

IT 10-03

Tax Type: Income Tax

Issue: Unitary Apportionment

Unitary – Inclusion of Company(ies) In A Unitary Group

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

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

v.

**ABC
SERVICES, INC.,**
Taxpayer

No. 00-IT-0000
FEIN 00-0000000
Tax Years Ending 12/97 - 12/99

John E. White,
Administrative Law Judge

RECOMMENDATION FOR DISPOSITION

Appearances: David Hughes, Horwood Marcus & Berk, appeared for ABC Co., Inc.; Ralph Bassett, Special Assistant Attorney General, appeared for the Illinois Department of Revenue.

Synopsis:

This matter involves a Notice of Deficiency (NOD) the Illinois Department of Revenue (Department) issued to ABC Services, Inc. (ABC) regarding tax years ending December 31, 1997 through December 31, 1999. The Department issued the NOD after determining that ABC erroneously filed Illinois returns for those years as a member of a unitary business group of transportation companies, whereas the Department determined that ABC was not a transportation company. The issue is whether ABC is a transportation company and thus, required to apportion its business income pursuant to § 304(d) of the Illinois Income Tax Act (IITA), 35 ILCS 304(d)(1).

The hearing was held at the Department's offices in Chicago. ABC offered documentary evidence as well as the testimony of two employees. I am including within this recommendation findings of fact and conclusions of law. I recommend that the issue be resolved in favor of ABC.

Findings of Fact:

1. ABC was, during the years at issue (and unless otherwise noted, all of the findings here are made regarding the years at issue), a wholly-owned subsidiary of ABC, Inc. (ABC). Department Ex. 2 (copy of Auditor's Comments Section, a workpaper dated June 8, 2004, and prepared regarding the Department's audit of ABC and ABC for the years at issue), p. 2 (General Background Information).
2. ABC, in turn, was a wholly-owned subsidiary of the XYZ Group (XYZ). Department Ex. 2, p. 2.
3. On its combined Illinois income tax returns, ABC reported ABC as a member of ABC unitary business group of transportation companies. Department Exs. 7-9 (copies of, respectively, ABC completed IL-1120 forms for 1997 through 1999), p. 6 (of each exhibit).
4. ABC incorporated ABC in 1988. Taxpayer Ex. 1 (copy of ABC's 1994 Application for Certificate of Authority to Transact Business in Illinois (1994 Illinois Application)); Hearing Transcript (Tr.), p. 77 (testimony of John Doe (John Doe), financial director for ABC Global Services, formerly known as ABC).
5. On its 1994 Illinois Application, ABC described its corporate purpose as "Armored and secured transportation and the arranging for same including related services." Taxpayer Ex. 1, p. 2.
6. In 1999, ABC's name was changed to ABC Global Services USA, Inc. Tr. pp. 23-24 (John Doe).

7. Prior to 1989, ABC was an operating division of ABC that handled diamond and jewelry transportation. Tr. pp. 77-78 (John Doe). ABC incorporated ABC, rather than continue to operate it as a division, because of differences ABC noted between the business of transporting currency and transporting diamonds and jewelry. Tr. pp. 78-80 (John Doe).
8. ABC contracted to provide air courier services with persons who wanted to ship diamonds and jewelry. Department Ex. 2, p. 2; Taxpayer Ex. 2 (original Shipper's Letter of Instructions form); Tr. pp. 33-36 (John Doe).
9. ABC's customers include diamondmaters (i.e., persons who deal with diamonds) or jewelers, such as Tiffany's, Nieman Marcus, Sears, QVC, and small diamond companies (Tr. p. 29 (John Doe)), whereas ABC' customers are usually financial institutions. Tr. pp. 29-30, 41, 78-79 (John Doe).
10. The comparative liability issues of ABC and ABC differ because ABC allows its customers to determine the value of a shipment ("said to contain basis") whereas ABC always counts the value of the currency that it is transporting. Tr. pp. 79-80 (John Doe). Additionally, ABC's transportation usually involves air travel, while ABC transportation usually does not. Tr. pp. 83-84 (John Doe).
11. On its federal income tax return for 1999, XYZ reported that ABC's principal business activity was providing "air courier service[s]," according to NAICS code number 492110. Department Ex. 4 (copy of XYZ's 1999 Federal Income Tax Schedule 851 (Affiliation Schedule, for members of its federal affiliated group members), p. 5 (entry on Schedule 851 attachment for ABC).
12. The United States Census Department describes NAICS code number 492110 as follows:

NAICS 492110: Couriers

This U.S. industry comprises establishments primarily engaged in providing air, surface, or combined courier delivery services of parcels generally between metropolitan areas or urban centers. The establishments of this industry form a network including courier local pickup and delivery to serve their customers' needs. The data published with NAICS code 492110 are comprised of these parts of the following SIC industries:
4215 (pt) Courier services (except local or by air)
4513 Air courier services (including delivery of parcels weighing 100 lbs or less)

