CERTIFICATE(S) OF DOCUMENTATION;		
(iv) HAS NOT BEEN REBUILT SINCE LAST DOCUMENTATION		
(v) THE VESSEL IS		
<input checked="" type="checkbox"/> NOT TITLED UNDER A STATE OR <input type="checkbox"/> IS TITLED UNDER THE LAWS OF _____		
(C) THE NAME(S) OF THE VESSEL(S) WILL NOT BE CHANGED WITHOUT APPROVAL FROM NATIONAL VESSEL DOCUMENTATION CENTER; AND		
(D) (WE) WILL PROMPTLY NOTIFY THE NATIONAL VESSEL DOCUMENTATION CENTER UPON A CHANGE IN ANY OF THE INFORMATION OR REPRESENTATIONS IN THIS APPLICATION.		
PRINTED OR TYPED NAME	SIGNATURE	CAPACITY (E.G., OWNER, AGENT, TRUSTEE, GENERAL PARTNER, CORPORATE OFFICER)
John Doe	_____	Managing Owner

Jane Doe

Owner

DATE: 2/26/08

Department Ex. 2, p. 6 (§ K).

11. The Coast Guard form provided that the XXXXXX's hailing port, which was "TO BE MARKED ON THE VESSEL" was Chicago, Illinois. Department Ex. 2, p. 5 (§ F). It also provided that the primary service for which the XXXXXX would be used was recreational. *Id.*, p. 6 (§ I).
12. After the Coast Guard form was prepared and submitted, the Coast Guard issued a Certificate of Documentation for the XXXXXX, publicly identifying John Doe and Jane Doe as its owners. Department Ex. 2, pp. 6,¹ 7 (copy of print-out of data from Coast Guard Vessel Documentation database, dated October 9, 2009).
13. The XXXXXX was brought into Illinois within 30 days from the date of its purchase in Florida. Department Ex. 1, p. 2; Hearing Transcript (Tr.) pp. 32-33 (John Doe). It has been kept at a Chicago area harbor since then. Department Ex. 1, p. 2; Taxpayer's Post-Trial Brief (Taxpayer's Brief), p. 3.

¹ On the second page of the Coast Guard form, the following language is included with the agency's privacy statement, regarding information reported on the form:

2. The principal purposes for which this information is to be used are:
 - (1) to determine citizenship of the owner of the vessel for which application for documentation is made; and
 - (2) to determine eligibility of the vessel to be documented with the trade endorsement sought.
3. The routine uses which may be made of this information include release to law enforcement officials, to the general public under Freedom of Information Act, and to publish information about U.S. Documented vessels.
4. Disclosure of the information requested on this form is voluntary, however, failure to provide the information requested will result in denial of the application for documentation, which may prevent the owner from operating the vessel(s) in a specified trade.

Department Ex. 2, p. 6.

14. The Department conducted an audit of watercraft physically present within Illinois, and compared such watercraft with returns filed with the Department and with registration forms filed with the Illinois Department of Natural Resources. Department Ex. 1, p. 2 (copy of Audit Narrative). Glen Phillips, since retired, conducted the audit. *Id.*; Tr. p. 42 (testimony of audit supervisor Dan Olivero (Olivero)).
15. Based on the best available information, the Department's auditor made certain determinations about the purchase of the XXXXXX on February 26, 2008. Department Ex. 1, pp. 2, 3 (copy of auditor prepared use tax return Phillips prepared regarding audit).
16. As a result of the audit, the Department determined that John Doe purchased and owned the XXXXXX on February 26, 2008, and that he had failed to file an Illinois return to report that purchase for use in Illinois. Department Ex. 1, p. 3 (copy of the Audit Correction Determination of Tax Due).
17. The auditor determined that John Doe brought the XXXXXX into Illinois on the date it was purchased. *See* Department Ex. 1, p. 3; Department Ex. 2, p. 2.
18. The auditor also determined that the selling price John Doe paid for the XXXXXX was \$1,350,000. Department Ex. 2, p. 3. The auditor determined this selling price based on the best available information, after receiving no information from John Doe about the actual selling price for the vessel. Department Ex. 2, p. 2; Tr. pp. 54, 56-57 (Olivero).

19. The Department thereafter issued an NTL to John Doe, which assessed tax in the amount of \$94,500, a late filing penalty in the amount of \$250, a late payment penalty in the amount of \$18,900, plus interest. Department Ex. 1, p. 4 (copy of NTL).
20. During 2008, ZZZ Associates, Inc. (ZZZ ASSOCIATES), a corporation, conducted business as ABC Business (JKL BUSINESS). Taxpayer Ex. 1 (copy of Illinois Secretary of State registration certificate to ZZZ ASSOCIATES); Taxpayer Ex. 2 (copy of Certificate of Registration issued by the Department to ZZZ ASSOCIATES).
21. In addition to selling motor vehicles, JKL BUSINESS also occasionally sold watercraft at retail. Taxpayer Ex. 5 (copies of three bills of sale documenting retail sales of watercraft by JKL BUSINESS to purchasers, and accompanying forms ST-556, Sales Tax Transaction Returns, JKL BUSINESS prepared to report each such retail sale of watercraft).

Conclusions of Law

The Illinois Use Tax Act (UTA) imposes a tax “upon the privilege of using in this State tangible personal property purchased at retail from a retailer” 35 ILCS 105/3. Because it is relevant to the main fact question at issue, it is important to note that the statutory definition of use generally does not include “the sale of such property in any form as tangible personal property in the regular course of business” 35 ILCS 105/2; 86 Ill. Admin. Code § 130.120(c). In other words, a retailer’s purchase of tangible personal property that is placed into the retailer’s inventory of property for resale is ordinarily not a “use” that would be subject to use tax that a retailer would owe.

