ST 18-07
Tax Type: Sales Tax
Tax Issue: Unjust Enrichment
Unreported/Underreported Receipts (Fraud Application)

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

THE DEPARTMENT OF REVENUE	)	Docket No. XX-ST-XXXX
OF THE STATE OF ILLINOIS	)	Reg. No. XXXXX
v.	)	NTL No. XXXXX
***ABC, INC.*,**	)	John E. White,
Taxpayer	)	Administrative Law Judge

RECOMMENDATION FOR DISPOSITION

Appearances: Michael Coghlan, Law Office of Michael Coghlan, LLC, appeared for *ABC, INC.*; Michael Coveny, Special Assistant Attorney General, appeared for the Illinois Department of Revenue.

Synopsis:

This matter arose after *ABC, INC.* (*ABC* or Taxpayer) protested a Notice of Tax Liability (NTL) the Illinois Department of Revenue (Department) issued to it after conducting an audit of Taxpayer's business for the months of January 2006 through December 2008. The NTL assessed tax, penalties and interest, which included a penalty based on tax amounts the Department determined Taxpayer charged and collected from its customers, and then either failed to refund to its customers, or remit to the Department.

The issues include whether *ABC* owed tax, penalties and interest in the amounts assessed in the NTL. After considering the evidence admitted at hearing, I am including in this recommendation findings of fact and conclusions of law. I recommend that the

NTL be revised as detailed in this recommendation, and that it be finalized as so revised, pursuant to statute.

Findings of Fact:

1. The Department began an audit of Taxpayer in late 2008. Department Ex. 7 (copy of Department letter, dated November 28, 2008, titled, Notice of Audit Initiation) (hereafter, Initiation letter). Eric K[ ] (hereafter, K) conducted the audit. *Id*., p. 2; Hearing Transcript (Tr.), pp. 20-21 (K).
2. *ABC's* business included selling, and financing the sale of, recreational and other vehicles and related products. Department Exs. 8-10 (copies of, respectively, Taxpayer's completed federal forms 1120S for calendar years 2006, 2007, and 2008) (p. 2, Schedule B, line 2 of each return); Taxpayer Exs. 1-3 (copies of, respectively, letters from a senior vice president of *BANK*, dated April 6, 2009, July 15, 2013, and May 24, 2013); Tr. pp. 482-83.
3. Taxpayer was, during the years at issue, registered with the Illinois Secretary of State (SOS) as a loan broker for recreation products, pursuant to the Illinois Loan Brokers Act of 1995, 815 ILCS 175/15-50(b). Taxpayer Ex. 4 (certified copy of Taxpayer's registration with the SOS as a loan broker for 2006-2009); Tr. p. 483 (no objection to Taxpayer's offer of Taxpayer Exhibit 4). Taxpayer brokered financing under the name of *XYZ GROUP*. Taxpayer Exs. 1-3, 22.
4. During the years at issue, Taxpayer was a broker vendor for *BANK*, which is located in *ANYWHERE*, Missouri. Taxpayer Exs. 1-3. In that capacity, Taxpayer originated financing for the purchase of recreational vehicles by customers from various dealers

approved by Taxpayer, which used Taxpayer to find and secure financing for customers. Taxpayer Ex. 1. Also in that capacity, Taxpayer acted as an escrow agent/clearinghouse vendor for *BANK*, and received a fee from *BANK* for the brokerage services Taxpayer performed. Taxpayer Exs. 2-3.

5. The audit period initially covered was January 2006 through and including December 2007, but it was later expanded through December 2008. Department Exs. 1, 7.

6. During the audit, K prepared a Summary Analysis schedule, which summarizes all of the adjustments he determined should be made regarding transactions Taxpayer reported on ST-556 returns it filed during the audit period, as well as regarding transactions Taxpayer did not report on ST-556 returns. Department Ex. 6; Tr. pp. 85-107 (K).

7. The below table reflects the data contained in K's Summary Analysis schedule, and adds numbers at the left to identify the principle audit adjustments made:

	Description		Sch. Ref. or Exam Code	Tax Type & Tax rate	Tax Base	Tax Due
[1]	Non taxed misc. fees ─ used car lot sales	detailed-08	Sch. 4 ST D	ROT/6.25%	$ 18,397	$ 1,150
		projection-06 & 07	Sch. 4 ST M	ROT/6.25%	12,864	804
[2]	Under reported receipts per ST-556/tax accrual/CD invoices		10-100	ROT/6.25%	3,242,928	202,683
[3]	Disallowed sale to Michael L[ ]		10-101	ROT/6.25%	148,848	9,303
[4]	Disallowed discount – ST 556 delivery date changed per CD invoice		Sch. 2D 10-120	ROT/6.25%	11,328	708
[5]	2008 ST 556 all unreported receipts per sample (receipts & fees)	projected over 2008 missing deals in sample	Sch. 4 ST R 10-300	ROT/6.25%	8,016	501
	2008 ST 556 sample – unreported receipts (no misc. fees)	detail 2008	Sch. 4 ST U 10-130	ROT/6.25%	31,728	1,983
		projection-06 & 07	Sch. 4 ST U 10-310	ROT/6.25%	82,608	5,163
[6]	Drive away exceptions	Projection of 08 recip state exceptions	Sch.4 ST A	ROT/6.25%	248,208	15,513
	No DA permit issued	Projection of 08 NR state exceptions	4 ST A NR / 10-340	NR states/6%	23,296	1,456
	IL DL & open returns	2008 sample NR state exceptions	4 ST A / 10-140	NR states/6%	12,330	740
		2008 sample recip state exceptions	4 ST A R/ 10-145	ROT/6.25%	126,125	7,883

[7] Fixed Assets – no tax paid	30-100	U[T]/6.25%	356,848	22,303
		Total Additional Tax Due		$270,190

[Description]		[Sch. Ref. or Exam Code]		[Tax Due]
TOTALS		Adjustment to match STT		(1.00)
Interest	37,233	Total additional interest due through May 17, 2010 (Sch. 2A)		37,105
Late Filing Penalty	3,236	Total additional interest due for late filed ST-556 returns (Sch. 2C)		128
Late Payment Penalty	63,688	Total late payment penalties from STT (Sch. 2B)		54,038
Unjust Enrichment	2,413,245	Total late filing penalties for ST-556 returns (Sch. 2F)		3,236
		Total late payment penalties for ST-556 returns (Sch. 2P)		9,650
		Total civil fraud penalty due at 50% (Sch. 2 CFP)		71,542
[8] Unjust enrichment – Sales tax collected > than sales tax remitted		Sch 2 ILL UJ	Illinois only	2,091
Unjust enrichment – Sales tax collected > than sales tax remitted		Sch 5-2008		440,520
Unjust enrichment – Sales tax collected > than sales tax remitted		Sch 5-2007		1,010,700
Unjust enrichment – Sales tax collected > than sales tax remitted		Sch 5-2006		959,934
All assessed as a penalty				
		Total Additional Audit Liability Due		$2,859,133

Department Ex. 6. Throughout this recommendation, I will refer to the different audit adjustments using the bracketed numbers I have included within the above table.

8. In the initiation letter K sent to Taxpayer, K asked Taxpayer to provide the following documents: 2006 and 2007 federal and state income tax returns; 2006-2008 profit and loss statements; 2008 detail general ledger; 2006-2008 trial balance; 2008 deal jackets; Ebay reports for all vehicle sales; TRP report from Illinois Secretary of State website for all vehicles in the audit period; fixed asset invoices; depreciation schedules and general ledger detail of asset additions; and ST-556 accounting copies. Department Ex. 7; Tr. pp. 20-21 (K). K also received and reviewed Taxpayer's profit and loss statements. Tr. pp. 473-76 (K).

9. Taxpayer produced the requested records regarding what K referred to as the used car side of Taxpayer's business (Tr. p. 21), as well as those regarding what K referred to as the lending or financing side of Taxpayer's business. Tr. pp. 24-25 (K).

10. For each of the audit adjustments K made, he prepared a separate schedule, which the Summary Analysis identifies. Department Ex. 6. Those separate schedules were not offered or admitted at hearing.

11. When he initiated the audit, K had been given a compact disc (CD) containing copies of invoices, which someone he identified as a confidential informant provided to another person at the Department, who gave the CD to K. Tr. pp. 256-59 (K).
12. K used the data contained on the CD as a basis for correcting some of the ST-556 returns Taxpayer filed during the audit period, for determining some transactions that should have been reported as retail sales, and as the sole basis for determining that Taxpayer collected from customers amounts designated to such customers as tax, in excess of the amounts remitted to the Department regarding such transactions. Tr. pp. 85-86, 495-97 (K); *see also* Department Ex. 6.
13. The record does not disclose the identity of the person from whom K obtained the CD. *See* Tr. pp. 256-59 (K). No evidence was offered to authenticate the invoices K said were contained on the CD. *Id*.
14. K acknowledged that the data contained on the CD, and which he relied on when making some of his audit determinations, did not include a letterhead identifying Taxpayer by name, and did not include any signatures of the buyers and/or sellers regarding such invoices. Tr. pp. 158-59 (K).
15. K never identified the person who provided the CD to anyone at the Department. Nor did he ever provide testimony from which it could be inferred that he had personal knowledge of the person who, he said, provided the CD to anyone at the Department.
16. Prior to his audit of Taxpayer, K had no experience auditing a person engaged in business as a loan broker, or as a dealer of recreational vehicles. Tr. p. 186 (K).
17. During the audit, K had access to Taxpayer's bank records, including the escrow account Taxpayer maintained as an escrow agent/clearinghouse vendor for *BANK*

(*see* Taxpayer Exs. 1-3), but he did not review or schedule the amounts of the deposits and withdrawals from its bank accounts. Tr. pp. 191-93, 195, 477 (K). At hearing, K acknowledged that he was unfamiliar with the concept of an escrow account. Tr. pp. 194, 475-77 (K).

18. The Summary Analysis schedule identifies one individual transaction, and several categories of transactions, regarding which Taxpayer filed forms ST-556 with the Department as a retailer, and for which K determined Taxpayer owed Illinois tax. Department Ex. 6. The schedule also identifies different types and amounts of gross receipts attributable to such transactions, and the amounts of tax, penalties and interest due regarding such transactions. *Id*.

19. The Summary Analysis schedule also identifies categories of transactions regarding which Taxpayer did not file forms ST-556 with the Department as a retailer, and for which K determined Taxpayer should have filed such returns as a retailer. Department Ex. 6 (entries for audit adjustment 2); Tr. pp. 87-89, 161-62, 330-32 (K).

20. When performing the audit, K used the year 2008 as a test period, and projected the adjustments he determined for that year to the other years in the audit period. Department Ex. 6; Tr. pp. 86-87, 91-92, 150, 174 (K).

21. During his audit, K obtained a transcript of all of the ST-556 returns Taxpayer filed during 2006 through 2008, in the following numbers: 110 for 2006; 183 for 2007; and 188 for 2008. Tr. pp. 330, 364 (K); Taxpayer Ex. 11 (copy of printout of transcript of Taxpayer's filed ST-556 returns for audit period). At hearing, K was unsure of how many financing transactions Taxpayer conducted, during the audit period, for which Taxpayer did not file a form ST-556. Tr. pp. 347, 361 (K).

22. Each ST-556 return Taxpayer filed with the Department during the years at issue bears a unique identifying number. Taxpayer Ex. 11, *passim*; Tr. pp. 424, 430-31 (K).

23. During the audit, Taxpayer provided K with 111 of its deal jackets for 111 different loan brokerage transactions, which K agreed he would review. Tr. pp. 144, 432-44, 451, 466 (K), 487 (colloquy regarding offer of Taxpayer Exs. 12-21); Taxpayer Exs. 12-20 (respectively, copies of contents of 10 of the 111 deal jackets involving Taxpayer's loan brokerage transactions which Taxpayer provided to K during audit); Taxpayer Ex. 22 (copy of K's schedule of Taxpayer's 111 deal jackets provided for review).

24. K had access to the 111 deal jackets for months, which were kept at a bank at which he reviewed Taxpayer's records. Tr. pp. 144-46 (K). The 111 deal jackets included transactions conducted during each of the years during the audit period. Tr. p. 146 (K). After reviewing the deal jackets, K determined that no tax was due regarding any of the transactions to which the deal jackets pertained. Tr. pp. 146-48 (K).

25. Of the approximately $2.8 million of tax assessed on the NTL, only about $70,000 relates to Taxpayer's business of selling motor vehicles as a retailer. Tr. pp. 125-26, 347-48 (K). The rest relates to the lending side of Taxpayer's business. *Id*.

Facts Regarding Audit Adjustment 1

26. Regarding the adjustments based on "non taxed misc. fees ─ used car lot sales detailed-08[,]" K reviewed all of the ST-556 returns Taxpayer filed to report its sales during 2008, and noted that Taxpayer included a charge on such returns for a documentary fee, but which it did not include when calculating the receipts that were subject to tax. Department Ex. 6; Tr. p. 86 (K). K determined that such fees were

subject to ROT. Department Ex. 6. He determined that Taxpayer's total charges for such fees in 2008 equaled $18,397, and determined that $1,150 in tax was due regarding such charges. *Id*.

