

**ST 06-17**

**Tax Type: Sales Tax**

**Issue: Trade-In Transactions Under Illinois Use Tax Act**

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

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**THE DEPARTMENT OF REVENUE  
OF THE STATE OF ILLINOIS**

v.

**ABC, INC.,  
Taxpayer**

**No. 00-ST-0000  
IBT #0000-0000  
NTL #00 00000000000000  
#00 00000000000000**

**Ted Sherrod  
Administrative Law Judge**

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**RECOMMENDATION FOR DISPOSITION**

**Appearances:** Special Assistant Attorney General Shepard Smith on behalf of the Illinois Department of Revenue; Robert Kleeman, Esq. of Robert Kleeman, Ltd. on behalf of ABC, Inc.

**Synopsis:**

This matter is before the Department of Revenue (“Department”) Office of Administrative Hearings as the result of a timely protest by ABC, Inc. (“ABC” or “taxpayer”) of two Notices of Tax Liability assessing Retailers’ Occupation and related taxes issued to the taxpayer on August 25, 2004. The taxpayer sells and leases motor vehicles, and the taxes at issue were assessed with regard to sales the taxpayer made during the period from January 1998 through December 2001. The issue presented in this case is whether the taxpayer was entitled to certain trade-in deductions taken on tax

forms filed to report sales transactions during the tax period in controversy. The taxpayer also contends that the Department improperly determined the amount of tax due with respect to taxes collected by the taxpayer but not remitted to the Department, and objects to the doubling of interest due on the assessed liability pursuant to 35 ILCS 735/3-2(f).

A hearing on the taxpayer's protest was held at the Department's offices in Chicago, Illinois on February 9, 2006. At the hearing, the parties presented a Stipulation of Facts, and testimony by Angelo Lolis, a Department auditor, and by Phillip Durante, the taxpayer's owner and President. The record in this case also includes documentary evidence and briefs submitted by both the Department and the taxpayer. Subsequent to the hearing, and by agreement of the parties, the Department's auditor submitted revised computations substantially reducing the taxpayer's liability as shown on the Notices of Tax Liability that were originally issued.

Following the submission of all evidence and a review of the record in this case, it is recommended that the taxpayer's liability be reduced from the amount of tax (excluding interest) shown in the notices of tax liability at issue (\$960,325) to \$733,325 in accordance with the auditor's revisions noted above and that these notices of tax liability, as so modified, be finalized and affirmed.

**Findings of Fact:**

1. ABC, Inc. ("ABC" or "taxpayer") is engaged in the operation of an automobile dealership and leasing agency. Taxpayer's Stipulation of Facts ("Stip.") number ("No.") 2. The taxpayer is licensed in the State of Illinois to collect and remit sales taxes under the Illinois Retailers' Occupation Tax Act. *Id.*

2. *ABC* is required to file, and files ST-556 forms reporting its gross receipts from selling tangible personal property on a transaction by transaction basis. Stip. No. 2 and No. 10; Stip. Exhibit (“Ex.”) No. 1 (audit narrative); 35 **ILCS** 120/3. That is, for each sale it makes, *ABC* files a separate return. Stip. No. 2; 35 **ILCS** 120/3.
3. The Department audited *ABC* regarding the period from January 1, 1998 through and including December 31, 2001. Transcript (“Tr.”) p. 17; Stip. No.1 and No. 3; Stip. Ex. No. 1 (audit narrative). This audit was conducted on a “test check” basis due to the high number of transactions during the audit period. Tr. pp. 19, 20; Stip. No. 4; Stip. Ex. No. 1.
4. The Department’s auditor described the results of the audit in his audit narrative, and prepared audit work papers to present his findings and determinations. Stip. Ex. No. 1.
5. The Department’s audit included an examination of *ABC*’s trade-in deductions reported in section 6 of *ABC*’s form ST-556. Stip. No. 4.
6. Due to the high number of transactions *ABC* made during the audit period, the Department’s auditor only examined books and records pertaining to the first five deals in each month during the audit period for which a trade-in deduction was claimed. Tr. p. 19; Stip. Ex. No. 1. These books and records were kept in the form of “dealer jackets,” one of which *ABC* created and maintained for each separate transaction. Tr. p. 17. The dealer jackets generally included: sales invoices, insurance cards, lease documents, bills of sale, odometer statement forms and certificates of title and other title documents. *Id.* The auditor also reviewed other documents. Tr. pp. 17, 18.

7. After analyzing the audit sample, consisting of the first five deals in each month during the audit period involving a trade-in (Stip. No. 5), the Department's auditor determined the amount of tax due regarding the sample transactions, and then projected the tax due based upon the audit sample analysis, to the entire audit period. Tr. pp. 19, 20; Stip. Ex. No. 1 (Schedule marked "Test").
8. The tax assessed as a result of the audit was based upon the Department's determination that *ABC* was not entitled to trade-in deductions that it claimed on certain transaction by transaction returns involving the receipt of vehicles previously leased by lessees from particular lessors and the sale of vehicles intended for lease to the same lessees by different lessors, or the substitution of new finance agreements or leases for old ones involving the same borrowers or lessees and vehicles and the same or different lenders or lessors. Tr. pp. 18, 23-31, 46-51; Stip. Ex. No. 1 (audit narrative).
9. Applying the aforementioned audit methodology, the Department's auditor disallowed 73 percent (73%) of the \$19,049,979 in trade-ins claimed by the taxpayer on forms ST-556 filed by the taxpayer during the audit period. Tr. pp. 19, 20; Stip. No. 5. The auditor determined that 9 percent (9%) of the disallowed trade-ins were sold to Chicago residents and therefore subject to the additional Chicago Use Tax of one percent (1%). Stip. No. 6. The total additional tax due as a consequence of this audit determination was \$960,325. *Id.*
10. The auditor's determinations resulting from the application of the aforementioned audit methodology are reflected in the amounts assessed indicated in Notice of Tax Liability number 00 000000000000 and Notice of Tax Liability number 00

00000000000000 issued to the taxpayer on August 25, 2004. The aggregate amount assessed pursuant to these Notices of Tax Liability is \$960,325 excluding interest.