The UTA was enacted as a complement to the Retailers’ Occupation Tax Act (ROTA), to prevent the evasion of tax monies that occurred when retail purchasers went

outside of Illinois to purchase goods, and to thereby protect the local retail merchant against diversion of his business to out-of-state sellers. Turner v. Wright, 11 Ill. 2d 161, 170, 142 N.E.2d 84, 89 (1957). The use tax is imposed on the purchaser-user of the property for the privilege of using, in Illinois, property purchased at retail, regardless of where the sale occurred. 35 ILCS 105/3; Weber-Stephen Products, Inc. v. Department of Revenue, 324 Ill. App. 3d 893, 898, 756 N.E.2d 321, 324-25 (1st Dist. 2001). The UTA makes the retailer a collector of the tax insofar as Illinois purchases are concerned (35 ILCS 105/3-45), but the primary liability for the tax is incurred by the person who purchases for use. Klein Town Builders v. Department of Revenue, 36 Ill. 2d 301, 303, 222 N.E.2d 482, 484 (1967). Thus, when a person purchases property from an out-of-state retailer for use in Illinois, § 10 of the UTA requires the purchaser to file a return to report the purchase and to pay the appropriate amount of tax. 35 ILCS 105/10.

The Illinois General Assembly incorporated into the UTA certain provisions of the ROTA. 35 ILCS 105/12. Among them is § 5 of the ROTA, which provides that, in the event a required return is not filed, the Department shall determine the amount of tax due using its best judgment and information. 35 ILCS 120/5. It also provides that, under such circumstances, the Department's determination of tax due constitutes prima facie proof that tax is due, and in the amount determined by the Department. *Id.* In this case, the Department established its prima facie case when it introduced a copy of the NTL, under the certificate of the Director. Department Ex. 1, p. 3; 35 ILCS 105/12; 35 ILCS 120/5. That exhibit, without more, constitutes presumptive proof that Taxpayer owes Illinois use tax in the amount determined by the Department. 35 ILCS 105/12; 35 ILCS 120/5; Copilevitz v. Department of Revenue, 41 Ill. 2d 154, 156, 242 N.E.2d 205, 206-07

(1968); Henderson v. Department of Revenue, 30 Ill. 2d 451, 453, 197 N.E.2d 18, 19 (1964).

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

Issue 1: Who Purchased and Owned the XXXXXX on February 26, 2008

The primary dispute here requires a determination of the identity of the purchaser/owner of the XXXXXX. The identification of the purchaser in a particular sale is a question of fact. *See e.g.* JB4 Air LLC v. Department of Revenue, 388 Ill. App. 3d 970, 977, 905 N.E.2d 310, 316 (2d Dist. 2009) ("In the present case, ... the identity of the purchaser was undisputed and there was no intermediary. The parties stipulated that JB4 acquired the airplane for \$350,000."). Here, the Department determined that John Doe purchased the vessel. Department Ex. 1. That factual determination is presumed correct. 35 ILCS 105/12; 35 ILCS 120/5. To rebut that particular determination, John Doe was obliged to offer documentary evidence, closely associated with books and records, to show that he was *not* the purchaser. Copilevitz, 41 Ill. 2d at 157-58, 242 N.E.2d at 207; Balla, 96 Ill. App. 3d at 296, 421 N.E.2d at 238.

Before going further, it is necessary to comment briefly about certain evidence offered at hearing, and corresponding arguments made by counsel in their briefs. In his audit comments, Phillips determined that, even if ZZZ ASSOCIATES had purchased the

XXXXXX, it would still be subject to Illinois use tax on that purchase, since it had made an interim use of the vessel for more than 18 months. Department Ex. 1, p. 2. At hearing, the parties' respective counsel asked Olivero, the audit supervisor witness, questions regarding this determination, and both parties made arguments on this point within their respective briefs.

The first task in resolving whether John Doe owes use tax is to determine whether he purchased and owned the XXXXXX. The Department issued the NTL that is the subject of this case to John Doe. Department Ex. 1, p. 3. Therefore, the only person whose potential liability is at issue is John Doe. If the documentary evidence shows that ZZZ ASSOCIATES — or any person other than John Doe — purchased and owned the XXXXXX, John Doe will have rebutted the Department's prima facie case that he owes Illinois use tax. Thus, any consideration of arguments involving ZZZ ASSOCIATES's potential liability is wholly irrelevant to this contested case. *See 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 [Use Tax] Act.”).

John Doe offered documents at hearing to attempt to show that he was not the person who purchased the XXXXXX. In his initial brief, John Doe argued that the Department may not disregard the documentary evidence showing that ZZZ ASSOCIATES had purchased and resold watercraft as part of its business of selling at retail. Taxpayer's Brief, pp. 4-5 (*citing* Taxpayer Ex. 5). In his reply, John Doe argues that the bill of sale is the best evidence of ownership, and it shows that ZZZ ASSOCIATES is the true owner of the XXXXXX. Taxpayer's Post-Trial Reply Brief (Taxpayer's Reply), p. 1 (*citing* Taxpayer Ex. 3). The Department, on the other hand,

regards the Coast Guard form as the best evidence of ownership. Department's Brief, p. 3.

Two of the documents admitted at hearing contain written statements suggesting that John Doe was conducting business as ZZZ ASSOCIATES or JKL BUSINESS or both. Taxpayer Exs. 3, 10. Specifically, these documents consist of the bill of sale, and a completed Illinois Department of Revenue form CRT-61, Certificate of Resale. Taxpayer Exs. 3 (copy of bill of sale), 10 (resale certificate). On the bill of sale, John Doe's name was printed adjacent to the printed words "DBA ABC Business Anywhere USA (Buyers)." Department Ex. 2, p. 4; Taxpayer Ex. 3. On the Department's copy of that form, Taxpayer's signature was also written adjacent to the hand-written words "DBA ABC Business[.]" Department Ex. 2, p. 4. On the resale certificate, the purchaser of the XXXXXX was identified as "John Doe d/b/a JKL BUSINESS Auto & Truck Sales[.]" Taxpayer Ex. 10. For the reasons which follow, I do not consider the two documents to be credible evidence showing that ZZZ ASSOCIATES, and not John Doe, purchased and owned the XXXXXX.