27. Regarding the same adjustment for 2006 and 2007, K projected the results of his determination for 2008, but using the lower amount of documentary fee which he saw that Taxpayer charged customers during those years. Department Ex. 6; Tr. pp. 86-87 (K). He determined that Taxpayer's total charges for documentary fees in 2006 and 2007 equaled $12,864, and determined that $804 in tax was due regarding such charges. Department Ex. 6.

Facts Regarding Audit Adjustment 2

28. The adjustments described as "Under reported receipts per ST-556/tax accrual/CD invoices[,]" (hereafter, under reported receipts adjustments) were based on K's review of Taxpayer's records and other information he received from three sources: deal jackets and tax accrual records K received from Taxpayer, through its power of attorney during the audit period; documents he received from *DEF, INC.* (hereafter, *DEF*); and information from the CD. Department Exs. 2, 4-6; Tr. pp. 24-51, 88 (K, and colloquy regarding the proffer and objections regarding Department Exs. 4 and 5).

29. The under reported receipts adjustments involved two types of transactions. The first type involved transactions Taxpayer reported on ST-556 returns Taxpayer filed with the Department, as a retailer, regarding transactions that Taxpayer, at hearing, asserted involved only Taxpayer's provision of finance brokerage services. Department Ex. 2; Taxpayer Exs. 10-11; Tr. pp. 37-38, 330-32, 368-73 (K), 486-87

(colloquy regarding offer of Taxpayer Exhibit 10). K treated such transactions as involving Taxpayer's sales of vehicles at retail. Tr. pp. 330-32 (K); Department Ex. 2, 4-6; Taxpayer Ex. 11.

30. The second type of under reported receipts adjustments involved transactions Taxpayer did not report on forms ST-556 that it filed as a retailer. For these transactions, K determined either that Taxpayer signed a form ST-556 as a purchaser for resale of the vehicle for which Taxpayer claimed to have acted solely as a loan broker, and/or that Taxpayer signed the back of a certificate of origin or title for such a vehicle, and thus, placed itself in the chain of title for the vehicle before title was transferred to a person Taxpayer claims was merely its finance brokerage customer. Tr. pp. 87-89, 158, 161-62 (K); Department Ex. 2 (copies of documents K obtained from *DEF* regarding a transaction involving 2006 Freightliner and 2008 Performax), pp. 4, 8 (respectively, copies of forms ST-556, identifying Taxpayer as the purchaser of the 2006 Freightliner and 2008 Performax for resale), 9-10 (copy of the front and back page of the certificate of origin of the 2008 Performax, identifying Taxpayer as the purchaser of that vehicle from *DEF*). K also treated any such transaction as a sale at retail. Tr. pp. 330-32 (K); Department Ex. 6.

31. For the second type of under reported receipts transactions, K assumed that Taxpayer actually took physical possession of any vehicle it purchased for resale, or for which it placed itself within the chain of title. Department Ex. 2; Tr. p. 171 (K). He also presumed that Taxpayer, thereafter, delivered the vehicle to the retail purchaser in Illinois. Tr. p. 171 (K).

32. K estimated that, regarding the under reported receipts adjustments, he reviewed

about 30 ST-556 returns that Taxpayer filed regarding transactions which Taxpayer, at hearing, asserted involved only its provision of finance brokerage services. Tr. pp. 361, 369, 370-73 (K).

33. After reviewing such records, K determined that, for certain ST-556 returns Taxpayer filed during the audit period, on which Taxpayer named itself as the retailer, the selling price Taxpayer reported on the return should be adjusted upward, for example, to reflect the amount Taxpayer paid to acquire the vehicle it later sold at retail, or to adjust downward the value of the vehicle trade-in(s) claimed as deductions on such filed returns. Department Ex. 6; Tr. pp. 55-71, 71-79, 81-82, 369 (K); *see also* Department Ex. 4, p. 10; Department Ex. 5, pp. 1-2.
34. Regarding the under reported receipts adjustments, K determined that the under reported gross receipts Taxpayer realized from such transactions was $3,242,928, and he also determined that $202,683 in tax was due regarding such under reported receipts. Department Ex. 6; Tr. pp. 87-88, 369 (K).
35. No evidence offered at hearing identified the distinct amounts of the under reported receipts adjustments that were based on K's review of the CD invoices, versus those that were based on K's review of Taxpayer's regularly kept books and records. *See* Department Ex. 6 (referring to schedule 10-100, which was not admitted at hearing).
36. At hearing, Taxpayer tendered to K a completed Department form ST-6, titled, Claim for Sales and Use Tax Overpayment/Request for Action on a Credit Memorandum, and offered a completed and signed front side of that form as Taxpayer Exhibit 10. Taxpayer Ex. 10; Tr. pp. 486-87.
37. I take note that the back side of Department form ST-6 provides the instructions for

using and completing that form, which provide as follows:

ST-6 Claim for Sales and Use Tax Overpayment / Request for Action on a Credit Memorandum

General Instructions

When do I need to file Form ST-6?

You should file Form ST-6, Claim for Sales and Use Tax Overpayment/Request for Action on a Credit Memorandum, if you are a registered retailer who has

- a sales and use tax overpayment on file and you want to
  - convert this overpayment to a credit memorandum, or
  - convert it to a credit memorandum and transfer ownership of the credit to another registered retailer, or
  - convert it to a cash refund; or
- been issued a credit memorandum and you want to
  - transfer ownership of this credit to another registered retailer, or
  - convert it to a cash refund.

What is the deadline for filing a claim?

The deadline for filing a claim changes semiannually on January 1 and July 1. If you file a claim between January 1 and June 30 of this year, you may file for a credit that was created during the current year and the previous 36 months. Beginning July 1, you may file for a credit that was created during the current year and the previous 30 months.

How do I get forms?

If you need additional forms, you may photocopy a blank form, or visit our web site at tax.illinois.gov, or call our 24-hour Forms Order Line at 1 800 356-6302.

How do I get help?

Visit our web site at tax.illinois.gov or call weekdays between 8 a.m. and 5 p.m. at **1 800 732-8866** or **217 782-3336**. The number for our TDD (telecommunications device for the deaf) is **1 800 544-5304**. If you have a specific question about a claim you have already filed, call us at **217 782-7517** or write us at

SALES TAX PROCESSING DIVISION
ILLINOIS DEPARTMENT OF REVENUE
PO BOX 19013
SPRINGFIELD IL 62794-9013

To what address do I mail my completed return?

Mail your completed return to:
ILLINOIS DEPARTMENT OF REVENUE
PO BOX 19013
SPRINGFIELD IL 62794-9013

Specific Instructions

Step 1: Identify your business

1-2 Write your Illinois account ID number as it appears on your original tax return. Next, write the name of your business.

Step 2: Tell us why you are filing this claim for an overpayment

3 Check this item if you have an overpayment that you want converted to a credit memorandum and transferred to another Illinois account ID number. Write the account ID number on the line provided.

4 Check this item if you have an overpayment on file that you want converted to a credit memorandum.

Step 4: Tell us what action you are requesting for this credit memorandum

7 Check this item if you have been issued a credit memorandum that you want transferred to another Illinois account ID number. Write the account ID number on the line provided.

8 Check this item if you have a balance of credit memorandum on file that you want converted to cash.

Step 5: Tell us the amount of the credit memorandum

9 Write the total amount of credit memorandum you are claiming.

Step 6: Sign below

5 Check this item if you have an overpayment on file that you want to have converted to cash.

Step 3: Tell us the amount of the overpayment

6 Write the total amount of overpayment you are claiming.

This form cannot be processed unless it is signed by the owner, officer, or other person authorized to sign the original return.

ST-6 back (R-10/10)

Department form ST-6, revised October 2010 (available to view at the Department's web site at http://tax.illinois.gov/TaxForms/Sales/ST-6.pdf) (last viewed on February 26, 2016).

38. Taxpayer offered no evidence to show that it ever timely filed an amended form ST-556-X with the Department to request a credit or refund regarding any particular original ST-556 return it filed during the audit period. *See* Taxpayer Ex. 10; *see also* 35 ILCS 120/6-6a; 86 Ill. Admin. Code §§ 130.1501 (Claims for Refund – Limitations – Procedure), 130.1505 (Disposition of Credit Memos by Holders Thereof). Taxpayer did not offer any evidence to show that it had an overpayment on file with the Department regarding the audit period. Finally, Taxpayer did not offer any evidence to show that the Department had issued it a credit memorandum that could be tied to any of the tax it had previously paid regarding any ST-556 returns Taxpayer filed during the audit period.

Facts Regarding Audit Adjustment 3

39. The Summary Analysis schedule's entry for "Disallowed resale to Michael L[ ]" was based on K's review of a transaction return Taxpayer filed to report a sale of a vehicle to an individual purchaser. Department Ex. 6; Tr. p. 89 (K). On the filed return, however, Taxpayer claimed that the sale was a sale for resale, and included the IBT [Illinois Business registration] number of a registered retailer who was not the named purchaser. Department Ex. 6; Tr. p. 89 (K); *see also* 35 ILCS 120/2c; 86 Ill. Admin.

Code §§ 130.1401 (Seller's Responsibility to Determine the Character of the Sale at the Time of the Sale), 1410 (Seller's Responsibility to Obtain Certificates of Resale and Requirements for Certificates of Resale). K disallowed the deduction reported on that return. Tr. p. 89 (K); Department Ex. 6. K determined that Taxpayer's gross receipts regarding that sale were $148,848, and that tax in the amount of $9,303 was due regarding that sale. Department Ex. 6.

Facts Regarding Audit Adjustment 4

40. The Summary Analysis schedule's entry for "Disallowed discount – ST-556 delivery date changed per CD invoice[,]" was based on K's review of Taxpayer's filed transaction returns, together with his review of the CD data. Tr. pp. 89-90 (K). Regarding transaction returns Taxpayer filed which identified a delivery date which was more than 20 days after the delivery date entered on the CD, K disallowed the discount reported as a deduction on the return Taxpayer filed regarding the sale, and determined that tax was due on such amounts. Department Ex. 6; Tr. pp. 89-90 (K). K determined that the amounts discounted in such transactions totaled $11,328, and that tax in the amount of $708 was due regarding those disallowed deductions. Department Ex. 6.

Facts Regarding Audit Adjustment 5

41. The Summary Analysis schedule's entry for "2008 ST-556 sample – unreported receipts (no misc. fees) detail 2008[,]" (hereafter, unreported receipts adjustments), was based on K's review of all transaction returns taxpayer filed during 2008, which did not reflect entries for miscellaneous fees K determined that Taxpayer had actually charged to the customer. Tr. pp. 90-91 (K); *see also* Taxpayer Ex. 11 (copy of

schedule showing data obtained from some of the entries included within ST-556 transaction returns Taxpayer's filed with the Department regarding transactions undertaken in 2008), pp. 1-4. K determined that the charges not reported regarding such transactions during 2008 totaled $31,728, and that tax in the amount of $1,983 was due regarding those unreported receipts. Department Ex. 6.

42. The unreported receipts adjustments also included K's projection of a comparative amount of tax due on unreported receipts from Taxpayer's 2008 returns to the tax due on unreported receipts attributable to transaction returns Taxpayer filed during 2006 and 2007. *See* Tr. pp. 90-91 (K); Department Ex. 6. K determined that the charges not reported regarding such transactions during 2006 and 2007 totaled $82,608, and that tax in the amount of $5,163 was due regarding those unreported receipts. Department Ex. 6.

Facts Regarding Audit Adjustment 6

43. The Summary Analysis schedule's next four adjustments, grouped under the heading of "Drive away exceptions[:] No DA permit issued [or] IL DL & open returns[,]" (hereafter, drive away adjustments) were all based on K's review of transaction returns Taxpayer filed with the Department as a retailer, on which Taxpayer reported that the gross receipts realized from its sale of a vehicle were exempt from or not subject to tax, because the vehicle was not purchased for use in Illinois. Tr. pp. 92-95 (K); Department Ex. 6; Taxpayer Ex. 11; *see also* 35 ILCS 120/2-5(25) (statutory exemption for gross receipts from retail sales of motor vehicles purchased by a nonresident for use outside Illinois, but delivered to the purchaser in Illinois); 35 ILCS 120/2-5(25-5) (statutory exception to § 2-5(25)'s exemption).

44. K determined that, for transaction returns on which a § 2-5(25) exemption is claimed, a retailer was required to provide information to support the exempt nature of the sale. Tr. pp. 92-95, 201 (K); *compare also* 35 ILCS 105/4 (statutory presumption that property purchased at retail and delivered to purchaser in Illinois was sold for use in Illinois) *with* 35 ILCS 120/2-2(25) *and* 86 Ill. Admin. Code § 130.605(b)(1) (describing documentation Illinois motor vehicle retailers must obtain and keep to document a claim that a sale of a vehicle was exempt under ROTA § 2-2(25).