*Id.*; Stip. No. 7; Stip. Ex. No. 2.

- 11.** Subsequent to the issuance of the Notices of Tax Liability, the Department conducted a reaudit of the taxpayer, which included an examination of all of the taxpayer's transactions in which trade-in deductions were claimed and was not based upon projections. Stip. No. 8.
- 12.** At the conclusion of the reaudit, the auditor prepared a 25 page schedule, designated as the auditor's schedule 1 (included in the record as Stip. Ex. No. 3), listing all transactions involving trade-ins during the audit period and showing the sale price of each vehicle as shown on the invoice to the purchasing bank or financial institution (Stip. Ex. No. 3, column 3), each trade-in accepted (in dollars) as shown on the bank invoice (Stip. Ex. No. 3, column 4), the tax billed by the taxpayer as shown on the invoice to the purchaser (Stip. Ex. No. 3, column 5), the number of the ST-556 report reporting the transaction as shown on the invoice to the purchaser (Stip. Ex. No. 3, column 2), the sale price of the vehicle reported on the ST-556 (Stip. Ex. No. 3, column 6), the trade-in reported in the ST-556 (Stip. Ex. No. 3, column 7), the tax remitted pursuant to the ST-556 (Stip. Ex. No. 3, column 8), and the ultimate lessee of the purchased vehicle (Stip. Ex. No. 3, column 1). Stip. No. 10; Stip. Ex. No. 3.
- 13.** At the conclusion of the reaudit, the auditor also prepared a 10 page list designated as the auditor's schedule 2 (included in the record as Stip. Ex. No. 4) showing trade-ins allowed and disallowed on reaudit. This schedule shows the names of lessees (Stip. Ex. No. 4, column 1), the taxpayer's classification of the transaction as a lease

or retail sale (Stip. Ex. No. 4, column 3), the number of the ST-556 form filed to report each transaction (Stip. Ex. No. 4, column 4), the auditor's classification of the transaction as a "Good Trade", "Refinancing" or "Re-Lease" (Stip. Ex. No. 4, column 2), the date the vehicle was delivered (Stip. Ex. No. 4, column 5), the amount of claimed trade-ins denied by the auditor (Stip. Ex. No. 4, column 6), and the amount of claimed trade-ins allowed by the auditor (Stip. Ex. No. 4, column 7). The summary page on page 10 of this schedule shows the total amount of trade-ins disallowed and deemed to be taxable by the auditor. Stip. No. 12; Stip. Ex. No. 4. The gross amount of disallowed trade-ins is \$4,539,609 and the total state and city Retailers' Occupation Tax due determined by the auditor on this amount is \$310,509; (\$306,424 in state tax due and \$4,086 in City of Chicago home rule tax due). Stip. No. 12 and No. 13; Stip. Ex. No. 4.

- 14.** The results of the auditor's reaudit of the taxpayer are enumerated on the last page of Stip. Ex. No. 3. This summary indicates that \$1,510,303 in tax was billed by the taxpayer and paid by banks and financial institutions purchasing vehicles to the taxpayer, that \$977,989 of this amount was paid over to the Department and that \$532,314 of this amount was collected but not paid over to the Department. Stip. No. 11; Stip. Ex. No. 3.
- 15.** The taxpayer agreed in the pre-hearing order in this case dated September 29, 2005, that the amount of \$532,314 is the amount of tax that was collected and not paid over to the Department and that this amount is due to the Department. Stip. No. 11. However, the taxpayer subsequently argued that this amount is in error, and contended during the hearing that it is entitled to trade-in deductions on an

unspecified number of transactions reflected in the amount previously agreed to, and that \$196,956 (37% times \$532,314) remains in controversy. Stip. No. 11. The taxpayer does not dispute 63% of the \$532,314 in tax indicated to be due in the pre-hearing order. *Id.*; Stip. No. 15.

- 16.** Documents reviewed on reaudit and determined by the auditor to corroborate allowable trade-in deductions on sales for lease and refinancing transactions are included in the record as Stip. Ex. No. 5. Tr. pp. 25-28; Stip. Ex. No. 5. In each of these transactions, the auditor found that one of the purchasers of a vehicle from the taxpayer was named on the title of the vehicle claimed as a trade-in for the purchased vehicle and therefore determined that the owner of the trade-in vehicle was also designated as a purchaser of the vehicle being sold. Tr. pp. 37, 38; Stip. Ex. No. 5. These findings were based upon documentation that named the purchaser of the vehicle sold on the title to the trade-in vehicle tendered to the taxpayer. Stip. Ex. No. 5.
- 17.** Documents reviewed during the reaudit and determined by the auditor to corroborate the disallowance of trade-in deductions taken by the taxpayer on sales for lease and in connection with lease refinancing transactions are included in the record as Stip. Ex. No. 6. Tr. pp. 28-31; Stip. Ex. No. 6.
- 18.** Subsequent to the hearing in this matter, and pursuant to an agreement entered into as required by 86 Ill. Admin. Code, ch. I, section 200.155(f), the Department reexamined documentation contained in the record and additional documentation supplied by the taxpayer. This reexamination resulted in a reduction in the amount determined to be due and owing on trade-ins taken on forms ST-556 filed by the

taxpayer and disallowed by the auditor. See Taxpayer's Brief, p. 2; Taxpayer's Ex. 4(a) submitted with the Taxpayer's Brief. According to the Taxpayer's Ex. 4(a), the tax due as shown in Stip. Ex. No. 4 is reduced from \$310,509 to \$241,011. *Id.* The Department does not contest the auditor's reduction of the amount of tax due on disallowed trade-ins to \$241,011. Department Brief p. 3.