As the Illinois appellate court has noted, "The designation 'd/b/a' means doing business as' but is merely descriptive of the person or corporation who does business under some other name. Doing business under another name does not create an entity distinct from the person operating the business." Pekin Ins. Co. v. Estate of Goben, 303 Ill. App. 3d 639, 645-46, 707 N.E.2d 1259, 1264 (5th Dist. 1999) (*quoting Duval v. Midwest Auto City, Inc.*, 425 F.Supp. 1381, 1387 (D.Neb.1977), *aff'd*, 578 F.2d 721 (8th Cir.1978)). Here, it is clear that both the Illinois Secretary of State and the Department have authorized ZZZ ASSOCIATES to conduct business as JKL BUSINESS; that is,

they treat ZZZ ASSOCIATES and JKL BUSINESS as the same person. Taxpayer Exs. 1-2; Department Ex. 2, pp. 10-11. But what John Doe wants, at least for purposes of this particular tax dispute, is for the Department to treat him as though he were ZZZ ASSOCIATES, an Illinois corporation, the same person that was issued licenses permitting it to deal in used motor vehicles and to make retail sales of tangible personal property in Illinois.

John Doe, however, offered no evidence to show that he was authorized — either by some agency or by the corporation, itself — to do or conduct business as ZZZ ASSOCIATES or JKL BUSINESS. Department Ex. 2, pp. 10-11. If John Doe really intended to notify the public that he was personally conducting business as JKL BUSINESS, the legislature afforded him the means to do so, via § 1 of Illinois' Assumed Business Name Act (805 ILCS 405/1), which provides:

Sec. 1. Certificate; misrepresentation. No person or persons shall conduct or transact business in this State under an assumed name, or under any designation, name or style, corporate or otherwise, other than the real name or names of the individual or individuals conducting or transacting such business, unless such person or persons shall file in the office of the County Clerk of the County in which such person or persons conduct or transact or intend to conduct or transact such business, a certificate setting forth the name under which the business is, or is to be, conducted or transacted, and the true or real full name or names of the person or persons owning, conducting or transacting the same, with the post office address or addresses of such person or persons and every address where such business is, or is to be, conducted or transacted in the county. The certificate shall be executed and duly acknowledged by the person or persons so conducting or intending to conduct the business.

805 ILCS 405/1; Main Street Development v. DeMicco, 248 Ill. App. 3d 392, 396, 618 N.E.2d 442, 444 (1st Dist. 1993) (referring to 805 ILCS 405/1, and noting that, “under Illinois law a person transacting business under an assumed name is required to file a certificate with the county clerk disclosing the names of the persons owning, conducting or transacting business under an assumed name.”). John Doe offered no such certificates into evidence at hearing. Indeed, other than his mere testimony, he offered no evidence that he owned or was president of ZZZ ASSOCIATES. DeMicco, 248 Ill. App. 3d at 396-97, 618 N.E.2d at 444 (“the record before this court contains no evidence which identifies the nature of the entity called Wilson Builders. There is also no evidence that Guy DeMicco was the owner of Wilson Builders or that he ever transacted business under the assumed name of Wilson Builders.”).

And even more fundamentally, as a matter of Illinois corporate and tax law, John Doe is a different person than ZZZ ASSOCIATES, the corporation. “A corporation is a legal entity that exists separately and distinctly from its shareholders, officers, and directors, who generally are not liable for the corporation's debts.” Fontana v. TLD Builders, Inc., 362 Ill. App. 3d 491, 500, 840 N.E.2d 767, 775 (2nd Dist. 2005). And since the UTA defines “person” to include both “public and private corporations” and “natural individuals” (35 ILCS 105/2), a natural individual is not the same person as either a public or private corporation. JB4 Air LLC, 388 Ill. App. 3d at 974, 905 N.E.2d at 314 (“We read the Use Tax Act in its entirety and determine that it did not intend for ‘individual’ to include limited liability companies, because it uses the terms separately and distinctly.”) (*citing* 35 ILCS 105/2).

The Illinois Secretary of State authorized ZZZ ASSOCIATES, a corporation, to conduct business as JKL BUSINESS. Department Ex. 2, p. 11. There is no evidence admitted showing that it also authorized John Doe, personally, to conduct business as JKL BUSINESS. Similarly, the Department issued a certificate permitting ZZZ ASSOCIATES to make retail sales as JKL BUSINESS. *Id.*, p. 10. JKL BUSINESS's ROT returns do not reflect that John Doe was making retail sales of tangible personal property to purchasers for use or consumption in Illinois. *See* Taxpayer Ex. 5. Instead, they reflect that ZZZ ASSOCIATES, doing business as JKL BUSINESS, was making such retail sales. *Id.* Nor do JKL BUSINESS's bills of sale or letterhead hold out that ZZZ ASSOCIATES or JKL BUSINESS are merely the names by which John Doe, individually, conducts business. Taxpayer Exs. 5-6; 805 ILCS 405/1; DeMicco, 248 Ill. App. 3d at 396, 618 N.E.2d at 444.