45. The type of documentation K looked for when reviewing Taxpayer's transaction returns claiming a § 2-5(25) exemption included the residence address of the purchaser listed on the return, the state in which the vehicle was claimed to be intended for use, and information Taxpayer made and kept to document the exemption. Tr. pp. 92-95, 201 (K); Department Ex. 6; *see also* Taxpayer Exs. 7-9; 86 Ill. Admin. Code § 130.605(b)(1).

46. For the drive away adjustments, K made a detailed review of all returns on which drive away exemptions were made for 2008, and then projected his disallowance of such exemptions regarding similar transaction returns Taxpayer filed in 2006 and 2007. Department Ex. 6; Tr. pp. 92-95 (K).

47. All of the drive away adjustments are based on K's determination that Taxpayer lacked support to document the deduction/exemption claimed on the ST-556 return Taxpayer reported as a retail sale of a vehicle that was delivered to a purchaser in Illinois. Tr. p. 92 (K); Department Ex. 6; *see also* 35 ILCS 120/2-5(25)-(25-5); 86 Ill. Admin. Code § 130.605(b)(1).

48. The Summary Analysis schedule's entries for drive away exceptions include four

rows. Department Ex. 6. The bottom two rows reflect K's detail review of all such returns for 2008, and the top two rows reflect K's projection of the detail adjustments to similar returns filed during the other years in the audit period. Department Ex. 6. Each pair of rows is divided by whether the purchaser's state of residence, as reported on the return, did or did not have an exemption that was reciprocal to Illinois's statutory exemption. *Id*.; *see also* 35 ILCS 120/2-5(25-5); 86 Ill. Admin. Code § 605(b)(1)(C). The former are described as "2008 sample recip [reciprocal] state exceptions[,]" and the latter as "2008 sample NR [no reciprocal] state exceptions[.]" Department Ex. 6.

49. K determined that the gross receipts Taxpayer realized from sales to purchasers residing in states without an exemption like Illinois' were subject to 6% tax, and that gross receipts from sales to purchasers residing in states with an exemption like Illinois' were subject to 6.25% tax. Department Ex. 6.

50. For the 2008 drive away adjustments, where the purchaser's state of residence did *not* have an exemption like Illinois', K disallowed claimed exemptions in the amount of $12,330, and determined that tax in the amount of $740 was due on such taxable receipts. Department Ex. 6.

51. For the 2008 drive away adjustments, where the purchaser's state of residence *did* have an exemption like Illinois', K disallowed claimed exemptions in the amount of $126,848, and determined that tax in the amount of $7,883 was due on such taxable receipts. Department Ex. 6.

52. Taxpayer Exhibit 7 consists of copies of Taxpayer's invoices reflecting some of its sales of vehicles during 2006, copies of seller's copies of some ST-556 returns it

made and kept regarding some of those invoices, and copies of some drive-away permits issued regarding some of its sales. Taxpayer Ex. 7.

53. Taxpayer Exhibit 8 consists of copies of Taxpayer's invoices reflecting some of its sales of vehicles during 2007, copies of seller's copies of some ST-556 returns it made and kept regarding some of those invoices, and copies of some drive-away permits issued regarding some of its sales. Taxpayer Ex. 8.

54. Taxpayer Exhibit 9 consists of copies of Taxpayer's invoices reflecting some of its sales of vehicles during 2008, copies of seller's copies of some ST-556 returns it made and kept regarding some of those invoices, and copies of some drive-away permits issued regarding some of its sales. Taxpayer Ex. 9.

55. For some of the transactions Taxpayer claims were not sales at retail, but were instead transactions in which Taxpayer merely brokered financing to customers who purchased recreational vehicles sold by other retailers, Taxpayer signed a form ST-556, on which it named itself as the purchaser of the motor vehicle for resale, and/or signed the reverse side of a certificate of title or a certificate of origin for such vehicle. *E.g.*, Department Ex. 2.

Facts Regarding Audit Adjustment 7

56. The Summary Analysis schedule's entries for "Fixed Assets – no tax paid[,]" are based on K's review of Taxpayer's fixed asset invoices documenting its purchases of tangible personal property for use in Illinois, and for which Taxpayer had no proof that it paid Illinois use tax regarding its purchase and use of such property. Department Ex. 6; Tr. p. 20 (K); 35 ILCS 105/3. K determined that Taxpayer owed Illinois use tax as measured by Taxpayer's cost price to purchase such fixed assets.

Department Ex. 6.

Facts Regarding Audit Adjustment 8

57. The Summary Analysis schedule's entries for "Unjust enrichment-sales tax collected > [greater than] than sales tax remitted […] All assessed as a penalty" (hereafter unjust enrichment adjustments) are based on K's review of tax accrual records Taxpayer provided to him, and from information contained on the CD. *E.g.*, Tr. pp. 99-101 (K).

58. Taxpayer's tax accrual records contain entries grouped under the heading of "sales tax" regarding transactions described within such records. Tr. pp. 103-04 (K). There is no evidence that Taxpayer ever provided its tax accrual records to any of its customers who either purchased vehicles from Taxpayer at retail, or who obtained financing from Taxpayer, regarding their purchase of a vehicle from some other retailer. Tr. pp. 104, 262-63 (K); *see also* Stipulation (Stip.).

59. K was aware that the purchase prices for the recreational vehicles Taxpayer sold, or for which it brokered financing, could be greater than $200,000, and that the tax on a taxable sale of such a vehicle could be in excess of $10,000. Tr. pp. 164-65 (K). K was not aware of any purchasers of vehicles from Taxpayer, or who purchased a recreational vehicle from a retailer other than Taxpayer using financing obtained through Taxpayer, who complained that Taxpayer collected taxes from them that were not due. *Id*. K agreed that, ordinarily, people would complain if a person was overcharging them thousands of dollars of tax that was not due. Tr. p. 165 (K).

60. For all of the unjust enrichment adjustments described on the Summary Analysis schedule, K relied on the CD invoices as the sole source for his determination that

Taxpayer collected amounts as tax regarding such invoices. Tr. pp. 495-97 (K); *see also* Department Ex. 6.

61. Taxpayer offered into evidence copies of the contents of deal jackets for a sample of the 111 deal jackets it provided to K regarding transactions in which it brokered financing for customers who purchased vehicles from a retailer other than Taxpayer. Taxpayer Ex. 12-20; Stip., ¶¶ 4-8.

62. In the sample deal jackets reflecting Taxpayer's lending transactions, Taxpayer kept copies of its invoices to such customers. Taxpayer Ex. 12, p. 5 (Taxpayer invoice providing, in part, "Thank you for allowing *XYZ GROUP* to assist you in financing your New/Used RV or marine product. …"); Taxpayer Ex. 13, pp. 5 (Taxpayer invoice providing, in part, "Thank you for allowing *XYZ GROUP* to assist you in financing your New/Used RV or marine product. …"); Taxpayer Exs. 14-20.

63. Taxpayer's invoices for financing transactions also included a breakdown showing how the borrowed funds would be used by the retailer to whom the borrowed funds would be paid, including whatever amounts the retailer was charging the customer as tax or sales tax. *E.g.*, Taxpayer Ex. 12, p. 16 (copy of invoice from Indiana retailer documenting its sale of vehicle to purchaser(s) for whom Taxpayer brokered financing, and referenced throughout exhibit); Taxpayer Ex. 13, p. 14 (copy of invoice from Colorado retailer documenting its sale of vehicle to purchaser(s) for whom Taxpayer brokered financing, and referenced throughout exhibit).

64. K did not attempt to speak with, or to obtain any information from, the purchasers of recreational vehicles for whom Taxpayer provided finance brokerage services, and who were named as customers in Taxpayer's records regarding transactions for which

Taxpayer's did not file an ST-556 as a retailer. Tr. pp. 163-66 (K).

Conclusions of Law:

The Department introduced the NTL it issued to Taxpayer into evidence under the certificate of the Director. Department Ex. 1. Pursuant to §§ 4 and 5 of the Retailers' Occupation Tax Act (ROTA), that NTL constitutes the Department's prima facie case in this matter. 35 ILCS 120/4-5, 7. The Department's prima facie case is a rebuttable presumption. 35 ILCS 120/7; Copilevitz v. Department of Revenue, 41 Ill. 2d 154, 157, 242 N.E.2d 205, 207 (1968); DuPage Liquor Store, Inc. v. McKibbin, 383 Ill. 276, 279, 48 N.E.2d 926, 927 (1943). The presumption of correctness that attaches to the Department's prima facie case extends to all elements of taxability. *See* 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).

A taxpayer cannot overcome the statutory presumption merely by denying the accuracy of the Department's assessment. A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3d 826, 833, 527 N.E.2d 1048, 1053 (1st Dist. 1988). Instead, a taxpayer has the burden to present evidence that is consistent, probable and closely identified with its books and records, to show that the Department's determinations are not correct. Fillichio v. Department of Revenue, 15 Ill. 2d 327, 333, 155 N.E.2d 3, 7 (1958); A.R. Barnes & Co., 173 Ill. App. 3d at 833-34, 527 N.E.2d at 1053.

Issues & Argument

1. Adjustments Based on CD Invoices (Audit Adjustments 2, 4 & 8)

The first issue is whether Taxpayer is liable for retailers' occupation tax (ROT) in the total amount of $2,683,434, plus statutory interest. *See* Pre-hearing Order. The bases for all of the adjustments K determined should be made are summarized on K's Summary Analysis schedule. Department Ex. 6. Taxpayer objects to several of the adjustments, chief among them those that are based on K's use of, and reliance upon, invoices he obtained from a CD that K said came from a confidential informant.

K's Summary Analysis schedule expressly refers to the CD invoices as being a source of K's adjustments for under reported receipts, for disallowed discounts, and for unjust enrichment. *Id.* In addition, K testified that the CD invoices were the sole source for the amounts of tax that K determined were due from Taxpayer as a penalty, regarding the unjust enrichment adjustments. *Id.*; Tr. pp. 495-97 (K). Since they comprise the lion's share of the tax determined to be due from Taxpayer in this contested case (*see* Department Exs. 1, 6 ($2,413,245 of the $2,683,434 total tax assessed)), I address the unjust enrichment adjustments first.

a. Adjustments for Unjust Enrichment (Audit Adjustment 8)

At hearing, K acknowledged that what he described as invoices which were included on the CD did not name or otherwise identify Taxpayer as one of the parties to the transactions to which the CD invoices pertained. Tr. pp. 256-59 (K). For example, K agreed that Taxpayer's name, business logo, its business address and/or telephone numbers were not included on the CD invoices, and that they did not include the name or signature of someone K could identify as a Taxpayer employee or agent. *Id.*; *compare*

also Department Exs. 2, 4 (copies of returns bearing Taxpayer's agent's signature) *with* Taxpayer Exs. 7-9 (copies of returns bearing Taxpayer's agent's signature). Other than referring in the most general manner to the person whom K said was the source for the CD, K never described him, for example, by name or occupation, as someone who might be familiar with Taxpayer's business. Tr. pp. 118, 256-59 (K).

Additionally, there was no evidence offered to show that the confidential informant was an individual who had personal knowledge of the creation or origin of the invoices copied onto the CD, or who could otherwise directly tie such invoices to Taxpayer's actual business operations during the audit period. *See id*. There was no testimony offered by K which demonstrates that he had personal knowledge of whether the CD invoices were made and kept in the regular course of business by Taxpayer, or regarding the other foundational questions for business records. *Id*.; *see also, e.g.*, Kimble v. Earle M. Jorgenson Co., 358 Ill. App. 3d 400, 414, 830 N.E.2d 814, 827-28 (1st Dist. 2005) ("A sufficient foundation for admitting [business] records may be established through testimony of the custodian of records or another person familiar with the business and its mode of operation."). More to the contrary, K acknowledged that he had no personal knowledge whether the CD invoices were correct. Tr. p. 256 (K). Further, there is nothing in this record which demonstrates that the CD invoices were someone else's business records ─ that is, that they were made and kept in the regular course of business by a person with whom Taxpayer conducted business, regarding transactions involving Taxpayer. Finally, there was no evidence offered to show that the CD invoices were of a type commonly relied upon by reasonably prudent men in the conduct of their business affairs. *See* 5 ILCS 100/10-40(a); 86 Ill. Admin. Code § 200.155(a).

In a nutshell, the Department has provided no detailed information about the confidential informant, or about how the CD was made, or about the origin of the invoices placed within it. In short, there was no evidence sufficient to allow an objective fact-finder to conclude that the CD invoices reasonably could be relied upon as reflecting a true and accurate record of Taxpayer's actual business or financial operations. Notwithstanding the utter lack of evidence to authenticate the CD invoices in any way, the evidence shows that K relied on them to determine that Taxpayer owed almost 2.5 million dollars in tax regarding transactions that K himself acknowledged were part of the lending side of Taxpayer's business. Department Ex. 6; Tr. pp. 122-23, 370-73 (K); 35 ILCS 120/2-40.