19. The Department has doubled the amount of statutory interest due on the tax assessed and found to be due and owing by the auditor pursuant to 35 ILCS 735/3-2(f) and the taxpayer disputes the constitutionality of the doubling of interest pursuant to this provision. Stip. No. 15.

### **Conclusions of Law:**

#### **Department's Denial of Trade-in Credits**

The primary issue in this case is whether vehicles, titles to which are tendered to the taxpayer, an automobile dealer, by persons other than the purchasers of the vehicles shown in the dealer's books and records qualify as trade-ins under section 1 of the Illinois Retailers' Occupation Tax Act, 35 ILCS 120/1. If such transactions are treated as trade-ins for purposes of calculating the Retailers' Occupation tax, the base for calculating the amount of taxes assessed in connection with sales of vehicles is substantially less than it would be if these transactions are not treated as trade-ins because, if not treated as trade-ins, the value of the relinquished vehicles cannot be offset against the purchase price of the vehicles being sold. For the reasons enumerated below, I conclude that vehicles, titles to which were transferred to the taxpayer from persons other than the purchasers of

vehicles from the taxpayer in the transactions that are in controversy did not constitute trade-ins under the Illinois Retailers' Occupation Tax Act ("ROTA").

The admission into evidence of the corrected returns by the Department under the certification of the Director at a hearing before the Department or in any legal proceeding establishes the Department's *prima facie* case. 35 ILCS 120/4; Copilevitz v. Department of Revenue, 41 Ill. 2d 154 (1968); Central Furniture Mart v. Johnson, 157 Ill. App. 3d 907 (1<sup>st</sup> Dist. 1987). Thus, when the Department introduced the corrected returns as part of the stipulation of facts introduced into the record, the Department's *prima facie* case was established.

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

The tax at issue in this matter is imposed by the Retailers' Occupation Tax Act ("ROTA"), 35 ILCS 120/1 *et seq.* It is a tax upon persons engaged in the business of selling tangible personal property that is measured by the gross receipts from such sales. 35 ILCS 120/3; Norton Co. v. Illinois Department of Revenue, 340 U.S. 534 (1951). A retailer subject to the ROTA may pass it on to the purchaser. Johnson v. Marshall Field & Co., 57 Ill. 2d 272 (1974). The amount of Retailers' Occupation Tax imposed on a

purchase is determined by multiplying the “gross receipts” from the sale of tangible personal property by the prescribed rate. 35 ILCS 120/2-10. The term “gross receipts” is defined as follows: “ ‘(G)ross receipts’ from the sales of tangible personal property at retail means the total selling price or the amount of such sales, as hereinbefore defined.” 35 ILCS 120/1. The term “selling price” is defined in the Retailers Occupation Tax Act as follows:

“Selling price” or the “amount of sale” means the consideration for a sale valued in money whether received in money or otherwise, including cash, credits, property, other than as hereinafter provided, and services, but not including the value of or credit given for traded-in tangible personal property where the item that is traded-in is of like kind and character as that which is being sold ... [.]” (emphasis added)  
35 ILCS 120/1

As is evident from the foregoing definition which, when read *in pari materia* with the definition of “gross receipts” provides for the reduction of taxable “gross receipts” by the value or credit properly given for trade-ins, the determination of the “selling price” of vehicles sold by the taxpayer, an automobile dealer, is the principal issue in this case.

The trade-in deductions at issue in this case were claimed on ST-556 returns filed regarding two distinct types of sales: 1) lease exchange or “re-lease” transactions (hereinafter “exchange transactions”), and 2) refinance transactions. Exchange transactions involved a customer that leased one vehicle from one lessor and who wanted to lease the same<sup>1</sup> or another vehicle from another lessor. Tr. pp. 27, 28, 34, 36; Stip. Ex. No. 5 and No. 6. Accordingly, each exchange transaction that is in controversy involved one customer, two lessors and two leases. *Id.* In each exchange transaction, the

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<sup>1</sup> During testimony, the auditor acknowledged that in some lease exchange transactions the lessee “wouldn’t necessarily be getting into a second or different automobile ... [.]” Tr. p. 34.

customer came to the taxpayer having the right to the use and possession of one vehicle pursuant to one lease. *Id.* After the transaction was completed, the taxpayer's customer had completed its obligations under the first lease, with the vehicle being transferred to the taxpayer and the customer having undertaken obligations regarding possession of the same or a different vehicle pursuant to a second lease. *Id.* In each exchange transaction, a payment was made to the lessor to terminate the lease obligation of the taxpayer's customer, which was followed by the transfer to the taxpayer of title to the vehicle that had been leased. Tr. pp. 33, 34. Upon receipt of title to the vehicle under the first lease, the taxpayer sold the vehicle desired by the customer to the customer's new lessor. Tr. p. 34; Stip. Ex. No. 5 and No. 6. The documentation accompanying the sale named both the new lessor and the lessee, who was also the taxpayer's customer, as the purchaser of the vehicle covered by the customer's new lease. Stip. Ex. No. 5 and No. 6.