<http://www.census.gov/epcd/ec97/def/492110.HTM>

13. On schedules prepared and submitted as part of its federal consolidated returns, ABC reported the revenues ABC realized as being attributable to the air courier business. Department Ex. 6 (copies of schedule titled, ABC Incorporated Revenue by Line of Business).
14. Persons who contracted with ABC to provide air courier services completed a form titled, Shipper's Letter of Instructions. Taxpayer Ex. 2; Tr. pp. 33-36 (John Doe).
15. The Shipper's Letter of Instructions forms that ABC used are commonly known as house air waybills (HAWBs). *E.g.* ABC Ltd. v. South African Airways, 93 F.3d 1022, 1025 & n.1 (2d Cir. 1996); *see also* 810 ILCS 5/201(6) (Illinois Commercial Code's definition of bill of lading includes a definition of "Airbill," which is defined as "a document serving for air transportation as a bill of lading does for marine or rail transportation, and includes an air consignment note or air waybill.").
16. Each HAWB used by ABC includes a unique 11-digit number in a box with the following caption: "HAWB No:." Taxpayer Ex. 2.
17. When signed by both the shipper (that is, the person who wants property to be delivered by ABC) and ABC, the HAWB constitutes a written, integrated, bilateral agreement. Taxpayer

Ex. 2 (Conditions of Contract, printed on the reverse side of each page of the form), ¶¶ I.1, XII; *see also* 625 ILCS 5/18c-1104 (definition of shipper).

18. On the HAWBs ABC used, ABC holds itself out as a “contract carrier and not a common carrier or a bailee”, and it also states that it “is not an air carrier or an indirect air carrier for purposes of the [Warsaw] Convention.” Taxpayer Ex. 2 (Conditions of Contract, printed on the reverse side of each page of the form), ¶ I.1.

19. ABC’s HAWBs include, *inter alia*, the following pertinent provisions:

[ABC] — CONDITIONS OF CONTRACT
I. DEFINITIONS. The meanings of capitalized words used in the Contract are a part of Contract. They are as follows:

1. “ABC” refers to [ABC] or any of its affiliated companies, whether wholly or partially owned, directly or indirectly by ABC or its parent companies, as indicated on the signature line of this Contract. ABC is a private, contract carrier and not a common carrier or a bailee under this Contract. ABC is not an air carrier or an indirect air carrier for purposes of the Convention.
2. “You” and “Your” refers to the sender, its employees and agents.
3. “Destination” and “Consignee” refers to the recipient or receiving location designated by You as the completion point of the Service that ABC is providing to You as described in this Contract.
4. “Contract” refers to the agreement set forth in this document and any other documents provided by ABC or its agents that refer specifically to this Contract or are issued pursuant to this Contract such as, for example, air waybills, collection notices, receipts, etc., all of which are a part of the agreement between You and ABC.

5. “Shipment” refers to a distinctively and securely sealed or locked container(s) of Property, collected or received in one place at any one time, with one or more designated Destinations or Consignees.
6. “Property” refers to the commodity or commodities said by You in the Contract to be contained in any Shipment.
7. “Convention” means, unless the context requires otherwise, whichever of the following as is applicable to the Contract and any future amendments to the Warsaw Convention as they are signed and implemented by the various participants to the Convention, from time to time:
 - The Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw, 12 October, 1929, (hereinafter, the “Warsaw Convention”)
 - The Warsaw Convention as amended at The Hague, 28 September 1955
 - The convention on the Contract for the International Carriage of Goods by Road signed at Geneva, 19th May 1956
 - The Warsaw Convention as amended by Additional Protocol No 1 of Montreal

- The Warsaw Convention as amended at The Hague 1955 and by Additional Protocol No 4 of Montreal 1975
 - The Warsaw Convention as amended at The Hague 1955 and by Additional Protocol No 4 of Montreal 1976
8. "Door" means the premises designated by You for pick-up or delivery.
 9. "Service" refers to one of the following Services offered by ABC as specified by You in the Contract for the Shipment.
 - A. Door-to-Door (DD)
 - B. Door-to-Aircraft Side/Airport Vault at Destination Point (DA)
 - C. Forwarding Agent for Air Carriage (AA)
 - D. Airport Vault at Origin-to-Airport Vault at Destination (AV)
 - E. Airport Vault / Aircraft Side at Origin-to-Door (AD)
 - F. Hand Carried by ABC (DP)
 - G. Additional Services as specified in riders to this Contract
 10. "ABC Liability" refers to the responsibility assumed by ABC under the terms of the Contract during the course of providing Service as further defined by the terms and limitations of the Contract and the Specific Service designated in the Contract for the specific Shipment.

V. USE OF SUBCONTRACTORS. You understand and agree that ABC may, in its absolute discretion, choose to perform the Services or any part of them itself, by its own employees or agents or by independent subcontractors. ABC obligations to You are not affected by that choice and Your rights and obligations remain as stated in this Contract. Every ABC employee, agent or independent subcontractor performing services relating to Your Shipment is entitled

to the benefit of every limitation and defense to which ABC is entitled under this Contract.