This, perhaps, is the good point to revisit and compare the statutory presumption of correctness that attaches to a Department's NTL or a correction of a taxpayer's returns (35 ILCS 120/4-5), with the type of evidence necessary to rebut one of the factual determinations that makes up part of the Department's prima facie case. The particular assessments at issue here, the unjust enrichment adjustments, involve a question of taxability, not exemption. *See* Department Exs. 1, 6. That is, the Department did not make a determination that Taxpayer failed to support a deduction for receipts claimed on a return, so that the receipts deducted on a return are now being treated by the Department as taxable. *See* Department Ex. 6 (comparing, for example, the disallowed discount adjustments with the unjust enrichment adjustments). Rather, the Department made a factual determination that Taxpayer actually charged customers, and collected from such customers, receipts Taxpayer presented to the customer as being a charge for tax, and then failed to refund to the customers, or turn over to the Department, such

collected receipts. Department Exs. 1, 6; Tr. pp. 495-97 (K). The NTL incorporated K's determinations, and, by statute, the NTL, when offered under the certificate of the Director at a Department hearing, is presumptively correct. 35 ILCS 120/4-5; Copilevitz, 41 Ill. 2d at 157, 242 N.E.2d at 207; Balla, 96 Ill. App. 3d at 296, 421 N.E.2d at 238.

"Ordinarily, the taxing authority has the burden of proof regarding a taxpayer's liability to the government. For example, the taxing authority bears the burden of proving that the taxpayer actually received income [citations omitted], and that such income is properly subject to taxation …." Balla v. Department of Revenue, 96 Ill. App. 3d 293, 296, 421 N.E.2d 236, 238 (1st Dist. 1981). "The Illinois legislature, in order to aid the Department in meeting its burden of proof in this respect, has provided that the findings of the Department concerning the correct amount of tax due are prima facie correct." *Id*. ("However, when a taxpayer claims that he is exempt from a particular tax, or where he seeks to take advantage of deductions or credits allowed by statute, the burden of proof is on the taxpayer.").

The tax assessed for these unjust enrichment adjustments was not the result of K's determination that all of the transactions that K treated as involving only its provision of finance brokerage services to customers should have been reported by Taxpayer as retail sales on filed transaction returns. Department Ex. 6;[1] Tr. p. 176 (K). So, when making the unjust enrichment adjustments, K did not add up all of the amounts the contents of Taxpayer's deal jackets show were financed, to treat such amounts as though they were

[1] K did make such adjustments for some of Taxpayer's financing transactions, based on his determination that Taxpayer should have reported particular transactions as sales at retail. Department Ex. 6; Tr. pp. 87-89, 161-62, 330-32 (K). Those are included within the under reported receipts adjustments on the Summary Analysis schedule (Department Ex. 6 (audit adjustment 2)), and are discussed more fully in this recommendation, *infra*, at pp. 33-39.

the gross receipts Taxpayer realized from its retail sales of vehicles. *See* Department Ex. 6. Instead, K determined that, regardless whether transactions involved Taxpayers' retail sales of vehicles, or Taxpayer's provision of loan brokerage services to customers who purchased vehicles from others, Taxpayer should be assessed a penalty in amounts he says he gleaned from the CD invoices. Tr. pp. 267-70, 495-97 (K). More specifically, K testified that it did not matter whether Taxpayer was acting as a retailer or a broker in the transactions regarding which K determined Taxpayer owed the unjust enrichment penalties, since "[t]he general principle of unjust enrichment would apply to any taxpayer." Tr. p. 270 (K).

But contrary to K's determination that some "general principle" of law authorizes the Department to assess a tax or penalty on a person, Illinois law is clear that "[t]he obligation of a citizen to pay taxes is a purely statutory creation …." Jones v. Department of Revenue, 60 Ill. App. 3d 886, 889, 377 N.E.2d 202, 204 (5th Dist. 1978). Illinois law is equally clear that "an administrative agency has no inherent or common law powers, but is empowered to act only according to authority properly conferred upon the agency by law." Parliament Insurance Co. v. Department of Revenue, 50 Ill. App. 3d 341, 347, 365 N.E.2d 667, 671 (1st Dist. 1977). The only reason persons engaged in the occupation of selling tangible personal property at retail in Illinois are required to pay tax based on the gross receipts they realize from engaging in that occupation is because the ROTA was enacted and imposes such a tax. Jones, 60 Ill. App. 3d at 889, 377 N.E.2d at 204. If it did not exist, the State, through the Department, would not be able to make retailers pay such a tax. Parliament Insurance Co., 50 Ill. App. 3d at 347, 365 N.E.2d at 671. General principles do not require anyone to pay taxes; tax statutes do.

For purposes of this case, § 2-40 of the ROTA provides as follows:

> Sec. 2-40. Purchaser refunds. If a seller collects an amount (however designated) that purports to reimburse the seller for retailers' occupation tax liability measured by receipts that are not subject to retailers' occupation tax, or if a seller, in collecting an amount (however designated) that purports to reimburse the seller for retailers' occupation tax liability measured by receipts that are subject to tax under this Act, collects more from the purchaser than the seller's retailers' occupation tax liability on the transaction, the purchaser shall have a legal right to claim a refund of that amount from the seller. If, however, that amount is not refunded to the purchaser for any reason, the seller is liable to pay that amount to the Department. This paragraph does not apply to an amount collected by the seller as reimbursement for the seller's retailers' occupation tax liability on receipts that are subject to tax under this Act as long as the collection is made in compliance with the tax collection brackets prescribed by the Department in its rules and regulations.

35 ILCS 120/2-40. A complementary provision exists in the Use Tax Act. 35 ILCS 105/3-45.

Taxpayer presented ample documentary evidence to show that it engaged in the business of brokering financing for customers who purchased recreational vehicles from other retailers. Taxpayer Exs. 1-4, 12-20; Stip., ¶¶ 4-8. Just as K acknowledged at hearing, the documentary evidence proves beyond doubt that Taxpayer engaged in two businesses: loan brokerage and retailing. During the audit period, Illinois did not impose an excise or occupation tax on persons engaged in the business of brokering financing. *See* 35 ILCS 105 through 35 ILCS 175 (statutes encompassing all Illinois use and occupation taxes). Because there was no statute which imposed a tax on the occupation of brokering financing, the tax act that did not exist could not have contained a provision that was similar to ROTA § 2-40.

A person is subject to those taxes that have been authorized by positive law ─ that is, by statute. Il. Const. of 1970, Art. IX, § 1 (“The General Assembly has the exclusive

power to raise revenue by law except as limited or otherwise provided in this Constitution. The power of taxation shall not be surrendered, suspended, or contracted away."); Jones, 60 Ill. App. 3d at 889, 377 N.E.2d at 204. Since it is clear that K did not determine that Taxpayer acted as a retailer regarding the financing transactions for which Taxpayer did not file a transaction return, or for which it did not place itself within the chain of title for a vehicle financed, there is no factual basis for concluding that Taxpayer was a seller regarding such transactions, for purposes of ROTA § 2-40. Department Ex. 6; Taxpayer Exs. 1-4, 12-20. And while K alluded to it, the evidence admitted at hearing does not permit a conclusion that Taxpayer's provision of loan brokerage services made it a serviceman who transferred a vehicle to a customer as an incident of its sale of loan brokerage services, and to whom § 3-40 of the Serviceman Occupation Tax Act (SOTA) would apply. 35 ILCS 115/3-40; 86 Ill. Admin. Code § 140.120 (meaning of serviceman). Based on the evidence, I respectfully submit that K's determination that Taxpayer was subject to ROT regarding its financing transactions cannot stand. Parliament Insurance Co., 50 Ill. App. 3d at 347, 365 N.E.2d at 671 ("administrative orders extending beyond the authority delegated to the agency are void.").

And even if I were to treat the Department's assessment of an unjust enrichment penalty as a factual determination which Taxpayer has the burden to rebut, instead of one upon which the Department bears the burden to show that Taxpayer is subject to ROT regarding the transactions at issue, I would still conclude that Taxpayer has rebutted the Department's prima facie case on this point. To rebut the Departments prima facie case, a taxpayer has to present evidence that is consistent, probable and closely identified with its books and records, to show that the Department's determinations are not correct.

Fillichio, 15 Ill. 2d at 333, 155 N.E.2d at 7; A.R. Barnes & Co., 173 Ill. App. 3d at 833-34, 527 N.E.2d at 1053. Here, after admitting the NTL into evidence under the certificate of the Director, the Department also offered the testimony of K, the auditor, to describe the nature and conduct of the audit, as well as to explain the factual bases for his several audit determinations. During this testimony, he explained that he determined that Taxpayer had collected receipts for charges Taxpayer made to customers for tax that was not due, and thereafter, failed to either refund or pay over such collected amounts of tax to the Department. K made clear that the sole source for his determination that Taxpayer collected certain amounts of tax from its financing customers was the CD invoices. Tr. pp. 495-99 (K).

In the case of Mitchell v. Illinois Department of Revenue, the court held that the question of whether the Department has presented a prima facie case is a one of law. Mitchell v. Department of Revenue, 230 Ill. App. 3d 795, 800, 596 N.E.2d 31, 35 (1st Dist. 1992). In that case, the Department proposed to assess a penalty against an individual, as a responsible person for a corporation, for willfully failing to remit to the Department the withholding tax payments the Department determined were due from the corporation for 1981, 1982 and the first and fourth quarters of 1983. *Id*. at 796-97, 596 N.E.2d at 32. The first issue was which statute of limitations set by § 905 of the Illinois Income Tax Act (IITA) affected the Department's authority to issue a notice of deficiency to the corporation. *Id*. at 796, 799-800, 596 N.E.2d at 34. After comparing the limitations set by §§ 905(c) and 905(j), the court found that "the circumstances of this case are governed by section 905(c) which relates to taxpayer's or persons derivatively liable for taxes who fail to file tax returns. In such cases, the notice of deficiency may be

issued at any time without limitation." *Id*. at 799, 596 N.E.2d at 34.

The Mitchell court then found that the evidence supported the Department's determination that the corporation did not file withholding tax returns for 1983, but did not support the Department's determination that the corporation similarly failed to file returns for the earlier years. *Id*. at 797, 799, 596 N.E.2d at 32-33, 34. As the court noted:

> ***
>
> In order to come within the penumbra of section 905(c), the State must allege and prove that returns were not filed for the years in question, since the filing of returns would make section 905(j) applicable.
>
> As to the returns for the years 1981 and 1982, defendant contends, and we agree, that the DOR made no attempt to check its records to determine whether the returns were filed and therefore did not carry its burden in showing that the returns were not filed.
>
> The DOR's investigator testified that he requested copies of Form IL-941 from the DOR Taxpayer Record Section for the quarters of 1983 only, and stated that he did not know if anyone else at DOR had requested copies of the 1981 and 1982 returns. Without foundation, he testified that it was his "recollection" that returns were not filed for 1981 and 1982. The DOR's auditor acknowledged that she did not attempt to determine whether returns for the 1981 and 1982 period were filed, but rather relied upon the evidence produced in the investigation. She simply used the returns provided, which were for two quarters in 1983, to project back to 1981 and 1982 to compute defendant's penalties for those years.
>
> ***

Mitchell, 230 Ill. App. 3d at 800, 596 N.E.2d at 34. I read Mitchell to stand for the proposition that the testimony offered by a Department witness can, on its own, undermine the factual determinations upon which one or more of the assessments included within an NOD or NTL are based. *Id*. at 801, 596 N.E.2d at 35 ("We find that the record in this case is devoid of any evidentiary support for the agency's factual determination that returns were not filed for 1981 and 1982.").

Here, K's testimony at hearing was clear that all of the unjust enrichment

penalties involved transactions that Taxpayer treated as involving its provision of finance brokerage services, and regarding which it did not file transaction returns as a retailer with the Department. Tr. pp. 362-63, 370-73 (K). K had Taxpayer's deal jackets, and its bank account records, including those regarding its escrow account, which, the evidence shows, Taxpayer used in its finance brokering business. Taxpayer Exs. 1-3. K had documents showing that Taxpayer was registered in Illinois and conducted business in Illinois as a broker of financial services. Taxpayer Exs. 1-4. The invoices Taxpayer provided to K regarding its finance brokerage transactions ─ and which were admitted at hearing, without objection ─ showed that Taxpayer was acting as the finance broker regarding a sale of a vehicle by a retailer other than itself. *E.g.*, Taxpayer Exs. 12-20.