On its ST-556 returns reporting exchange transactions, the taxpayer treated the vehicle it received from the taxpayer's old lessor as a trade-in for the vehicle sold to the taxpayer's new lessor and the taxpayer's customer, the lessee. Tr. pp. 26-30; Stip. Ex. No. 5 and No. 6. The Department disallowed most of the trade-in deductions taken by the taxpayer on these transactions. Stip. No. 4, No. 5, No. 8, No. 12; Stip. Ex. No. 4.<sup>2</sup>

Refinance transactions involved customers who wished to renegotiate financing of an existing vehicle. Tr. p. 25. Each of these transactions in which trade-in credits taken on ST-556 forms filed by the taxpayer were disallowed involved one customer, two lenders and one vehicle. Each such transaction involved a pay off terminating the

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<sup>2</sup> The Department's auditor allowed trade-in credits taken by the taxpayer on its ST-556 forms where the taxpayer renegotiated financing or entered into a lease for a different vehicle with the same lender or lessor. Tr. pp. 32, 33.

existing financing. Taxpayer's Ex. 2. The taxpayer advanced the amount necessary to cover the pay off and treated the transfer of the vehicle to the taxpayer's new lender as a sale upon being reimbursed in an amount approximating the amount advanced. *Id.*

With respect to the exchange transactions noted above, the taxpayer seeks to rely upon 86 Ill. Admin. Code, ch. I, section 130.455(c)(1)(A) as a legal basis for its claim that such transactions must be treated as trade-ins for purposes of determining the "selling price" of vehicles sold to its customer's new lessor and its customer. This regulation provides as follows:

(c) Use of Trade-in Credits.

(1) A dealer may reduce his gross receipts by the value of or credit given for a traded-in motor vehicle where:

(A) An individual trades a motor vehicle he owns on the purchase of a new or used motor vehicle;

86 Ill. Admin. Code, ch. I, section 130.455(c)(1)(A)<sup>3</sup>

As noted above, the exchange transactions the taxpayer seeks to classify as trade-ins pursuant to this regulation involve situations in which the taxpayer's customer is seeking to replace a current lease providing for the lease of a vehicle from one lessor with a new lease for the same or a different leased vehicle leased from another lessor. Upon being retained by a customer, *ABC* contacted the finance company lessor that was leasing the customer its current vehicle to arrange termination of the existing lease. Tr. p. 33. When the necessary new financing was in place to pay off the existing lease, the payoff and necessary title transfers would be completed. Stip. Ex. No. 5; Taxpayer Ex. No. 2.

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<sup>3</sup> The taxpayer incorrectly identifies (and erroneously quotes) 86 Ill. Admin. Code, ch. I, section 130.455(c)(1)(A) quoted in its brief, as 86 Ill. Admin. Code, ch. I, section 130.455(c)(1)(B). See Taxpayer's Brief p. 4. Accordingly, I find that 86 Ill. Admin. Code, ch. I, section 130.455(c)(1)(B), although referenced by the taxpayer in its brief, is not at issue in this case.

Pursuant to the authorization of the taxpayer's customer, when the existing lease was paid off, title to the old leased vehicle was sometimes transferred directly from the old lessor to *ABC* instead of from the customer or jointly from the old lessor and the customer to *ABC*. This was presumably done as a matter of convenience to facilitate the transaction. Since *ABC* also sold the same or a different vehicle to its customer and the customer's new lessor as part of this transaction, it reported the transaction as a trade-in on ST-556 forms filed to report these types of deals. Stip. Ex. No. 5 and No. 6. Thus, the returns the taxpayer filed characterized the transfer of title from the customer's old lessor to *ABC* as a trade-in from its customer to be credited against the sale price of the vehicle being sold to the customer and the customer's new lessor.

The Department denied trade-in credits in these situations because the customer's old lessor rather than the customer transferred title to *ABC*. Tr. pp. 28-31; Stip. Ex. No. 1 (audit narrative). Because of the form of title transfer, the Department found that the taxpayer's customer did not hold title to the vehicle traded in at the time of the trade-in. *Id.* Since 86 Ill. Admin. Code, ch. I, section 130.455(c)(1)(A), relied upon by the taxpayer as a legal basis for its reporting, requires that "an individual" trade a motor vehicle "he owns" on the purchase of a new or used automobile, the Department found that the requirements of this regulation were not met due to the transfer of title evidencing ownership from the customer's old lessor to the taxpayer. Tr. pp. 28-31. In sum, no trade-in could be allowed because the taxpayer's customer, although admittedly one of the purchasers of the purchased vehicle as shown on the title papers to this vehicle, simply did not own the vehicle that was traded-in at the time of the trade-in.

*ABC* contends that the customer should be treated as the owner of the vehicle transferred from the old lessor because the taxpayer's customer exercised a right to repurchase the vehicle under the lease with the old lessor. Taxpayer's Brief p. 4 ("It is the taxpayer's position that when a pay off letter is issued on behalf of a consumer coming off of his original lease, the consumer has purchased that vehicle from this original lessor ...[C]onsequently, that consumer then owns that vehicle."). The *gravamen* of the taxpayer's claim is that the transactions for which trade-in credits were denied, while in form transfers of title to vehicles from old lessors to the taxpayer, were in substance transfers of ownership to these vehicles by *ABC*'s customers to *ABC*. As noted above, the taxpayer admits that the premise of this argument is that the customer exercised a contractual option to pay off the existing lease. *Id.*

With respect to exchange transactions at issue in this case other than lease refinancing transactions, the principal problem with the taxpayer's claim is that it is not substantiated by any documentation contained in the record. The taxpayer vigorously argues in its Reply Brief that a pay off letter, introduced into the record in these proceedings as taxpayer's Exhibit 2, is documentary evidence that supports the taxpayer's contention. The taxpayer's President testified that the pay off letter, an example of which is contained in the record, was issued in every "third-party trade-in" situation. Tr. p. 61. However, this testimony is contradicted by the auditor's testimony that each deal jacket containing each individual exchange transaction's documentation was different; i.e. that "a majority", but not all deal jackets contained pay out letters. Tr. pp. 33, 34.