For sales tax purposes, moreover, it is unlawful for any person to make retail sales of tangible personal property without first applying for and obtaining a registration certificate authorizing the person to make such sales. 35 ILCS 120/2a. In People v. Parvin, 164 Ill. App. 3d 29, 517 N.E.2d 663 (2nd Dist. 1987), the Illinois appellate court refused to consider the "officers and agents of the registered taxpayer corporation [to be] persons 'engaged in the business of selling tangible personal property at retail' for purposes of the [ROTA]." *Id.* at 32, 517 N.E.2d at 665. Yet here, John Doe demands that the Department do what the court precluded the Department from doing in Parvin. Based on clear Illinois corporate and tax law, I do not recommend that the Director treat a self-described officer of a corporation as though he were the same person as the corporate entity that is registered with the Department, and licensed to make sales of property at

retail.

Further, if ZZZ ASSOCIATES were the person that purchased the XXXXXX, Illinois law required it to make and keep detailed records that would have provided more probative evidence of that fact than did either Taxpayer Exhibits 3 and 10. The Illinois Vehicle Code (Code) regulates new and used dealers of motor vehicles in Illinois. *See* 625 ILCS 5/5-101, 5-102. Dealers of used motor vehicles are required to obtain a license to engage in that business. 625 ILCS 5/5-102. ZZZ ASSOCIATES is the corporation that applied to the Illinois Secretary of State for permission to act as a dealer of used motor vehicles, and received the authority to do so. Department Ex. 2, p. 11; Taxpayer Ex. 1. Section 403.1 of the Code provides that:

Sec. 5-403.1. Inventory System.

- (a) Every person licensed or required to be licensed under the provisions of Sections 5-101, 5-101.1, 5-102 and 5-301 of this Code shall, under rule and regulation prescribed by the Secretary of State, maintain an inventory system of all vehicles or essential parts in such a manner that a person making an inspection pursuant to the provisions of Section 5-403 of this Code can readily ascertain the identity of such vehicles or essential parts and readily locate such parts on the licensee's premises.
- (b) Failure to maintain an inventory system as required under this Section is a Class A misdemeanor.
- (c) This Section does not apply to vehicles or essential parts which have been acquired by a scrap processor for processing into a form other than a vehicle or essential part.

625 ILCS 5/5-403.1; 92 Ill. Admin. Code § 1020.20 (Required Records For Automotive Parts Recyclers Rebuilders, New Vehicle Dealers, Used Vehicle Dealers, Repairers And Out-Of-State Salvage Vehicle Buyers). The introductory paragraph of the Illinois Secretary of State's recordkeeping regulations for motor vehicle dealers refers to this inventory system as the dealer's "police book," since the underlying purpose for requiring such detailed recordkeeping is to try to control vehicle theft. 92 Ill. Admin.

Code § 1020.20.²

In addition to the detailed inventory records ZZZ ASSOCIATES was required to keep pursuant to the Code, ZZZ ASSOCIATES is also required to keep records under the ROTA. Among the minimum records ZZZ ASSOCIATES was required to keep for tax purposes was “A record of the amount of merchandise purchased. To fulfill this requirement, copies of all vendors' invoices and taxpayers' copies of purchase orders must be retained serially and in sequence as to date.” 86 Ill. Admin Code § 130.805(a)(2).

Thus, if ZZZ ASSOCIATES purchased the XXXXXX in February 2008, it should have had available detailed books and records that John Doe, who said he was ZZZ ASSOCIATES's president and owner (Tr. pp. 8, 10 (John Doe)), could have used as evidence at hearing. Both the police book and ZZZ ASSOCIATES's financial books and records would have been particularly probative of the primary issue in this case. ZZZ ASSOCIATES's police book would have shown, among other things, the date it placed the XXXXXX into its inventory of vehicles or watercraft available for sale in February 2008 (*see* 92 Ill. Admin. Code § 1020.20(a)(1)-(2)), and its financial records would have shown that the value of its inventory had increased by a half of a million dollars by the

² The introduction of the Secretary's recordkeeping regulations for dealers provides: Each person or firm licensed pursuant to Sections 5-301 (excluding Scrap Processors), 5-302, 5-101 or 5-102 of the Illinois Vehicle Title and Registration Law (the Act) of the Illinois Vehicle Code (Ill.Rev.Stat. 1987, ch. 95½, pars. 5-301, 5-302, 5-101 and 5-102) is required to maintain for a period of three years subsequent to the acquisition, disposal, wrecking, rebuilding or junking of vehicles or essential parts thereof, a uniform record of such transactions at his principal place of business. Such records shall be kept in a bound ledger or electronic data processing system. The “Police Book” shall be double-entry reflecting the required information at the time of acquisition and at the time of disposal. The required information shall be, but without limitation, as required hereunder.

92 Ill. Admin. Code § 1020.20.

end of that month (*see* 86 Ill. Admin Code § 130.805(a)(2)) — again, *if* ZZZ ASSOCIATES was the person that purchased the XXXXXX.

But the books and records that ZZZ ASSOCIATES was required to keep under the Code, and under the ROTA, were not offered as exhibits at hearing. John Doe was represented at hearing by competent counsel, and I do not consider the absence of such documentary evidence as being caused by an oversight or mistake by John Doe’s counsel. Instead, I infer that the reason why John Doe did not offer detailed records that ZZZ ASSOCIATES was required to make and keep to document that it had purchased the XXXXXX, is because ZZZ ASSOCIATES did not purchase that vessel.

On this point, I want to note that Taxpayer offered into evidence, without objection, an undated letter, printed on what appears to be JKL BUSINESS’s letterhead. Taxpayer Ex. 6. The letter provides, in pertinent part, “To date the following watercraft, motorcycles have been sold by JKL BUSINESS: ...” following which the letter includes a list of eight separate items. The letter continues with the words, “Currently in inventory: ...” followed by a list of 5 items, including a 1988 Hatteras. Taxpayer Ex. 6.