Further, Taxpayer's regularly kept books and records, which both parties offered into evidence, show that Taxpayer's invoices used different language depending on whether it was acting as the seller of a motor vehicle or as a finance broker for the sale of a motor vehicle by another retailer. *Compare* Department Ex. 4, p. 9 (Taxpayer invoice providing, in part, "Thank you for purchasing your New/Used vehicle from *ABC*.") *with* Taxpayer Ex. 12, pp. 5 (Taxpayer invoice providing, in part, "Thank you for allowing *XYZ GROUP* to assist you in financing your New/Used RV or marine product. …"), 16 (copy of invoice from Indiana retailer documenting its sale of vehicle to purchaser(s) for whom Taxpayer brokered financing, and referenced throughout exhibit); Taxpayer Ex. 13, pp. 5 (Taxpayer invoice providing, in part, "Thank you for allowing *XYZ GROUP* to assist you in financing your New/Used RV or marine product. …"), 14 (copy of invoice from Colorado retailer documenting its sale of vehicle to purchaser(s) for whom Taxpayer brokered financing, and referenced throughout exhibit). The parties also

stipulated to testimony that would be offered by several of Taxpayer's financing customers, who, if called to appear as witnesses, would testify under oath that they were not charged tax by Taxpayer for its financing services, and that they did not pay any such amounts as tax to Taxpayer. Stip., ¶¶ 4-8. In short, even though K did not treat the transactions at issue as sales at retail by Taxpayer on the Summary Analysis schedule (Department Ex. 6), he still determined that the tax imposed by the ROTA on retailers should be assessed against Taxpayer for its financing transactions, as an unjust enrichment penalty, based on his reliance on information that cannot be corroborated by any credible evidence contained in this record.

It is generally unreasonable to rely on information that cannot be authenticated, and documentary evidence that cannot be authenticated is generally inadmissible. Illinois Rules of Evidence § 901; 5 ILCS 100/10-40(a). This issue, of course, does not involve the admissibility of the CD invoices, but only whether K's audit decision to rely on them met a minimum standard of reasonableness. *See* Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill. App. 3d 203, 207, 577 N.E.2d 1278, 1281 (1st Dist. 1991) ("the method employed by the Department in correcting the taxpayer's return must meet some minimum standard of reasonableness,"). Taxpayer has asserted, and the record in this case firmly establishes, that there is no credible evidence tending to show that the CD invoices can be relied upon as reflecting a true and accurate record of Taxpayer's business operations. The sample of the 111 finance brokerage transaction deal jackets Taxpayer offered at hearing (Taxpayer Exhibits 12-20) do not provide a basis for concluding that Taxpayer was a retailer who was selling the vehicles referred to in such documents, and they fully corroborate Taxpayer's well documented claim that, in addition to being engaged in the

occupation of retailing, it was also engaged in the business of providing loan brokerage services. Taxpayer Exs. 1-4, 12-20. In contrast, no credible evidence in the record supports K's audit determination that Taxpayer actually collected from its finance customers receipts which Taxpayer ─ as opposed to another retailer who sold a vehicle in a transaction regarding which Taxpayer provided finance brokerage services (*e.g.*, Taxpayer Ex. 12, p. 16; Taxpayer Ex. 13, p. 14) ─ charged them for tax. Given the lack of any evidence which authenticates the CD invoices, or which tends to show that they should be considered reliable for any purpose, I conclude that K's reliance on the CD invoices was patently unreasonable. *See* Novicki v. Department of Finance, 373 Ill. 342, 345, 26 N.E.2d 130, 131 (1940) ("since the records of purchases introduced by the department were incompetent and should not have been considered, the only competent evidence was the appellant's books and his testimony.").

The record includes no credible evidence which supports K's reliance on the CD invoices as forming a factual basis for determining that Taxpayer should be assessed an unjust enrichment penalty, authorized by ROTA § 2-40, regarding transactions for which Taxpayer did not file a return as a retailer, and for which it neither purchased for resale nor held title to the vehicle being financed. Department Exs. 1, 6; Tr. pp. 100, 102 (K); 35 ILCS 120/2-40. As a result, I respectfully recommend that the Director eliminate all of the tax and/or penalties based on K's unjust enrichment determinations. *See* Mitchell, 230 Ill. App. 3d at 800, 596 N.E.2d at 34.

b. Adjustments for Under Reported Receipts per ST-556/Tax Accrual/CD Invoices (Audit Adjustment 2)

K also used and relied on the CD invoices to make the under reported receipts adjustments. Department Ex. 6. These adjustments involved two types of transactions.

The first type involved transactions Taxpayer reported on ST-556 returns, which Taxpayer filed with the Department as a retailer, regarding transactions which Taxpayer, at hearing, asserted involved only its provision of finance brokerage services. *E.g.*, Department Ex. 2; Tr. pp. 37-38 (K). Just as Taxpayer did when it filed each such return, K treated each such transactions as Taxpayer's sale of a vehicle at retail. Tr. pp. 330-32 (K); Department Exs. 2, 6.

Some of the evidence Taxpayer offered regarding the first type of transactions includes a completed Department form ST-6, titled, Claim for Sales and Use Tax Overpayment/Request for Action on a Credit Memorandum. Taxpayer Exhibit 10; Tr. pp. 335-36, 416-22 (K), 486-87. Taxpayer questioned K regarding the effect of that form, with K responding that he gave it no effect, since he was not aware that Taxpayer had ever filed a claim for refund regarding each of the returns Taxpayer filed during the audit period. *See* Tr. pp. 416-22 (K). After considering the evidence, I find K's responses to such questions were both reasonable and fully in accord with Illinois law.

The legislature has granted retailers a statutory right to claim and obtain a refund and/or credit for tax overpaid in error, but it has also placed limitations on that right, and set forth procedures that retailers are required to use when making any and all such claims. 35 ILCS 120/6-6a; American Airlines, Inc. v. Department of Revenue, 402 Ill. App. 3d 579, 596-99, 931 N.E.2d 666, 681-83 (1st Dist. 2009) (discussing procedures required by ROTA § 6a, and period of limitations set by ROTA § 6, which affect and limit a taxpayer's statutory right to claim a credit or refund for tax overpaid in error); Jones, 60 Ill. App. 3d at 889, 377 N.E.2d at 204 ("the right to a refund or credit can arise only from the acts of the legislature."). Regarding the adjustments at issue, K relied on

Taxpayer's filed returns ─ its own written statements reporting that certain transactions involved its retail sale of a vehicle to a purchaser for use or consumption in Illinois. Department Ex. 2; Tr. pp. 37-38 (K). Thereafter, he corrected such returns, based either on his review of Taxpayer's purchase records for the vehicle(s) sold, or after determining that Taxpayer could not support the trade-in deduction(s) claim on such returns. Department Ex. 6; Tr. pp. 330-32, 370-73 (K). To rebut these reasonable and documented determinations, Taxpayer presents its mere argument that it made a mistake when filing each such return, and reporting each such transaction as a taxable sale at retail. It then asserts that it is entitled to a credit or refund of any tax it paid regarding such returns, in this contested case. Taxpayer's Closing Statement (Taxpayer's Brief), pp. 34-36; Taxpayer Ex. 10.

If Taxpayer made a mistake of fact or law when filing transaction returns with the Department regarding transactions it later determined were not subject to ROT, the ROTA provided Taxpayer with a procedure to correct such reporting errors. 35 ILCS 120/6-6a. Taxpayer, however, offered no evidence to show that it had ever actually obtained a credit memorandum from the Department. *Compare* Taxpayer Ex. 10 *with* 35 ILCS 120/6a; 86 Ill. Admin. Code § 130.1405. Nor is there any evidence that Taxpayer ever took even the first step toward obtaining such a credit memorandum, by timely filed an amended form ST-556-X with the Department to request a refund or credit regarding any tax it may have overpaid in error on any particular individual original form ST-556 it filed during the audit period. *See* Taxpayer Ex. 10; 35 ILCS 120/6-6a; 86 Ill. Admin. Code § 130.1401.

This contested case, moreover, does not involve Taxpayer's protest of the

Department's denial(s) of any claim(s) for refund based on the tax Taxpayer may have erroneously paid to the Department in error. Rather, it involves only Taxpayer's protest of the Department's NTL. Department Ex. 1; Pre-Hearing Order. The ROTA's provisions authorizing refunds require a retailer of motor vehicles to file a separate return for each transaction for which it claims to have erroneously overpaid tax. 35 ILCS 120/6-6a. There is no evidence that Taxpayer ever filed even one such claim, let alone one for all of the hundreds of transaction returns Taxpayer filed during the audit period, and then generally referred to on Taxpayer Exhibit 10. *Compare* Taxpayer Ex. 10 *with* Taxpayer Ex. 11. The form admitted as Taxpayer Exhibit 10 does not satisfy the statutory requirements set by ROTA § 6a for claims for credit or refund, and Taxpayer's arguments regarding its Exhibit 10 do not address the corrections K actually made to Taxpayer's filed returns. Department Exs. 1, 6; 35 ILCS 120/6-6a.

The second type of under reported receipts adjustment involved transactions Taxpayer did not report on forms ST-556 that it filed as a retailer. Instead, they involved transactions Taxpayer treated as involving its provision of financing brokerage services only, but regarding which K determined that Taxpayer had signed a form ST-556 as a purchaser for resale of the vehicle being sold in a transaction for which Taxpayer claimed to have acted solely as a loan broker, and/or regarding which Taxpayer signed the back of a certificate of origin or title for such a vehicle. Department Exs. 4-5; Tr. pp. 158, 161-62 (K). K determined that, for each such transaction, Taxpayer had placed itself within the chain of title or ownership of the vehicle. He also determined that Taxpayer should have reported each such transaction as a sale at retail, and itself as the retailer who sold each such vehicle, at retail. Tr. pp. 330-32 (K); Department Exs. 4-6.

If K had not used or relied on the CD invoices when making the two types of under reported receipts adjustments he described at hearing, I would have no problem concluding that K's audit method, when reviewing such transactions, was reasonable. The first type involved Taxpayer's own returns reporting that certain transactions were sales of vehicles at retail, and the Department is fully authorized to correct such returns, if Taxpayer's records cannot support the entries reported on them. 35 ILCS 120/4. Each and every ST-556 return that Taxpayer filed with the Department is a written statement, by Taxpayer, that is inconsistent with its position at hearing regarding these adjustments. Department Ex. 2; Tr. pp. 37-38 (colloquy regarding offer of Department Exhibit 2); Taxpayer's Brief, p. 30; 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) ("Generally, any statement made by a party or on his behalf which is inconsistent with his position in litigation may be introduced into evidence against him."). As a result, each and every such return that Taxpayer filed with the Department, and involving a transaction Taxpayer now asserts involved only its provision of loan brokerage services, constitutes substantive evidence that Taxpayer acted as the retailer in such transactions, and sold the vehicle, at retail, to the purchaser named on each such return. In re Cook County Treasurer, 166 Ill. App. 3d at 379, 519 N.E.2d at 1014 ("Contradictory statements of a party constitute substantive evidence against the party of facts stated.").

The following testimony by K, on redirect, makes the issue clear:

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> Q: Let me ask it this way: Taxpayer's position is that broke – the proceeds from brokerage sales are not subject to sales tax. And that's also probably the correct position of the law. But this Taxpayer was filing hundreds of tax returns. So –
> A: Yes it was.

> Q: Did that affect your decision regarding what the Taxpayer – what business the Taxpayer was conducting?
> A: Yes. As a retailer making sales via ST-556 returns and with the valid Secretary of State dealer's license, I treated them as a retailer.
> Q: But was this a situation where the Taxpayer, itself, was representing – holding itself out as a retailer by filing these returns?
> A: In my view, yes, holding itself out as a retailer.
> ***

Tr. p. 502 (K).

Regarding the second type of transaction included within the under reported receipts adjustments, K determined that Taxpayer had not acted solely as a finance broker regarding transactions for which K obtained and reviewed documentary evidence showing that Taxpayer either purchased a vehicle for resale, or otherwise placed itself within the chain of title for such a vehicle prior to the transfer of such vehicle to the person(s) Taxpayer argues were merely its financing customers. Department Exs. 4-6. This determination, too, is reasonable, based on credible, documentary evidence, and consistent with Illinois law. Illinois law is clear that "a prima facie presumption of ownership arises from a certificate of title, [although] the presumption may be rebutted by other competent evidence." People v. Disharoon, 5 Ill. App. 3d 42, 45, 282 N.E.2d 506,509 (1st Dist. 1972). These adjustments are based on K's review of documents Taxpayer, itself, signed, indicating that it acquired title or ownership of a vehicle regarding a transaction for which it claims it provided only loan brokerage services to the customer. Again, Taxpayer's signatures on such documents act as its own written statements which are inconsistent with its position at hearing. In re Cook County Treasurer, 166 Ill. App. 3d at 379, 519 N.E.2d at 1014. Contrary to Taxpayer's litigation position, if it owned or held title to a vehicle being sold at retail to a person to whom Taxpayer claims to have provided only finance brokerage services, its ownership of the

vehicle forms a factual basis for rejecting Taxpayer's claim that it provided *only* finance brokerage services regarding that transaction.