Exhibit 2, by the taxpayer's own admission, was not executed in a transaction involving an exchange of vehicles but, rather, relates to a refinancing transaction. Tr. pp.

46, 47. The record is devoid of any documentary evidence of a pay off letter executed by the taxpayer's customer related to the type of exchange transactions other than lease refinancing exchanges disallowed as like-kind exchanges by the Department.<sup>4</sup> Since not all deals involved pay out letters, it was incumbent upon the taxpayer to show that these were used in connection with exchange transactions involving the replacement of a lease for one vehicle with a lease for another, which the record in this case does not establish.

As noted in ABC Motor Sports, Inc., Administrative Hearing Decision No. ST 05-2, Illinois Department of Revenue, Office of Administrative Hearings, January 24, 2005, a case discussed at length in the briefs that have been submitted in this case, the Illinois courts have repeatedly held that “one can own an automobile through the certificate of title in the name of another [.] Country Mutual Ins. Co. v. Aetna Life & Casualty Ins. Co., 69 Ill. App. 3d 764, 768 (2d Dist. 1979) (quoting State Farm Ins. Co. v. Lucas, 504 Ill. App. 3d 894 (4<sup>th</sup> Dist. 1977) ... [.]”). The presumption, however, is that the person named as the owner on a certificate of title for a vehicle is the owner of the vehicle. Pekin Insurance Co. v. U.S. Credit Funding, Ltd., 212 Ill. App. 3d 673, 676-77 (1<sup>st</sup> Dist. 1991). This presumption is consistent with the statutory presumption in favor of the Department, which establishes all elements of its *prima facie* case upon the introduction of its assessment determination into the record under the certificate of the Director. 35 ILCS 120/4; Branson v. Department of Revenue, 168 Ill. 2d 247, 257-58 (1995); Soho Club v. Department of Revenue, 269 Ill. App. 3d 220, 232 (1<sup>st</sup> Dist. 1995). In order to prove that the owner of the traded-in vehicle in exchange transactions other than lease

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<sup>4</sup> Stip. Ex. No. 5 contains an example of a pay off letter issued in connection with a lease refinancing exchange. See Stip. Ex. No. 5 (Letter to Bank from John Doe dated August 31, 1999).

refinancing exchanges, was someone other than the party shown on the title given the taxpayer, it was incumbent upon the taxpayer to introduce documentary evidence corroborating this claim into the record. Copilevitz, supra; Central Furniture Mart, supra; Mel-Park Drugs, supra.

Documentary evidence pertaining to exchange transactions that might have established this claim, in the form of pay off letters or other documents contained in dealer jackets prepared in connection with each and every exchange transaction the taxpayer entered into, was in the possession of the taxpayer. In lieu of this documentation, the taxpayer seeks to rely upon only the testimony of its President. However, as a matter of law, such testimony is insufficient to rebut the Department's *prima facie* case. Mel-Park Drugs, supra. A.R. Barnes & Co., supra at 833-34 (“A taxpayer cannot overcome the DOR’s *prima facie* case merely by denying the accuracy of its assessments. [I]nstead, evidence must be presented which is consistent, probable, and identified with its books and records.”).

In sum, 86 Ill. Admin. Code, ch. I, section 130.455(c)(1)(A), upon which the taxpayer seeks to rely, provides that a trade-in may properly be taken where “[A]n individual trades a motor vehicle he owns on the purchase of a new or used vehicle ... [.]” However, the taxpayer has failed to show that this regulation applies to these exchange transactions (other than lease refinance exchanges) at issue here since it has offered no documentary evidence to corroborate its claim that, in these type of transactions an “individual”, namely the taxpayer’s customer traded in “a motor vehicle he owns on the purchase of a new or used motor vehicle ... [.]” 86 Ill. Admin. Code, ch. I, section 130.455(c)(1)(A). This finding is based upon the taxpayer’s failure to introduce

any documentary evidence pertaining to such exchange transactions to support its claim that its customer owned the traded in vehicle by virtue of its exercise of its right to pay off and terminate the existing lease. The taxpayer's proof is therefore deficient because the taxpayer failed to show that pay off letters were executed in connection with its transfer of purportedly traded-in vehicles in exchange transactions other than lease refinancing transactions. Accordingly, I find that the taxpayer has failed to rebut the Department's *prima facie* case, which is based upon its unrebutted finding that the customer's old lessor, rather than the customer, transferred title to the vehicles claimed as trade-ins by the taxpayer in connection with these types of exchange transactions.

While Taxpayer's Exhibit 2 is unrelated to, and therefore fails to corroborate taxpayer's characterization of exchanges involving the exchange of leases of automobiles for new leases of different automobiles as like-kind exchanges, this Exhibit does constitute documentary evidence related to refinancing transactions. Tr. pp. 46, 47. Moreover, the record contains similar documentation pertaining to lease refinancing transactions in which the taxpayer's customer substituted a new lessor for an old lessor, but continued to lease the same vehicle. See Stip. Ex. No. 5.