Hearsay evidence received without objection may be given its natural probative weight. Mahonie v. Edgar, 131 Ill. App. 3d 175, 178, 476 N.E.2d 474, 477 (1st Dist. 1985). There was no foundation offered to authenticate the letter as a business record, and John Doe identified the document as having been created the day before the hearing was held. Tr. p. 18 (John Doe). Clearly, therefore, the document was prepared in anticipation of hearing, and cannot be considered a contemporaneous record of ZZZ ASSOCIATES’s inventory on the date the XXXXXX was brought into Illinois in 2008. Just as clearly, the scant information contained within the letter cannot satisfy the detail

required for JKL BUSINESS's police book. *Compare* Taxpayer Ex. 6 with 92 Ill. Admin. Code § 1020.20(a)(1)-(2). Nor does that document detail the value of JKL BUSINESS's inventory during the year John Doe claims that ZZZ ASSOCIATES purchased the XXXXXX. 86 Ill. Admin Code § 130.805(a)(2). Therefore, I give Taxpayer Exhibit 6 no weight at all as evidence that the XXXXXX was, in fact, part of ZZZ ASSOCIATES's inventory of property for sale after its purchase, or as evidence that ZZZ ASSOCIATES purchased that vessel in February 2008.

I also want to briefly discuss Taxpayer Exhibit 10. That document is a copy of the Illinois resale certificate on which John Doe's name is printed before the words, "d/b/a [ZZZ ASSOCIATES] d/b/a/ JKL BUSINESS ..." on a line of the form intended to identify the person who purchased property, for resale, from an Illinois retailer. Taxpayer Ex. 10. While that exhibit was being discussed at hearing, the exhibit bore the original handwritten signature of John Doe, and a copy was substituted for that original. Taxpayer Ex. 10; Tr. p. 34. In his brief, John Doe argued that, "Provided that the statement is correct, the Department will accept a Certificate of Resale as prima facie proof that sales covered thereby were made for resale." Taxpayer's Brief, p. 6. John Doe's use of the document, however, is inconsistent with the intended purpose for such documents. American Welding Supply Co. v. Department of Revenue, 106 Ill. App. 3d 93, 101-02, 435 N.E.2d 761, 767-68 (5th Dist. 1982); 86 Ill. Admin. Code § 130.1405(b).

A resale certificate is the type of documentary evidence that an Illinois retailer is required to keep to protect itself against a claim, by the Department, that it owes tax on the gross receipts it realized from selling property in a sale for which it did not charge the Illinois tax that would properly be due on the gross receipts from such a sale. American

Welding Supply Co., 106 Ill. App. 3d at 101-02, 435 N.E.2d at 767-68; 86 Ill. Admin Code § 130.1405(b). That is why the certificate form itself provides the following statements:

General information

When is a Certificate of Resale required?

Generally, a Certificate of Resale is required for proof that no tax is due on any sale that is made tax-free as a sale for resale. The purchaser, at the seller's request, must provide the information that is needed to complete this certificate.

Who keeps the Certificate of Resale?

The seller must keep the certificate. We may request it as proof that no tax was due on the sale of the specified property. **Do not** mail the certificate to us.

Can other forms be used?

Yes. You can use other forms or statements in place of this certificate but whatever you use as proof that a sale was made for resale must contain

- the seller's name and address;
- the purchaser's name and address;
- a description of the property being purchased;
- a statement that the property is being purchased for resale;
- the purchaser's signature and date of signing; and
- either an Illinois registration number, an Illinois resale number, or a certification of resale to an out-of-state purchaser.

Taxpayer Ex. 10 (emphasis original).

Evidence may be relevant for one purpose and not for other purposes. *See* People v. Lucas, 132 Ill. 2d 399, 429, 548 N.E.2d 1003, 1015 (1989). Here, the Department is not claiming that ZZZ ASSOCIATES owes retailers' occupation tax regarding its sale of the XXXXXX, and that is the only context in which a resale certificate might provide relevant evidence. 35 ILCS 120/2c; 86 Ill. Admin Code § 130.1405(b). Nor, considering that John Doe identified the signed, original certificate at hearing, does it appear that ZZZ ASSOCIATES gave that original to the seller, as would be the case ordinarily. *See*

Taxpayer Ex. 10 (“The seller must keep the certificate”). Further, the statement that John Doe was doing business as ZZZ ASSOCIATES or JKL BUSINESS is not correct. 805 ILCS 405/1; Rock Island Tobacco & Specialty Co. v. Illinois Department Of Revenue, 87 Ill. App. 3d 476, 478, 409 N.E.2d 136, 138 (3rd Dist. 1980) (determining that it was proper for the Department to “disallow certificates which were inaccurate.”). John Doe was not, in fact, doing business as ZZZ ASSOCIATES or JKL BUSINESS, as he cannot demand that he be treated as though he were, simply by placing the letters “d/b/a” between his and ZZZ ASSOCIATES’s names. *See Parvin*, 164 Ill. App. 3d at 32, 517 N.E.2d at 665. In sum, John Doe wants me to read too much into his use of the ambiguous designations “d/b/a” and “DBA” on Taxpayer Exhibits 3 and 10. John Doe and ZZZ ASSOCIATES are different persons, and I do not accept John Doe’s argument that the two documents on which his name was printed and handwritten next to the words “DBA JKL BUSINESS,” or “d/b/a [ZZZ ASSOCIATES,]” prove that ZZZ ASSOCIATES purchased the XXXXXX.