That said, the evidence also clearly shows that, when making the under reported receipts adjustments, K used and relied upon the CD invoices ─ at least in part ─ to correct Taxpayer's filed ST-556 returns, and when calculating the amount of gross receipts Taxpayer realized from transactions for which Taxpayer did not file such transaction returns. Tr. pp. 362-63, 368 (K). Again, the hearing record is devoid of any evidence showing that the CD invoices can be relied upon ─ for any purpose ─ as a true and accurate record of Taxpayer's business operations. It is K's unreasonable reliance on those CD invoices which taints any and all adjustments based on them. As a result, I respectfully recommend that no audit adjustment based on the CD invoices should be finalized as issued.

I further recommend that the best remedy to achieve this result is for the Director to have Department audit personnel review the audit schedule referred to on Department Exhibit 6 regarding the under reported receipts adjustments, to determine whether it identifies which of the adjustments were based, even in part, on the CD invoices, and to eliminate any amounts of tax assessed on them. *See* Department Ex. 6 (schedule 10-100); Tr. pp. 362-63 (K). If, however, K's audit schedule does not specify which adjustments were based on the CD invoices and which were not, then none of the tax based on the under reported receipts adjustments should be finalized as issued.

c. Adjustments For Disallowed Discount – ST 556 Delivery Date Charged Per CD Invoice (Audit Adjustment 4)

The last of the adjustments which involve K's reliance on the CD invoices are based on his disallowance of discounts reported on certain ST-556 returns Taxpayer filed

during the audit period. *See* Department Ex. 6. Section 3 of the ROTA authorizes a retailer to take a discount in the amount of 1.75% of the taxable receipts reported on a return, "to reimburse the retailer for the expenses incurred in keeping records, preparing and filing returns, remitting the tax and supplying data to the Department on request." 35 ILCS 120/3. The disallowed discount adjustments referred to on the Summary Analysis schedule reflects K's determination that the discounts reported on some of Taxpayer's filed ST-556 returns should be disallowed because the delivery date reported on the return was more than 20 days after a date he said he saw on CD invoices. Department Ex. 6; Tr. pp. 87-90 (K). Because these adjustments are based on K's reliance on the CD invoices, I recommend that the tax based on them not be finalized as issued.

2. Adjustments Based on Non-Taxed Miscellaneous Fees (Audit Adjustment 1) and ST-556 Unreported Receipts (Audit Adjustment 5)

The adjustments for non-taxed fees are based on K's review of transaction returns Taxpayer filed regarding its retail sales of vehicles, and his review of Taxpayer's deal jackets regarding the sales reported on those returns. Department Ex. 6; Tr. pp. 86-87 (K). K testified that, on either the returns or on documents kept in Taxpayer's deal jackets kept regarding those sales, K saw that Taxpayer had charged its purchasers amounts for different types of fees, which amounts were not, thereafter, taken into account when Taxpayer calculated the selling price of the vehicle. Tr. pp. 86-87 (K). K determined that such charges were properly includable within the amount of the selling price for a vehicle. *Id*.; Department Exs. 1, 6.

The next adjustments are for unreported receipts, and are also based on K's review of Taxpayer's filed returns for 2008 and Taxpayer's deal jackets. Department Ex. 6; Tr. pp. 90-91 (K). K noted that Taxpayer did not have deal jackets for all of the

transactions for which it filed returns during 2008. Tr. pp. 90-91 (K). K presumed that Taxpayer's inability to keep deal jackets for all of the transactions for which it filed Illinois returns in 2008 would be consistently true for all transactions for which it filed Illinois returns in 2006 and 2007. Based on his review of Taxpayer's records, and this reasonable presumption, K determined that some of the non-taxed fees that he observed in the deal jackets Taxpayer did keep for its 2008 sales should be projected to the gross receipts from the transactions Taxpayer reported in 2008 but for which it did not have deal jackets, and to the similar transactions in other years during the audit period. Tr. pp. 90-91 (K); Department Ex. 6.

K's adjustments in both cases were reasonable and fully consistent with Illinois law. 35 ILCS 120/1 (definition of selling price); Velde Ford Sales, Inc. v. Department of Revenue, 136 Ill. App. 3d 589, 483 N.E.2d 721 (4th Dist. 1985) (fees charged by motor vehicle retailer for services related to obtaining and transferring title to vehicle sold were includable in retailer's selling price for vehicle). Taxpayer, moreover, offered no evidence which addressed any of these adjustments. Therefore, Taxpayer has not rebutted the tax and penalties assessed regarding these adjustments

3. Adjustment Based on Disallowed Sale to Michael L[ ] (Audit Adjustment 3)

This adjustment is based on a transaction return Taxpayer filed regarding a sale of a vehicle to an individual purchaser, but regarding which Taxpayer claimed a deduction as a sale for resale, using a registration number that K determined belonged to a retailer who was not the individual purchaser identified on the return. Tr. p. 89 (K). K said that the individual purchaser took title to the vehicle, and obtained Illinois license plates for it, in his own name. *Id.*

As K explained at hearing, the Department uses a transaction return on which a sale for resale deduction is claimed as a de facto certificate of resale referred to within ROTA § 2c. Section 2c of the ROTA provides, in pertinent part, as follows:

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> Except as provided hereinabove in this Section, a sale shall be made tax-free on the ground of being a sale for resale if the purchaser has an active registration number or resale number from the Department and furnishes that number to the seller in connection with certifying to the seller that any sale to such purchaser is nontaxable because of being a sale for resale.
>
> Failure to present an active registration number or resale number and a certification to the seller that a sale is for resale creates a presumption that a sale is not for resale. This presumption may be rebutted by other evidence that all of the seller's sales are sale for resale, or that a particular sale is a sale for resale.

35 ILCS 120/2c. So long as a resale certificate is valid on its face, it creates a presumption that the sale was a sale for resale, and was not taxable.

Here, the evidence makes clear that K determined that a particular transaction return was not valid on its face, since the named individual purchaser was not the same person as the retailer to whom the registration number reported on the return had been assigned. Tr. p. 89 (K). In short, K determined that the individual purchaser of the vehicle in this transaction was not a retailer. Illinois courts have repeatedly upheld the Department's disallowance of deductions for receipts claimed to have been realized from sales for resale, but for which the retailer presents a resale certificate which is not valid on its face. Rock Island Tobacco & Specialty Co. v. Illinois Department of Revenue, 87 Ill. App. 3d 476, 478-79, 409 N.E.2d 136, 138-39 (3rd Dist. 1980) (holding that it was "proper for the auditor to disallow certificates which were inaccurate."); *accord* American Welding Supply Co. v. Department of Revenue, 106 Ill. App. 3d 93, 102, 435 N.E.2d 761, 768 (5th Dist. 1982). The inaccuracy determined to have occurred here

involved Taxpayer's identification of the purchaser on a return it filed, and its representation that the named purchaser was a registered retailer. Department Ex. 6.

At hearing, Taxpayer asked K if the individual purchaser was a family relation of someone associated with the retailer whose registration number Taxpayer reported on the return. Tr. p. 180 (K). But Taxpayer's suggestion of why it chose, in this transaction, to treat an individual purchaser as though he were a registered retailer is not evidence, and is not well taken. Even though sales for resale to registered retailers or resellers are not intended to be subject to ROT or use tax, a retailer's sales to persons who are not registered retailers or resellers are presumed taxable, unless some exemption applies. 35 ILCS 120/2c; 35 ILCS 120/7;[2] American Airlines, Inc., 402 Ill. App. 3d at 590, 931 N.E.2d at 676 ("Under the UTA, unless exempted, all items of tangible personal property used in Illinois are subject to tax."). The person claiming an exemption, moreover, has the statutory burden to document which of its sales are not taxable, or are exempt. 35 ILCS 120/7; Wyndemere Retirement Community v. Department of Revenue, 274 Ill. App. 3d 455, 459, 654 N.E.2d 608, 611 (2d Dist. 1995) ("A statute which exempts property or an entity from taxation must be strictly construed in favor of taxation and against exemption; the exemption claimant must prove clearly and conclusively its

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[2] Section 7 of the ROTA provides, in pertinent part:

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> Except in the case of a sale to a purchaser who will always resell and deliver the property to his customers outside Illinois, anyone claiming that he has made a nontaxable sale for resale in some form as tangible personal property shall also keep a record of the purchaser's registration number or resale number with the Department.
>
> It shall be presumed that all sales of tangible personal property are subject to tax under this Act until the contrary is established, and the burden of proving that a transaction is not taxable hereunder shall be upon the person who would be required to remit the tax to the Department if such transaction is taxable.

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35 ILCS 120/7.

entitlement.").

Moreover, merely asking K whether the named individual purchaser was somehow related to a registered retailer (*see* Tr. p. 180 (K)) does not constitute substantive or credible evidence that the real purchaser in this transaction was the retailer whose registration number Taxpayer reported on the return. Except in the case of a sole proprietorship, the individual owners, officers or agents of an entity that is licensed as an Illinois retailer, and the retailer itself, are separate and distinct persons. *See; e.g.*, People v. Parvin, 125 Ill. 2d 519, 528, 533 N.E.2d 813, 816-17 (1988) ("We hold only that the statutory language "person engaged in the business of selling tangible personal property at retail" as used in the failure-to-file provision of section 13 does not include officers and agents of a corporation which is required under the Act to file returns."); Fontana v. TLD Builders, Inc., 362 Ill. App. 3d 491, 500, 840 N.E.2d 767, 775 (2nd Dist. 2005) ("[a] corporation is a legal entity that exists separately and distinctly from its shareholders, officers, and directors …."). Taxpayer's suggested willingness to treat, for ROT and/or use tax purposes, an individual relative of an owner or agent of a registered retailer as the same person as the registered retailer does not persuade me that I should, too. Nor does it constitute clear and convincing evidence that the gross receipts from this particular transaction were exempt from ROT. 35 ILCS 120/2c; 35 ILCS 120/7.

Here, K's disallowance of the deduction claimed on the return at issue was reasonable, and Taxpayer had the burden to show, with books and records, that the gross receipts from this sale were not taxable. 35 ILCS 120/7. But since Taxpayer did not present any evidence to show that this particular sale was a sale for resale, it has not rebutted the Department's presumptively correct determination of the amount of tax due

regarding this transaction. 35 ILCS 120/2c; 35 ILCS 120/7; Rock Island Tobacco, 87 Ill. App. 3d at 478-79, 409 N.E.2d at 138.

4. Adjustments Based on Disallowed Drive Away Deductions (Audit Adjustment 6)

The drive away adjustments are based on K's review of ST-556 returns Taxpayer filed with the Department as a retailer, and on which it claimed that the gross receipts were exempt because the vehicle was not purchased for use in Illinois. Tr. pp. 92-95 (K); Department Ex. 6; Taxpayer Ex. 11. The evidence shows that, on certain returns Taxpayer filed during the audit as a retailer, and on which it claimed a statutory exemption for gross receipts from retail sales of motor vehicles purchased for use outside Illinois, but delivered to the purchaser in Illinois, K determined that Taxpayer lacked sufficient information required to document the statutory exemption. Before discussing in more detail how K made his determinations, and the evidence Taxpayer offered regarding this issue, a short review of the statutory exemption is in order.

The statutory exemption at issue is authorized by § 2-5(25) of the ROTA. A similar exemption is also included within the complementary Illinois Use Tax Act, as one of the exemptions designed to prevent actual or likely multistate taxation. *Compare id. with* 35 ILCS 105/3-55(h) *and* 35 ILCS 105/3-55(h-1). During the audit period, ROTA § 2-5(25), and the statutory exception to that exemption, found at § 2-5(25-5), provided as follows:

> § 2-5. Exemptions. Gross receipts from proceeds from the sale of the following tangible personal property are exempt from the tax imposed by this Act:
>
> ***
>
> (25) Except as provided in item (25–5) of this Section, a motor vehicle sold in this State to a nonresident even though the motor vehicle is delivered to the nonresident in this State, if the motor

> vehicle is not to be titled in this State, and if a drive-away permit is issued to the motor vehicle as provided in Section 3-603 of the Illinois Vehicle Code or if the nonresident purchaser has vehicle registration plates to transfer to the motor vehicle upon returning to his or her home state. The issuance of the drive-away permit or having the out-of-state registration plates to be transferred is prima facie evidence that the motor vehicle will not be titled in this State.
>
> (25–5) The exemption under item (25) does not apply if the state in which the motor vehicle will be titled does not allow a reciprocal exemption for a motor vehicle sold and delivered in that state to an Illinois resident but titled in Illinois. The tax collected under this Act on the sale of a motor vehicle in this State to a resident of another state that does not allow a reciprocal exemption shall be imposed at a rate equal to the state's rate of tax on taxable property in the state in which the purchaser is a resident, except that the tax shall not exceed the tax that would otherwise be imposed under this Act. At the time of the sale, the purchaser shall execute a statement, signed under penalty of perjury, of his or her intent to title the vehicle in the state in which the purchaser is a resident within 30 days after the sale and of the fact of the payment to the State of Illinois of tax in an amount equivalent to the state's rate of tax on taxable property in his or her state of residence and shall submit the statement to the appropriate tax collection agency in his or her state of residence. In addition, the retailer must retain a signed copy of the statement in his or her records. Nothing in this item shall be construed to require the removal of the vehicle from this state following the filing of an intent to title the vehicle in the purchaser's state of residence if the purchaser titles the vehicle in his or her state of residence within 30 days after the date of sale. The tax collected under this Act in accordance with this item (25–5) shall be proportionately distributed as if the tax were collected at the 6.25% general rate imposed under this Act.
>
> ***

35 ILCS 2-5(25)-(25-5).

K determined that, for all returns claiming what he referred to as a drive-away exemption, a retailer was required to document the exempt nature of the sale, both on the return and by obtaining or creating and keeping documentation regarding each such sale, as part of the retailer's records. *See* Tr. pp. 92-95, 201 (K); *compare also* 35 ILCS 105/4 (statutory presumption that property purchased at retail and delivered to purchaser in Illinois was sold for use in Illinois) *with* 35 ILCS 120/2-5(25) *and* 86 Ill. Admin. Code §

130.605(b)(1). All of the drive away adjustments included within the Summary Analysis schedule are based on K's determination that Taxpayer lacked support to document the deduction/exemption claimed on the ST-556 returns Taxpayer reported as retail sales of vehicles that were delivered to purchasers in Illinois. Tr. p. 92 (K); Department Ex. 6; *see also* 35 ILCS 120/2-5(25)-(25-5); 86 Ill. Admin. Code § 130.605(b)(1).