The taxpayer relies primarily upon the pay off authorization contained in taxpayer's Exhibit 2 as proof of its claim. Taxpayer's Brief p. 4. The pay off letter contained in Exhibit 2 plainly provides for the passage of title from a finance company to the taxpayer. Specifically, this document, which is addressed to a finance company, states as follows: "Please use this letter as my authorization ... to pay-off the balance for my [vehicle] ... [U]pon receipt of the above amount, I authorize you to release the title and/or lien release for the above mentioned vehicle and mail said title DIRECTLY to

[ABC] ... [.]” Taxpayer’s Ex. 2. Exhibit 2, on its face, indicates the passage of title from a lender to the taxpayer rather than from an individual (i.e. from the taxpayer’s customer) as required by 86 Ill. Admin. Code, ch. I, section 130.455(c)(1)(A). Illinois law plainly states that where an agreement between two parties is reduced to writing, and is complete and unambiguous on its face, the writing affords the only evidence of the terms of the contract between the parties. Mertke v. Kracik, 122 Ill. App. 2d 347 (1<sup>st</sup> Dist. 1969). Accordingly, the terms of the agreement between the parties must be determined by the writing itself. *Id.* Viewed in this light, Exhibit 2 plainly negates any inference that the taxpayer’s customer is involved in the title transfer in any way. Accordingly, the taxpayer’s exhibit 2 does not support its claim that regulation 86 Ill. Admin. Code, ch. I, section 130.455(c)(1)(A), upon which the taxpayer attempts to rely, is applicable in this case since this regulation requires that the individual that transfers title to the vehicle to the taxpayer be the same as the individual that is designated as the purchaser of the vehicle being refinanced.

Moreover, the taxpayer has made no attempt to explain the legal effect of the pay off letter authorizing the transfer of title by taxpayer’s lender to the taxpayer. To establish a foundation for its claim regarding the effect of the pay off letter, the taxpayer needed to show that: 1) its customer had a contractual right under its loan agreement with its old lender to pay off the loan; and 2) when the taxpayer’s customer exercised this contractual right, title to the traded-in vehicle passed to the taxpayer’s customer and then to the taxpayer when the vehicle was tendered as a trade-in. However, there is absolutely no evidence in the record to discern what specific provisions were included in the actual loan agreements used in the various refinancing transactions entered into by the

taxpayer's customer. Thus, documentary evidence supporting the taxpayer's arguments about the existence of its customer's contractual pay off right and the legal effect of such provisions when acted upon is nowhere established within the record.

If a particular contractual provision is an important element to a party's theory of a case, it is incumbent upon that party to introduce the contract itself into evidence. *See* 35 ILCS120/7 (description of documents required to support deductions); 735 ILCS 5/2-606 ("Exhibits. If a claim or defense is founded upon a written instrument, a copy thereof, or of so much of the same as is relevant, must be attached to the pleading as an exhibit or recited therein, unless the pleader attaches to his or her pleading an affidavit stating facts showing that the instrument is not accessible to him or her [.]" ); 86 Ill. Admin. Code, ch. I, section 200.155(a) ("The procedure at [Department] hearings shall be similar to that in court hearings [.]"). Here, the record indicates that the taxpayer kept copies of lease contracts in its dealer jackets. Tr. pp. 17, 18. However, in lieu of such documents, the taxpayer relies only upon the testimony of its President to prove the existence of its customer's contractual right to pay off the lease and the legal effect of such a pay off right when exercised. Tr. pp. 59-61; Taxpayer's Brief p. 4. As previously noted, as a matter of law, such testimony is insufficient to rebut the Department's *prima facie* case. A.R. Barnes & Co., supra; Mel-Park Drugs, supra.

While the form of the transaction claimed as a trade-in undertaken by the taxpayer is not within 86 Ill. Admin. Code, ch. I, section 130.455(c)(1)(A), the taxpayer contends that the record supports a characterization of the transaction at issue as being, in substance, a purchase of the vehicle under the old financing being concluded by the borrower and transfer of this vehicle by the borrower to the taxpayer. The sole basis for

claiming a *de facto* title transfer to the taxpayer from the borrower, who is also the taxpayer's customer, is the borrower's exercise of a pay off pursuant to which its obligations under its old financing are terminated upon payment of a specified amount for the financed vehicles. Taxpayer's Brief p. 4. As noted above, the taxpayer contends that "when a pay off letter is issued on behalf of a consumer coming off of his original lease, the consumer has purchased the vehicle from this original lessor", and, therefore, owned the vehicle at the time it was traded in. *Id.* The legal premise of the taxpayer's contention is that the substance of transactions rather than their form should govern the application of section 1 of the Retailers Occupation Tax Act, 35 ILCS 120/1 (defining the term "selling price" to exclude "credit given for traded-in tangible personal property") as implemented by regulation 86 Ill. Admin. Code, ch. I, section 130.455(c)(1)(A).

However, the Illinois sales and use tax statutes, as construed by the courts, clearly look to title transfer and negate the application of the "substance over form" doctrine to transactions involving the Retailers' Occupation Tax Act and the related Use Tax Act, which incorporates by reference the fundamental terminology and concepts underlying the ROTA (see 35 ILCS 105/12). Weber-Stephen Products, Inc. v. Department of Revenue, 324 Ill. App. 3d 893 (1<sup>st</sup> Dist. 2001); In re Stoecker, 179 F. 3d 546, 550 (7<sup>th</sup> Cir. 1999); O'Brien v. Isaacs, 32 Ill. 2d 105, 107 (1965). The case of Weber-Stephen Products, Inc., *supra*, is particularly instructive. At issue in this case was a use tax assessment on an aircraft acquired in a series of transactions designed to qualify for deferral of gain under IRC section 1031. In its decision, the court relied on the transfer of title reflected in a bill of sale for an aircraft as being evidence of a taxable sale. Citing several earlier ROTA and use tax cases, the court noted that the Illinois courts

have historically looked to the transfer of title as proof of the taxable character of a retail sale. See Weber-Stephen, *supra* at 898-900.