Contrary to John Doe’s position at hearing, the documentary evidence that is most probative on the question of who purchased and owned the XXXXXX on February 26, 2008 is the Coast Guard form. Department Ex. 2, pp. 5-6; Taxpayer Ex. 4. That document unambiguously identifies John Doe and his wife as the owners of the XXXXXX, and it further clearly identifies the owners as being individuals, and not a corporation. Department Ex. 2, pp. 5-6; Taxpayer Ex. 4. John Doe signed the form. The completed form was submitted to the Coast Guard and the Department of Homeland Security, and the information reported on that form is available to the public, pursuant to the federal Freedom of Information Act. *See* Department Ex. 2, pp. 6-7. The form is a

written statement by John Doe, a party to this contested tax case, which is inconsistent with his position at hearing. It is an admission, and constitutes substantive evidence that he, and not ZZZ ASSOCIATES, purchased and owned the XXXXXX on February 26, 2008. 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) (contradictory statements of a party constitute substantive evidence against the party of facts stated).

Although the signed Coast Guard form constitutes an admission, it is an evidentiary admission, and not a judicial admission. Elliott v. Industrial Commission of Illinois, 303 Ill. App. 3d 185, 187, 707 N.E.2d 228, 230 (1st Dist. 1999). “Ordinary evidentiary admissions may be contradicted or explained.” *Id.* (citing M. Graham, Cleary & Graham's Handbook of Illinois Evidence § 802.11, at 616 (5th ed. 1990)). Here, while testifying at hearing, John Doe tried to explain why he signed the completed Coast Guard form, on which he and his wife were identified as the XXXXXX's purchasers and owners. He said, and I quote, “The only way I could get financing on the boat is to put it in my own name. They would not put it in JKL BUSINESS's name.” Tr. pp. 15-16 (John Doe). When asked by counsel who he meant to describe when he used the word “they,” John Doe answered that he meant the bank. Tr. p. 16 (John Doe).

But if the bank that financed the purchase of the XXXXXX required John Doe and his wife to be named as the owners of the XXXXXX on the Coast Guard form, that explanation does not tend to persuade me that ZZZ ASSOCIATES was purchasing the XXXXXX. If there were a written agreement between the bank — the same bank that required the John Does to be named as the XXXXXX's owners — and the purchaser of the XXXXXX, I would not expect the named parties to that agreement to be the bank and

ZZZ ASSOCIATES. I do not understand why, if ZZZ ASSOCIATES were purchasing the vessel, the lender financing the purchase would demand that the object of the loan proceeds be titled to someone other than the purchaser. It is certainly understandable for a lender to ask a corporation's principle shareholders to personally guarantee a loan made to the corporation, but that is not what John Doe described in his testimony. *See* Tr. pp. 15-16 (John Doe). Nor did John Doe offer into evidence any written agreement as documentary evidence that a bank had, in fact, made a loan to ZZZ ASSOCIATES regarding *its* purchase of the XXXXXX. In short, John Doe's testimony on this point does not explain; it confounds. The simplest explanation why a bank would require that John Doe and his wife be publicly identified as the XXXXXX's individual owners on the Coast Guard form was because he and his wife, in fact, were the purchasers and owners of that vessel. I had the opportunity to observe John Doe during his testimony at hearing, and I found his testimony on this issue to be incredible. *See* Fillichio v. Department of Revenue, 15 Ill. 2d 327, 335, 155 N.E.2d 3, 8 (1958).

Finally, it is necessary to comment on Taxpayer Exhibit 7, which consists of copies of printouts of notices posted on the internet advertising the XXXXXX for sale. Taxpayer Ex. 7. The copies that make up that exhibit show that ads were posted on websites operated by the following entities: Craigslist (Taxpayer Ex. 7, p. 1); Sam's Marine (Taxpayer Ex. 7, p. 2); Pier 11 Marina (Taxpayer Ex. 7, pp. 3-4); and Yacht World (Taxpayer Ex. 7, p. 5). The first two of those ads notify persons to contact John either at JKL BUSINESS 000000000, or at XXXXXXXX.net. Taxpayer Ex. 7, pp. 1-2. The next two notify interested persons to contact the website on which the ad was posted. *Id.* pp. 3-5. None of the four ads contain the telephone or fax numbers identified as being

JKL BUSINESS's, on JKL BUSINESS's letterhead. *Compare* Taxpayer Ex. 7 with Taxpayer Ex. 6. Nor do any of those ads refer interested persons to JKL BUSINESS's business address, email address, or to its web site. *Compare* Taxpayer Ex. 7 with Taxpayer Ex. 6. In sum, I do not consider Taxpayer Exhibit 7 to constitute credible evidence that ZZZ ASSOCIATES was attempting to sell the XXXXXX, or that it, and not John Doe, purchased and owned the vessel in February 2008.

I conclude that John Doe has not offered credible evidence, closely associated with regularly kept books and records, sufficient to rebut the Department's prima facie correct determination that he purchased and owned the XXXXXX on February 26, 2008, and owes use tax regarding the use of that property in Illinois.

Issue 2: What Is the Correct Amount of the Tax Base

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

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

35 ILCS 105/2. The NTL assessed tax in the amount of \$94,500, based on a selling price of \$1,350,000. Department Ex. 1, pp. 2-3.

The auditor determined the selling price of what is now known as the XXXXXX based on the selling price of a comparable vessel. Department Ex. 2, p. 2; Tr. pp. 54, 56

(Olivero). The auditor used that selling price after he received no response from Taxpayer regarding his requests for information. Department Ex. 2, p. 2.

At hearing, however, both parties offered into evidence a copy of the bill of sale stating a selling price of \$500,000. Department Ex. 2, p. 4; Taxpayer Ex. 3. Olivero testified that he had no information that would contradict either the selling price set forth on the bill of sale, or John Doe's testimony about the selling price of the XXXXXX. Tr. pp. 55-56 (Olivero).