The type of information K considered when reviewing Taxpayer's filed transaction returns claiming a § 2-5(25) exemption included the residence address of the purchaser listed on the return, the state in which the vehicle was claimed to be intended for use, and any information Taxpayer made and kept to document that Taxpayer issued a drive away permit to the purchaser regarding the sale. Tr. pp. 92-95, 201 (K); Department Ex. 6; *see also* Taxpayer Exs. 7-9. For the adjustments K made regarding such transaction returns, K made a detailed review of all such returns for 2008, and then projected his disallowance of such exemptions regarding similar transaction returns Taxpayer filed in 2006 and 2007. Department Ex. 6; Tr. pp. 92-95 (K).

Regarding this issue, Taxpayer offered into evidence, without objection, copies of invoices regarding some of its sales transactions, copies of some of the seller's copies of ST-556 returns it completed on which it was identified as the retailer, and copies of drive-away permits issued regarding some such transactions. Taxpayer Exs. 7-9. It also offered into evidence a copy of a deposition transcript of an agent of the Illinois Secretary of State, who was asked questions regarding Illinois retailer's duties to obtain drive away permits. Taxpayer Ex. 6. In its brief, Taxpayer stresses agent *SMITH*'s deposition testimony that a retailer had no duty to obtain a drive away permit for a sale of a vehicle that is delivered to a non-resident purchaser outside Illinois, or where the vehicle, when

sold, is not physically present in Illinois. Taxpayer's Brief, pp. 10, 22. After considering the evidence Taxpayer offered regarding this issue, however, I conclude that much of it has no relevance to the drive away adjustments K actually made here. That conclusion is based on the fact that the evidence Taxpayer offered cannot be tied to the transaction returns K actually corrected.

To begin, all of the drive away adjustments K determined should be made were based on his corrections to ST-556 returns Taxpayer, itself, filed to report some of its retail sales during 2008. Department Exs. 6; Taxpayer Ex. 11. The documents admitted as Taxpayer Exhibit 9 all reflect sales transactions Taxpayer completed in 2008, which was the test year K used in the audit. Taxpayer Ex. 9; Department Ex. 6; Tr. pp. 92-95, 201 (K). Of the documents included within that exhibit, I take note of the following:

- Pages 6 through 8 of Taxpayer Exhibit 9 reflect Taxpayer's sale of a 2000 BMW to E[ ] K[ ], of Wisconsin, and include: a copy of a Bill of Sale (invoice) from Taxpayer (the text of which begins with the sentence, "Thank you for purchasing your used vehicle from *ABC*."); a copy of the seller's copy of a completed ST-556 return (bearing number XXXXX) naming Taxpayer as the seller regarding that sale; and a copy of the Illinois drive away permit issued regarding that sale. Taxpayer Ex. 9, pp. 6-8. The return, however, is not included within the schedule of Taxpayer's filed returns for 2008 which K reviewed. *Compare id.* p. 7 *with* Taxpayer Ex. 11, pp. 1-4, 17-20.
- Pages 9 and 10 of Taxpayer Exhibit 9 consist of, respectively, a copy of a Bill of Sale from Taxpayer, and a copy of the seller's copy of a completed ST-556 return (number XXXXX) showing Taxpayer as the seller, and R[ ] K[ ] of Edmond Alberta as the

purchaser, of a 2006 Ford, which was delivered to the purchaser on May 9, 2008. Taxpayer Ex. 9, pp. 9-10. That return, however, is not included within the schedule of Taxpayer's filed returns for 2008 which K reviewed. *Compare id.* p. 10 *with* Taxpayer Ex. 11, pp. 1-4, 17-20.

- Pages 11 and 12 consist of, respectively, a copy of a Bill of Sale from Taxpayer, and a copy of the seller's copy of a completed ST-556 return (number XXXXX) showing Taxpayer as the seller and J[ ] M[ ] of Ontario Canada as the purchaser of a 2007 Chevrolet, which was delivered on May 7, 2008. Taxpayer Ex. 9, pp. 11-12. The return number listed on the return, however, is not included within the schedule of Taxpayer's filed returns for 2008 which K reviewed. *Compare id* p. 12 *with* Taxpayer Ex. 11, pp. 1-4.
- Pages 20 and 21 consist of, respectively, a copy of a Bill of Sale from Taxpayer, and a copy of the seller's copy of a completed ST-556 return (number XXXXX) showing Taxpayer as the seller and D[ ] P[ ] of Tortola as the purchaser of a 2004 Mazda, which was delivered on June 3, 2008. Taxpayer Ex. 9, pp. 20-21. The return number listed on the return, however, is not included within the schedule of Taxpayer's filed returns for 2008 which K reviewed. *Compare id* p. 21 *with* Taxpayer Ex. 11, pp. 1-4, 17-20.
- Pages 22 through 24 of Taxpayer Exhibit 9 reflect Taxpayer's sale of a 2001 Ford to M[ ] P[ ], of Kentucky, and include: a copy of a Bill of Sale from Taxpayer; a copy of the Illinois drive away permit issued regarding that sale; and a copy of the seller's copy of a completed ST-556 return (number XXXXX) naming Taxpayer as the seller regarding that sale. Taxpayer Ex. 9, pp. 22-24. The return number listed on the return,

however, is not included within the schedule of Taxpayer's filed returns for 2008 which K reviewed. *Compare id* p. 24 *with* Taxpayer Ex. 11, pp. 1-4, 17-20.

- Pages 25 and 26 consist of, respectively, a copy of a Bill of Sale from Taxpayer, and a copy of the seller's copy of a completed ST-556 return (number XXXXX) showing Taxpayer as the seller and A[ ] T[ ] of Iowa as the purchaser of a 1997 Ford, which was delivered on March 5, 2008. Taxpayer Ex. 9, pp. 25-26. The return number listed on the return, however, is not included within the schedule of Taxpayer's filed returns for 2008 which K reviewed. *Compare id* p. 26 *with* Taxpayer Ex. 11, pp. 1-4, 17-20.
- Pages 27 and 28 consist of, respectively, a copy of a Bill of Sale from Taxpayer, and a copy of the seller's copy of a completed ST-556 return (number XXXXX) showing Taxpayer as the seller and J[ ] Y[ ] of Indiana as the purchaser of a 2001 Ford, which was delivered on March 7, 2008. Taxpayer Ex. 9, pp. 27-28. The return number for this return is included within the schedule of Taxpayer's filed returns for 2008 which K reviewed. *Compare id* p. 28 *with* Taxpayer Ex. 11, pp. 1, 18. The schedule K made regarding his adjustments regarding Taxpayer's filed returns involving drive away exemption claims, however, shows that he made no adjustment to the entries K reported regarding this transaction. Taxpayer Ex. 11, p. 18. More specifically, K agreed that Taxpayer paid the correct amount of tax due regarding that transaction. *Id*.

Taxpayer Ex. 9, pp. 6-12, 20-28; Taxpayer Ex. 11, pp. 1-4, 17-20.

As summarized above, Taxpayer appears to have regularly prepared and kept copies of Illinois ST-556 transaction returns which it did not file with the Department, regarding its sales of vehicles in 2008. Taxpayer Ex. 9, *passim*. The documents Taxpayer offered regarding its vehicle sales in 2006 and 2007 are similarly consistent on this point.

Compare id. with Taxpayer Exs. 7 *and* 8. In its brief, Taxpayer argues that such documents rebut the drive away adjustments K made here, since they established that it was not required to report to the Department, or to obtain an Illinois drive away permit regarding, any of its retail sales which involved transactions that were like the transactions agent *SMITH* opined about during his deposition ─ that is, transactions in which an Illinois retailer made a retail sale of a vehicle that was never physically present in Illinois to a non-resident of Illinois. Taxpayer's Brief, pp. 10, 22.

Read together, Taxpayer Exhibits 9 and 11 certainly provide proof that Taxpayer regularly made sales of vehicles which it did not report to the Department, regarding sales it now represents as involving vehicles that were never physically present within Illinois at the time of the sale. Taxpayer Exs. 9, 11. But the documents included within Taxpayer Exhibit 9 do not provide evidence that any one of Taxpayer's filed transaction returns, and regarding which K disallowed a drive away exemption, involved its sale of a vehicle that was never physically present in Illinois. Just as importantly, only one of the transactions reflected by the documents admitted regarding Taxpayer's 2008 sales can be tied to Taxpayer's filed returns that K actually reviewed regarding these drive away adjustments. Taxpayer Ex. 9, p. 28; Taxpayer Ex. 11, pp. 1-4, 17-20. The evidence regarding that transaction, moreover, shows that K did not make any adjustment regarding the return Taxpayer filed regarding that transaction ─ that is, he did not determine that any additional tax was due. Taxpayer Ex. 9, p. 28; Taxpayer Ex. 11, p. 18.

Finally, the evidence shows that all of the drive away adjustments are based on K's determination that Taxpayer lacked support to document the deduction/exemption claimed on some of the ST-556 returns Taxpayer filed, and on which Taxpayer reported

retail sales of vehicles which K presumed Taxpayer delivered to purchasers in Illinois. Department Ex. 6; Tr. p. 92 (K); Taxpayer Ex. 11, pp. 1-4, 17-20; *see also* 35 ILCS 120/2-5(25)-(25-5); 86 Ill. Admin. Code § 130.605(b)(1). Each of the ST-556 returns that Taxpayer filed regarding such sales constituted an admission by Taxpayer, and constitutes substantive evidence that the vehicle Taxpayer reported that it sold at retail was delivered to the purchaser in Illinois. In re Cook County Treasurer, 166 Ill. App. 3d at 379, 519 N.E.2d at 1014. Here again, if Taxpayer had intended to notify the Department that it made an error on its original returns, it was required timely to do so, using an amended return/claim form required by statute and regulation. 35 ILCS 120/6-6a; 86 Ill. Admin. Code § 130.1501. This would include any errors Taxpayer may have made when reporting that a vehicle it sold was delivered to a purchaser in Illinois, when in fact it was not. 86 Ill. Admin. Code § 130.605(b)-(g). However, offering invoices and documents that cannot be tied to the returns K actually corrected does not persuade me that K's corrections to Taxpayer's filed returns were in error.

5. Adjustments Based on Fixed Assets - No Tax Paid (Audit Adjustment 7)

The adjustments assessing Illinois use tax on Taxpayer's cost price of fixed assets are based on K's review of Taxpayer's fixed asset invoices documenting its purchases of tangible personal property for use in Illinois, and for which Taxpayer had no proof that it paid Illinois use tax regarding its use of such property. Department Ex. 6; Tr. p. 20 (K). Retailers do not owe Illinois use tax for tangible personal property they purchase to resell at retail (35 ILCS 105/2 (definition of use)), but they do owe use tax for the privilege of using any tangible personal property they purchase for use in Illinois. 35 ILCS 105/3; Howard Worthington, Inc. v. Illinois Department of Revenue, 96 Ill. App. 3d 1132, 1135-

36, 421 N.E.2d 1030, 1033 (2d Dist. 1981). Taxpayer offered no evidence to show that this adjustment was in any way improper. Therefore, Taxpayer has not rebutted the tax and penalties assessed regarding the tax assessed based on this adjustment.