The pay off letter contained in taxpayer's Exhibit 2 plainly provides that the form of the transaction whereby the taxpayer obtains title to the vehicle allegedly given in trade for a purchased vehicle is the passage of title from a finance company to the taxpayer. This contract negates any inference that ABC's customer is transferring title to ABC at the time of the alleged trade-in. Kracik, *supra*. Since the courts look to form, and specifically to the actual title transfers that took place, rather than substance in construing the tax consequences of transactions under the Retailers' Occupation Tax Act, the taxpayer's "substance over form" analysis is insufficient to establish the legal legitimacy of the taxpayer's claim. Accordingly, I find that the taxpayer's evidence, consisting of the pay off letter contained in the taxpayer's Exhibit 2, does not rebut the Department's *prima facie* determination denying a trade-in credit in various refinancing transactions, and in similar lease refinancing exchanges, involving the type of documentation presented by the taxpayer as Exhibit 2 in this case.

#### **Department's Assessment Based on Taxes Collected But Not Remitted**

During the hearing in this matter, the taxpayer argued that 37% of the \$532,314 in sales tax collected by the taxpayer but not remitted to the Department has been improperly assessed and is not subject to the ROTA. The pre-trial order entered in this matter states in part as follows:

The issue in this case is whether the taxpayer is liable for \$874,413 in sales tax for the period 1/98-12/01 resulting from the denial of claimed trade-ins of automobiles plus interest to be calculated at the statutory rate [...] ... If taxpayer is allowed these claimed trade-ins the amount of

sales tax collected by the taxpayer but not remitted to the Department is \$532,314 which inures to the Department pursuant to 35 ILCS 120/2-40.

Pursuant to the terms of the pre-trial order agreed to by the parties, the taxpayer concedes that tax is due on the entire amount of sales tax collected by the taxpayer and not remitted to the Department pursuant to 35 ILCS 120/2-40, which provides as follows:

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.  
35 ILCS 120/2-40

As is evident from the pre-trial order, neither the taxpayer's protest in this case, nor the pre-trial order entered in this matter raises the question whether any portion of the assessment arising from sales tax collected by the taxpayer and not remitted should be abated.

86 Ill. Admin. Code, ch. I, section 200.120(c) provides as follows:

- (c) Protests, upon notice to the Department's representative and by leave of the presiding Administrative Law Judge, may be amended to include additional grounds not previously cited at any time prior to the entry of a final pre-trial order which designates the issues to be considered at hearing. (emphasis added)  
86 Ill. Admin. Code, ch. I, section 200.120(c)

The pre-trial order expressly negates any claim that the taxpayer has raised any issue concerning the propriety of the assessment resulting from tax the taxpayer collected and failed to remit at or prior to the entry of the pre-trial order in this matter as required by 86 Ill. Admin. Code, ch. I, section 200.120(c), and there is no order entered by any

administrative law judge granting the taxpayer leave to amend its protest so as to raise this issue. Accordingly, I find that this issue has not properly been presented as an issue “to be considered at hearing” in accordance with the aforementioned regulation.<sup>5</sup>

Even if 86 Ill. Admin. Code, ch. I, section 200.120(c) did not preclude consideration of this matter, the taxpayer cannot prevail on its claim that 37% of the transactions on the auditor’s schedule indicating all transactions in which tax was collected but not remitted (Stip. Ex. No. 3) were not subject to Retailers’ Occupation tax. The transactions the taxpayer claims must be excluded from the tax base all involved situations in which a *ABC* customer wanted to refinance an existing vehicle. Taxpayer’s Brief pp. 2, 3. In order to effectuate the customer’s objective, *ABC* would obtain numbers on the pay off of the customer’s existing financing from its existing financing company, and advance the amount required as a pay off when instructed to do so by the customer. Tr. pp. 33, 34; Stip. Ex. No. 5 and No. 6; Taxpayer’s Ex. 2. As part of this transaction, *ABC*’s customer authorized its existing financing company to transfer title to the vehicle being refinanced directly to *ABC*. *Id.* The customer then used the proceeds of its new financing to pay off *ABC*. *Id.* The ST-556 forms filed by the taxpayer in these types of transactions reported a trade-in of the same vehicle being purchased. Taxpayer Ex. 2. However, the taxpayer’s invoice to the customer showed no credit for the trade-in reported and charged tax on the gross proceeds from the vehicle sale. *Id.*

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<sup>5</sup> While the parties could have stipulated that the amount of the Department’s assessment for unremitted taxes is in controversy to cure the problem created for the taxpayer by its failure to protest this issue or include it in the pre-trial order, the Department has expressly declined to so stipulate. See Stip. No. 15 (“The taxpayer as stated in number 11 now believes that 37% of this amount is still at issue[.] The Department does not agree ... [.]”).

The taxpayer claims that these transactions were improperly documented and that, had they been properly documented as trade-ins, no tax would have been due. Taxpayer's Brief pp. 2, 3. Specifically, the taxpayer contends that it should have shown no taxes due on the proceeds from the sales of vehicles in connection with refinancing transactions that the Department has agreed were trade-ins. It argues that the ST-556 forms and the invoices that were prepared in connection with its vehicle sales should have shown trade-ins in the amount of gross proceeds including taxes shown as the sale price on the invoices. *Id.* During testimony, The Department's auditor agreed that the taxpayer would owe no taxes if invoices used in connection with refinancing transactions giving rise to the Department's failure to remit taxes had been prepared in this manner. Tr. pp. 49, 50.