Where a purchaser has failed to file a return with the Department regarding the purchase of property for use in Illinois, the Department's statutory duty is to use its best judgment and information when determining the correct amount of tax due. 35 ILCS 105/12; 35 ILCS 120/5; Henderson, 30 Ill. 2d at 453, 197 N.E.2d at 19. The information now available to the Department, which includes the bill of sale, shows that the audit determination of the XXXXXX's selling price was incorrect. Department Ex. 2, p. 4; Taxpayer Ex. 3. Based on the documentary evidence admitted at hearing, I conclude that John Doe has rebutted the Department's original determination of the tax base. *Compare* Department Ex. 1, p. 3 *with* Taxpayer Ex. 3. John Doe has established that the selling price for the XXXXXX was \$500,000. Taxpayer Ex. 3; Department Ex. 2, p. 4. The tax assessed, therefore, should be reduced accordingly. Using the same tax rate used during the audit, the correct amount of use tax due is \$35,000. *See* Department Ex. 2, p. 4 ($0.07 * 500,000 = 35,000$).

Issue 3: Whether The Penalties Assessed Should Be Abated for Reasonable Cause

The NTL and correction of returns reflect that the

Department assessed a late payment penalty in the amount of \$18,900, and a late filing penalty in the amount of \$250. Department Ex. 1, pp. 2-3. In the pre-hearing order, the parties identified the final issue as whether the late filing and late payment penalties assessed should be abated for reasonable cause. Before addressing the evidence and arguments offered on that issue, I will first briefly discuss the two penalties assessed.

Section 3-3 of the Uniform Penalty and Interest Act (UPIA) authorizes the imposition of a penalty for failing to file, timely, a return that is required to be filed by a taxpayer. 35 ILCS 735/3-3(a)-(a-10). The late filing penalty is assessed in two tiers, both of which may be imposed. The first tier is measured as 2% of the tax required to be shown due on a return that was required to be filed, after taking into account any tax that was paid on time and any credit that was properly allowable on the date the return was required to be filed, up to a maximum of \$250. 35 ILCS 735/3-3(a-10). The second tier is the greater of 2% of the tax required to be shown due on a return, or \$250. *Id.* The second tier penalty may not exceed \$5,000. *Id.* Here, the Department issued only the first tier late filing penalty of \$250. Department Ex. 1, pp. 2-3.

Section 3-3 also authorizes a penalty “for failure to pay the tax shown due or required to be shown due on a return on or before the due date prescribed for payment of that tax” 35 ILCS 735/3-3(b-20), (c). For returns due on or after 2005, § 3-3(b-20) applies. 35 ILCS 735/3-3(b-20). The penalty imposed by § 3-3(b-20)(2) is measured using a sliding scale that increases the penalty rate from 2% to 20% of the tax due, depending on the time between the due date and the date the tax is paid. 35 ILCS 735/3-

3(b-20)(2). The statute allows for a reduction of the penalty rate to 15% if the taxpayer pays the tax in full not later than 30 days after the Department has provided the taxpayer with an amended return (following completion of an occupation, use, or excise tax audit). *Id.* John Doe made no argument that the penalty rate should be reduced to 15%.

Here, John Doe was required to file a use tax return to report his purchase of the XXXXXX not later than March 31, 2008 (*see* Tr. pp. 32-33 (John Doe)), and the use tax required to be shown due on that return was also due at the same time. 35 ILCS 105/10 (return due “by the last day of the month following the calendar month in which such purchaser makes any payment upon the selling price of such property”); Department Ex. 2, pp. 5-6. The Department issued the NTL in December 2009 (Department Ex. 1, p. 3), and, at least as of the date of the hearing, John Doe offered no evidence to show that he has paid any of the tax due. Nor did John Doe offer evidence to show that he had some credit that was available to apply to the amount of use tax due. Thus, the applicable late payment penalty properly due — when the NTL was issued — was 20% of \$35,000, which is \$7,500. 35 ILCS 735/3-3(b-20)(2); Taxpayer Ex. 3.

But UPIA § 3-3 was amended between the time this contested case was docketed within the Department’s Office of Administrative Hearings and the date of hearing. The 2010 amendments to UPIA § 3-3 were a result of the passage of Public Act 96-1435, pursuant to which the legislature also amended Illinois’ Tax Delinquency Amnesty Act (TDAA), 35 ILCS 745/1 *et seq.* (2010). As a result of the 2010 amendments to the TDAA and to the UPIA, at the time of hearing, § 3-3(j) provided as follows:

(j) If a taxpayer has a tax liability for the taxable period ending after June 30, 2002 and prior to July 1, 2009 that is eligible for amnesty under the Tax Delinquency Amnesty Act, except for any tax liability reported pursuant to Section 506(b) of the Illinois Income Tax Act (35

ILCS 5/506(b)) that is not final, and the taxpayer fails to satisfy the tax liability during the amnesty period provided for in that Act for that taxable period, then the penalty imposed by the Department under this Section shall be imposed in an amount that is 200% of the amount that would otherwise be imposed under this Section.

35 ILCS 735/3-3(j); *see also* 86 Ill. Admin. Code § 520.105(e).³. At hearing, the parties addressed the effect that the 2010 amendments to the TDAA and to the UPIA would have on the amount of the applicable penalties and interest due. *See* Tr. pp. 53, 72-73 (Olivero).

When the hearing in this matter was held, the NTL the Department had previously issued to John Doe was not final. 35 ILCS 105/12; 35 ILCS 120/12. And since the matter proceeded to hearing, John Doe obviously did not exercise his right to take advantage of

³ The applicable regulation adopted to implement the 2010 amendments to the TDAA provided, in part:

(e) Matters Pending in the Department's Office of Administrative Hearings. Matters pending in the Department's Office of Administrative Hearings are not *pending in any circuit court or appellate court or the Supreme Court of this State*. (ITDAA Section 10) Therefore, a tax liability that is being contested before one of the Department's Administrative Law Judges is eligible for the Amnesty Program.