6. Penalties

a. Fraud Penalty

The first penalty addressed is the fraud penalty, in the amount of $71,542 for the audit period. Pre-Hearing Order. Section 3-6 of the UPIA provides, in pertinent part, "[i]f any return or amended return is filed with intent to defraud, in addition to any penalty imposed under Section 3-3 of this Act, … a penalty shall be imposed in an amount equal to 50% of any resulting deficiency." 35 ILCS 735/3-6. The standard for determining whether a fraud penalty is appropriate is clear and convincing evidence. Puleo v. Department of Revenue, 117 Ill. App. 3d 260, 268, 453 N.E.2d 48, 53 (4th Dist. 1983). Clear and convincing evidence of a taxpayer's intent to defraud can be circumstantial in nature. Vitale v. Department of Revenue, 118 Ill. App. 3d 210, 213, 454 N.E.2d 799, 802 (3d Dist. 1983). Probative evidence that a return was filed with an intent to defraud is evidence that tends to make it more likely than not that a filed return contained representations that were false, and that such representations were made with knowledge that they were false. Camco, Inc. v. Lowery, 362 Ill. App. 3d 421, 839 N.E.2d 655, 665 (1st Dist. 2005) ("Evidence is probative when to the normal mind it tends to prove or disprove a matter at issue."); 37 Am. Jur. 2d Fraud and Deceit § 488 ("Evidence that a representation was made with knowledge of its falsity is regarded as proof of an intent to deceive."); *see also* Puleo, 117 Ill. App. 3d at 268, 453 N.E.2d at 53 ("the record is uncontradicted that the plaintiff admitted to the fraud agents that he had not filed correct

returns …").

Whether a penalty was properly imposed requires a review of the facts of the taxpayer's actions for the period under review. *See* Brown Specialty Co. v. Allphin, 75 Ill. App. 3d 845, 850-51, 394 N.E.2d 659, 663 (3rd Dist. 1979); Peterson v. Yacktman, 25 Ill. App. 2d 208, 214, 166 N.E.2d 452, 455 (1st Dist. 1960) ("There is no general rule for determining what facts will constitute fraud; whether or not it is found depends upon the special facts of each particular case."). The burden lies with the Department to prove fraud by clear and convincing evidence. Brown Specialty Co., 75 Ill. App. 3d at 853, 394 N.E.2d at 665; Racine Fuel Co. v. Rawlins, 377 Ill. 375, 380, 36 N.E.2d 710, 713 (1941) ("Fraud is not presumed but must be proved like any other fact by clear and convincing evidence.").

Here, K testified that the fraud penalty "would have been based on" the difference between the tax reported on the returns Taxpayer filed and the tax determined to be due following audit. Tr. p. 97 (K). Later, regarding other adjustments, Taxpayer's counsel questioned K's similar testimony, in the following exchange:

> Q: Did you use a specific statue as it relates to your reference to unjust enrichment in Exhibit 6?
> A: As a retailer, I never thought about it that way, but it would be the – I don't have the exact statute reference, but ROT, retailers.
> Q: So are you able to answer the question yes or no?
> A: I would have relied on the ROT statute, yes.
> Q: Okay. And the first part of your answer sounds like your usual procedure, where in this particular case the second part of your answer said yes.
>
> Are you referring to your usual procedure when you answered the question, or are you referring to this particular case"
> A: As a -- among -- as part, I guess.

Tr. p. 316 (K).

Taxpayer's ability to point out the vagueness of K's testimony regarding certain

fact questions is especially useful here. When considering K's response to being asked what facts the fraud penalty were based on, one way to understand K's testimony is to accept that the difference between the tax determined due and the tax reported on Taxpayer's returns was, in fact, the reason K expressed in the memo he said he wrote to recommend that a fraud penalty be assessed in this case. *Id*. Of course, and as counsel pointed out, K's use of the conditional, "would have," might just as readily reflect that, by the time of hearing, K had no recollection of why he asked that a fraud penalty be assessed in this case, and that the difference between the tax shown on the taxpayer's returns and the amount determined to be due following audit was the reason he had previously used, in other cases, as the basis to request that a fraud penalty be assessed. *See* Tr. p. 316. K's testimony was the only direct evidence offered to support the fraud penalty assessed here. After considering that testimony, I conclude that the record does not clearly and convincingly identify the factual bases for the Department's assessment of a fraud penalty in this case.

But even if I were inclined to construe K's testimony in the light most favorable to the Department, the record still shows that K's reliance on the CD invoices, when making his audit determinations, was unreasonable. *See supra*, pp. 22-32. K's determination that Taxpayer owed tax, pursuant to ROTA § 2-40, regarding what Taxpayer has shown were its financing transactions, cannot be supported by any credible evidence. So, even if the difference between the tax determined to be due by K's audit and the tax Taxpayer reported due on its filed returns was, in fact, the basis for the fraud penalty, K's use of CD invoices to measure the first amount means that the difference was grossly overstated.

Most importantly, however, the Department has the statutory authority to issue a fraud penalty in cases where "any return or amended return is filed with intent to defraud …." 35 ILCS 735/3-6. The same sentence provides that the amount of the fraud penalty "shall be imposed in an amount equal to 50% of any resulting deficiency." *Id*. When a statute does not define a term, courts assume that the legislature intended the words used to have their ordinary and popularly understood meaning. People v. Borash, 354 Ill. App. 3d 70, 75, 820 N.E.2d 74, 79 (1st Dist. 2004); City Suburban Elec. Motors, Inc. v. Wagner, 278 Ill. App. 3d 564, 567, 663 N.E.2d 77, 79 (1st Dist. 1996). In this case, as a noun, "resulting" means "something that happens as a consequence; outcome." http://dictionary.com/browse/resulting (last viewed accessed: March 17, 2016). Based on the plain and ordinary meaning of the words, I understand the legislature's use of the phrase "resulting deficiency," as used in § 3-6 of the UPIA, as referring to a deficiency that arises as a consequence of a false statement knowingly made on, or a true statement knowingly omitted from, any filed return. 35 ILCS 735/3-6; Puleo, 117 Ill. App. 3d at 268, 453 N.E.2d at 53. The plain text of UPIA § 3-6 does not authorize the assessment of a fraud penalty for a deficiency that is caused by a taxpayer's failure to file a return (35 ILCS 735/3-6); that remains a criminal offense, for which criminal penalties may be imposed. 35 ILCS 120/13(a). In this case, most of the deficiency assessed against Taxpayer was based on K's determination that tax was due regarding transactions for which Taxpayer did not file returns. Department Exs. 1, 6. Section 3-6 of the UPIA simply does not authorize the assessment of a civil fraud penalty for a deficiency resulting from such transactions. 35 ILCS 735/3-6.

And regarding the tax deficiency assessed which was based on K's corrections to

Taxpayer's filed returns, the evidence shows that such corrections primarily involved K's disallowance of deductions claimed on those returns, based generally on Taxpayer's failure to maintain the type of documents necessary to support them. *See* Department Ex. 6. Regarding these disallowed deductions, moreover, it is good to recall that not every incorrect statement made on a filed tax return is a false statement. *Compare e.g.*, Puleo, 117 Ill. App. 3d at 268, 453 N.E.2d at 53 *with* State ex rel. Beeler Schad and Diamond, P.C. v. Ritz Camera Centers, Inc., 377 Ill. App. 3d 990, 997-98, 878 N.E.2d 1152, 1158-59 (1st Dist. 2007) ("The *Wilkins* court addressed the requisite knowledge needed to prevail in a reverse false claims act violation and stated that "[t]he gist of the violation is not an intent to deceive but the knowing presentation of a claim, record or statement that is either fraudulent or false and the requisite intent is the knowing presentation of what is 'known to be false.") (internal quotation marks omitted). Again, Illinois law does not presume fraudulent intent; it must be established by clear and convincing evidence. Racine Fuel Co., 377 Ill. at 380, 36 N.E.2d at 713.

Here, the evidence supports K's presumptively correct determination that Taxpayer was not entitled to, for example, trade in, resale, and drive away deductions claimed regarding certain vehicle sales for which it filed ST-556 returns. Department Exs. 1, 6. That is because Taxpayer was unable to produce documents sufficient to support the different deductions claimed on its filed returns, and thereby, to rebut the Department's prima facie case regarding those adjustments. Department Exs. 1-2, 4-6; Fillichio, 15 Ill. 2d at 333, 155 N.E.2d at 7; A.R. Barnes & Co., 173 Ill. App. 3d at 833-34, 527 N.E.2d at 1053. But after considering all of the evidence admitted at hearing, I cannot conclude that this record contains clear and convincing evidence showing that

Taxpayer filed such returns with the intent to claim deductions to which it knew it was not entitled. 35 ILCS 735/3-6; Taxpayer Exs. 7-9. As a result, I respectfully recommend that Director cancel the fraud penalty assessed in this case.

b. Late Filing and Late Payment Penalties

The NTL and Department Exhibit 6 reflect that the Department assessed late filing and late payment penalties against Taxpayer. Department Exs. 1, 6. Section 4 of the ROTA, and § 3-3 of the UPIA, authorize the Department to issue and assess late filing and late payment penalties. 35 ILCS 120/4; 35 ILCS 735/3-3. Illinois courts have long treated the issuance of penalties like those described in UPIA § 3-3 to be a ministerial act, based simply on a mathematical percentage of the amount of tax the Department determined to be due. Diogenes v. Department of Finance, 377 Ill. 15, 22, 35 N.E.2d 342, 346 (1941); Department of Finance v. Gandolfi, 375 Ill. 237, 240, 30 N.E.2d 737, 739 (1940).

Section 3-8 of the UPIA provides that § 3-3 penalties, along with some others, "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's determination that penalties were due is presumed correct, and Taxpayer bears the burden to show that the UPIA § 3-3 penalties ─ or some amount of them ─ were not due. 35 ILCS 735/3-8; Hollinger International, Inc., 363 Ill. App. 3d at 315-16, 841 N.E.2d at 450.

After considering the record, I first conclude that Taxpayer has not offered evidence sufficient to show that it acted with ordinary business care and prudence

regarding the tax adjustments K determined should be made to Taxpayer's filed returns, and which corrections were not based on K's use of and reliance upon the CD invoices. Since, however, a considerable amount of the tax assessed was based on K's reliance upon the CD invoices, and which tax, I respectfully recommend, should not be finalized, the amount of the late filing and the late payment penalties must be revised to take into account the reduced amounts of tax due. *See* 35 ILCS 735/3-3(c). More specifically, and using the numbers previously included within the table reflecting K's Summary Analysis schedule (*see supra* pp. 3-4), I recommend as follows:

- Audit Adjustment 1: The penalties assessed regarding K's tax adjustments for "Non-taxed miscellaneous fees – Used car lot sale" should be finalized as issued. Department Ex. 6 (adjustment number 1, referring to schedule 4 ST D and M).
- Audit Adjustment 2: Regarding the tax adjustments for under reported receipts, if K's schedule 10-100 shows which of these adjustments were, and were not, based on the CD invoices, I recommend that any penalties related to tax based on the CD invoices be eliminated. Department Ex. 6 (adjustment number 2, referring to schedule 10-100). Penalties related to the tax adjustments based on Taxpayer's own books and records (i.e., tax that was not based on the CD invoices) should be finalized as issued. If, however, K's schedule 10-100 does not distinguish between the tax adjustments that were, and were not, based on the CD invoices, all penalties resulting from the adjusted tax amounts should be eliminated.
- Audit Adjustment 3: The late payment penalty assessed based on the disallowed sale to Michael L[ ] should be finalized as issued. Department Ex. 6 (adjustment number 3, referring to schedule 10-101).

- Audit Adjustment 4: Any late filing or late payment penalties based on K's adjustments for disallowed discounts regarding returns that K determined were filed late, after relying the CD invoices, should be eliminated. Department Ex. 6 (adjustment number 4, referring to schedule 2D 10-120).
- Audit Adjustment 5: The late payment penalties assessed based on the adjustments described as "2008 ST 556 all unreported receipts should be finalized as issued. Department Ex. 6 (adjustments number 5, referring to schedules 4 ST R/10-300, 4 ST U/10-130, and ST U/10-310).
- Audit Adjustment 6: The late payment penalties assessed based on the drive away adjustments should be finalized as issued. Department Ex. 6 (adjustments number 6, referring to schedules 4 ST A, 4 ST A NR/10-340, 4 ST A/10-140, and 4 ST A R/10-145).
- Audit Adjustment 7: The late payment penalties assessed based on the adjustment described as "fixed assets-no tax paid" should be finalized as issued. Department Ex. 6 (adjustment number 7, referring to schedules 30-100).
- Audit Adjustment 8: Any late payment penalties assessed based on the unjust enrichment adjustments should be eliminated. Department Ex. 6 (adjustment number 8, referring to schedules 2 ILL UJ, and Schedules 5-2006 through 2008).

Conclusion:

After reviewing the evidence admitted at hearing, I conclude that Taxpayer has rebutted the Department's prima facie case regarding some, but not all, of the amounts of tax and penalties assessed. I respectfully recommend that the Director revise the NTL to eliminate all tax, penalties and interest assessed that were based on K's reliance on the

CD invoices. I further recommend that the fraud penalty be eliminated, because the record contains no clear and convincing evidence showing that Taxpayer filed any of its returns with an intent to defraud. Finally, I recommend that the remaining amounts of tax and penalties be finalized as so revised, with interest to accrue pursuant to statute.

Date: March 25, 2016 John E. White, Administrative Law Judge