The taxpayer's argument ignores the obvious benefits to the taxpayer from the avoidance of Retailers' Occupation tax on gross receipts shown on the taxpayer's invoice in Exhibit 2 exceeding the maximum amount of the trade-in credit that could have been taken. See Taxpayer's Ex. 2. This is evident from the fact that the pay off letter in Exhibit 2 indicates that the pay off for the purported trade-in vehicle was \$66,573.28, while the amount invoiced the taxpayer was \$66,703.76. Thus, ROTA taxes were due on the amount by which gross receipts shown on the taxpayer's invoice exceeded the trade-in credit available. See 86 Ill. Admin. Code, ch. I, section 130.401 defining the term "gross receipts" as "all the consideration actually received by the seller, except traded-in tangible personal property."<sup>6</sup>

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<sup>6</sup>As is evident from the two pay off letters contained in the record (see Taxpayer's Ex. 2; Stip. Ex. No. 5) and the documents related to these pay off letters, in each case, the invoiced price exceeded the pay off amount to acquire the vehicle that was purportedly traded-in. For this reason, the pay off letters do not show that no taxes were due as a result of the pay offs alleged to show that proper trade-in credits were

However one need not speculate about a possible motive for reporting refinancing transactions in the manner indicated in the taxpayer's records or determine whether such reporting was indeed unintentional, as the taxpayer implies. The dispositive fact is that the ST-556 forms filed by the taxpayer show that taxes were actually collected by the taxpayer. Tr. p. 21; Taxpayer Ex. 2. Moreover, there is no evidence in the record that any of the amounts collected were ever paid over to the taxpayer's customers from whom they were collected to reimburse them for tax over-collections. *Id.* Sales taxes that were billed to and collected from customers were simply retained by the taxpayer. *Id.*

The plain language of section 35 **ILCS** 120/2-40 of the ROTA expressly mandates that all amounts invoiced to and collected from customers as taxes that are not returned to the customers must be turned over to the Department whether or not taxes have been properly imposed or collected. 35 **ILCS** 120/2-40 ("If a seller collects an amount ... that purports to reimburse the seller for retailers' occupation tax liability measured by receipts that are not subject to retailers' occupation tax ... the purchaser shall have a legal right to claim a refund of that amount from the seller[.] [I]f, however, that amount is not refunded to the purchaser for any reason, the seller is liable to pay that amount to the Department.").

The taxpayer has submitted only one exhibit as support for its claim that taxes collected in connection with refinancing trade-ins discussed above were incorrect.

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taken. Even if the pay off letters proved that the taxpayer was entitled to trade-in credits in refinancing transactions as it claims, they do not prove its claim that no taxes were due on such transactions since tax would be due on gross receipts exceeding the maximum trade-in credits allowable. See Taxpayer's Ex. 2; Stip. Ex. No. 5; 86 Ill. Admin. Code, ch. I, section 130.401.

Taxpayer Ex. 2. This evidence supports the taxpayer's claim that the taxpayer's ST-556 forms prepared to memorialize refinancing transactions show trade-ins. *Id.* However this documentation also plainly shows that taxes were charged to and collected from taxpayers on refinancing transactions where trade-ins were shown on the ST-556 forms but no trade-in credits were allowed the customer. *Id.* As noted above, there is no evidence that these taxes, which the taxpayer claims were over collections, were ever remitted to the Department. This evidence plainly establishes that the taxpayer collected and failed to remit taxes to the Department in violation of 35 ILCS 120/2-40. In light of this evidence, even if the taxpayer has properly presented the issue of the amount of tax assessed based upon the taxpayer's failure to remit taxes for hearing consideration in accordance with 86 Ill. Admin. Code, ch. I, section 200.120(c), the taxpayer cannot prevail on this issue since it has failed to rebut the Department's *prima facie* case that it violated 35 ILCS 120/2-40.

**Constitutionality of 35 ILCS 735/3-2(f)**

The taxpayer also contests the application of 35 ILCS 735/3-2 as amended by the "Tax Delinquency Amnesty Act" ("Amnesty Act"), P.A. 93-26 effective 6/20/2003 in determining the amount of interest due from the taxpayer in this case. Specifically, 35 ILCS 735/ 3-2(f) provides as follows:

(f) If a taxpayer has a tax liability that is eligible for amnesty under the Tax Delinquency Amnesty Act and the taxpayer fails to satisfy the tax liability during the amnesty period provided for in that Act, then the interest charged by the Department under this Section shall be imposed a rate that is 200% of the rate that would otherwise be imposed under this Section.

35 ILCS 735/3-2(f)

The taxpayer does not contest the finding implicit in the Notices of Tax Liability at issue that the tax liability assessed was eligible for amnesty under the Amnesty Act or that the taxpayer failed to satisfy the tax liability during the amnesty period provided by the Amnesty Act. Rather, the taxpayer contends that 35 **ILCS** 735/3-2(f) should not be applied in this case because it is unconstitutional. Stip. No. 15; Taxpayer's Brief p. 5. The resolution of this issue must necessarily consider the constitutionality of this statute. It is a settled tenet of administrative law jurisprudence that administrative agencies must presume the constitutionality of the statutes they interpret, and thus have no power to determine the type of constitutional issue the taxpayer has presented. Texaco-Cities Service Pipeline Co. v. McGaw, 182 Ill. 2d 262, 278 (1998), (citing Moore v. City of East Cleveland, 431 U.S. 494 (1977)). Accordingly, I have no authority to adjudicate the constitutionality of 35 **ILCS** 735/3-2(f), which is the sole issue regarding this section that the taxpayer has presented.

### **Conclusion**

**WHEREFORE**, for the reasons stated above, it is my recommendation that the taxpayer's liability be reduced from the amount of tax (excluding interest) shown in the Notices of Tax Liability at issue (\$960,325) to \$733,325 in accordance with the auditor's revisions noted above and that these Notices of Tax Liability, as so modified, be finalized and affirmed.

Ted Sherrod  
Administrative Law Judge

Date: July 28, 2006