- 1) A taxpayer who wishes to participate in the Amnesty Program with respect to an Eligible Liability at issue in a matter pending in the Office of Administrative Hearings must stipulate to judgment in favor of the Department with respect to that liability on or before November 8, 2010 and pay that liability during the Amnesty Program Period.
- 2) A taxpayer participating in the Amnesty Program under this subsection (e)(2) need not file a return or amended return under subsection (b) with respect to the liability that is the subject of the proceeding, but must specify in the stipulation that it is participating in the Amnesty Program and pay the Eligible Liability to the Department during the Amnesty Program Period.
- 3) A taxpayer that fails to participate in the Amnesty Program with respect to the liability that is the subject of the proceeding will be subject to the 200% Sanction.
- 4) A liability being contested in the Office of Administrative Hearings is an Established Liability, and no refund of the payment is allowed with respect to an Amnesty Issue.

86 Ill. Admin. Code § 520.105(e) (2010).

the 2010 amendments to the TDAA. *See* 86 Ill. Admin. Code § 520.105(e)(10-(2) (2010) (*quoted supra* n.3). Therefore, as a result of the 2010 amendments to UPIA § 3-3 and to the TDAA, the applicable statutory late filing penalty to be assessed against John Doe, in the absence of reasonable cause, is \$500 (35 ILCS 735/3-3(a-10), (j)), and the applicable late payment penalty is 40% of the tax required to have been shown due on the return, which is \$14,000. 35 ILCS 735/3-3(b-20), (j).

Section 3-8 of the UPIA provides that the penalties imposed by § 3-3 “shall not apply if the taxpayer shows that his failure to file a return or pay tax at the required time was due to reasonable cause. Reasonable cause shall be determined in each situation in accordance with the rules and regulations promulgated by the Department.” 35 ILCS 735/3-8. The Department has promulgated a regulation in which it defined reasonable cause and described how it would administer the UPIA. 86 Ill. Admin. Code § 700.400. That regulation provides, “... whether a taxpayer acted with reasonable cause shall be made on a case by case basis taking into account all pertinent facts and circumstances. The most important factor to be considered in making a determination to abate a penalty will be the extent to which the taxpayer made a good faith effort to determine his proper tax liability and to file and pay his proper liability in a timely fashion.” 86 Ill. Admin. Code § 700.400(b); *see also* PPG Industries, Inc., 328 Ill. App. 3d at 22-23, 765 N.E.2d at 40. The regulation further provides that, “[a] taxpayer will be considered to have made a good faith effort to determine and file and pay his proper tax liability if he exercised ordinary business care and prudence in doing so. A determination of whether a taxpayer exercised ordinary

business care and prudence is dependent upon the clarity of the law or its interpretation and the taxpayer's experience, knowledge, and education. ***" 86 Ill. Admin. Code § 700.400(c).

Although the issue was cited by the parties in the pre-hearing order, John Doe offered no evidence at hearing on this issue, and did not include any argument in his brief. After the Department pointed out John Doe's waiver (Department's Brief, p. 7), he made two summary arguments in his reply brief. First, John Doe argues that he "was advised that he did not need to pay [tax] since he is a retailer and the purchase was for resale." Taxpayer's Reply, p. 3. Next, he contends that he should not have to pay penalties because the Department grossly erred in its determination of a selling price that was three times greater than the actual selling price for the XXXXXX. *Id.* While I agree with the Department that John Doe has waived the issue, I address each of John Doe's arguments only to avoid the possibility of remand for consideration of a fact issue on which no evidence was offered at hearing.

The existence of reasonable cause justifying abatement of a tax penalty is a factual determination to be decided only on a case-by-cases basis. Hollinger International, Inc. v. Bower, 363 Ill. App. 3d 313, 334, 841 N.E.2d 447, 465 (1st Dist. 2005). Here, however, John Doe offered no credible evidence that he was notified by anyone that he did not have to file an Illinois return or pay Illinois tax regarding his purchase of the XXXXXX in 2008. *See Tr., passim.* Nor did John Doe exercise ordinary business care and prudence by acting as though he were the same person as ZZZ ASSOCIATES. TLD Builders, Inc., 362 Ill. App. 3d at 500, 840 N.E.2d at 775; Parvin, 164 Ill. App. 3d at 32, 517 N.E.2d at 665. John Doe is not a retailer; ZZZ ASSOCIATES

is. Department Ex. 2, pp. 10-11; Taxpayer Exs. 1-2. John Doe's self-executed assertion that he is (*see* Taxpayer Exs. 3, 10), does not make his behavior reasonable.

Finally, the Department's audit error has nothing to do with whether John Doe timely filed a return or timely paid the use tax due. The auditor attempted to obtain information from John Doe and was unable to do so. By that time, however, late payment and late filing penalties were already due. *Compare* Department Ex. 1, pp. 2-3 *and* Department Ex. 2, p. 2 *with* 35 ILCS 735/3-3(a-10), (b-20). There is no credible evidence in this record showing that John Doe made a good faith effort to determine and file and pay his proper use tax liability regarding the XXXXXX, or that he exercised ordinary business care and prudence when attempting to do so. 86 Ill. Admin. Code § 700.400(c).

Conclusion:

I recommend that the Director revise the NTL to reflect that tax, in the amount of \$35,000, is due from John Doe. The penalties and interest assessed should also be revised to take into account the corrected and revised amount of tax due, and to be consistent with the 2010 amendments to the UPIA and to the TDAA. The amount of the applicable late filing penalty due is \$500, and the amount of the applicable late payment penalty is \$14,000. 35 ILCS 735/3-3(a-10), (b-20), (j). The NTL shall be finalized as so revised, with interest to accrue pursuant to § 3-2 of the UPIA, as also amended by the 2010 amendments to the UPIA and to the TDAA. 35 ILCS 735/3-2(g) (2010).

June 23, 2011

John E. White

Administrative Law Judge