VIII: ABC IS NOT AN INSURER. ABC IS NOT AN INSURER OF YOUR SHIPMENT. If it is necessary to make a claim under this Contract, Your claim will be made directly to ABC and will be subject to the procedures and limitations contained in this Contract. At all times during the performance of this Contract, however, ABC will maintain insurance payable to ABC in such amounts and against such risks as to adequately cover the liability assumed by ABC under this Contract.

IX. ABC RESPONSIBILITY FOR LOSS. ABC responsibility is dependent upon the Service You designate for each Shipment. By Your signature on this Contract, You agree that the period during which ABC is responsible for the Service You have chosen for Your Shipment is as follows:

- A. Door-to-Door (DD). ABC responsibility begins when ABC or its authorized agent or independent contractor physically takes possession of the Shipment, signs the Contract, and gives You a copy. ABC responsibility ends when ABC or its authorized agent or independent contractor delivers the Shipment to the Consignee or the Consignee's representative at Destination.
- B. Door-to-Aircraft Side/Airport Vault at Destination Point (DA). ABC responsibility begins when ABC or its authorized agent or independent contractor physically takes possession of the Shipment, signs the Contract, and gives You a copy. When an airport vault at the destination is the Destination, ABC responsibility ends when ABC or its authorized agent or independent contractor delivers the Shipment to the airport vault at Destination. Otherwise, ABC responsibility ends when ABC or its authorized agent or independent contractor delivers the Shipment to the Consignee or

the Consignee's representative at the airport of Destination. The Consignee may choose to designate the airline as its representative for receipt of delivery by ABC.

- C. Forwarding Agent for Air Carriage (AA). ABC is acting on Your behalf solely as Your forwarding agent and is establishing a direct contractual relationship between You and the air carrier for the carriage by air of Your Property. ABC accepts no responsibility whatsoever during the air portion of the Shipment. The terms and conditions of the written agreement entered into with the local ABC affiliate shall govern the ground portion of the Shipment.
- D. Airport Vault at Origin-to-Airport Vault at Destination (AV). ABC responsibility begins when ABC or its authorized agent or independent contractor physically takes possession of the Shipment from an airport vault at the airport of origin, signs the Contract, and gives You a copy. ABC responsibility ends when ABC or its authorized agent or independent contractor delivers the Shipment to the airport vault at Destination.
- E. Airport Vault/Aircraft Side at Origin-to-Door (AD). ABC responsibility begins when ABC or its authorized agent or independent contractor physically takes possession of the Shipment at the airport side or airport vault at the airport of origin, signs the Contract, and gives You a copy. ABC responsibility ends when ABC or its authorized agent or independent contractor delivers the Shipment to the Consignee or the Consignee's representative at Destination.
- F. Hand Carried by ABC (DP). ABC responsibility begins when ABC or its authorized agent or independent contractor physically takes possession of the Shipment, signs the Contract, and gives You a copy. ABC responsibility ends

when ABC or its authorized agent or independent contractor delivers the Shipment to the Consignee or the Consignee's representative at Destination.

- G. Additional Services. ABC responsibility for services not described above, any waiver by You of ABC liability or any change to the terms of the Contract must be set forth in writing in a Rider to the Contract. Purely ground services will be provided by a local ABC affiliate under a separate agreement.

X. **ABC LIABILITY; DE-CLARED VALUE LIMITS; LIMITATIONS ON ABC LIABILITY.** In the event that the Property comprising the Shipment, or any part of it, is lost or damaged during the period in which ABC is responsible, ABC will pay to You the actual monetary value of the Property which is lost or damaged (to the extent of such damage) on the date of loss, up to the value declared for carriage subject to the terms and limitations contained in this Contract and the responsibility accepted by ABC for the specific Service(s) You have designated in the Contract for that Shipment. Notwithstanding the foregoing, should you fail to identify a fragile item and pay additional charges if required by ABC, ABC Liability shall be limited to loss only, and not for damage, and payment of the actual monetary value on the date of loss up to the value declared for carriage.

Prior to or at the time that You tender a Shipment to ABC, You will declare a value of the Shipment for customs purposes. You will also declare a value of the Shipment for carriage that equals or exceeds the customs value unless You expressly waive all claims against ABC. ABC liability is based upon the value You declare for carriage. Under no circumstances will ABC be liable for an amount exceeding the value of the Shipment declared by You for carriage or the actual monetary value of the Property as of the date of loss, whichever is the lesser amount. If

You declare an amount less than the full actual value of the Shipment for carriage, You understand and agree that ABC is only responsible for loss up to, but not more than, the declared value for carriage, in the same proportion that the declared value bears to the full actual value of that Shipment. If You fail

to declare a value for any Shipment, the value of that Shipment for the purposes of establishing the liability of ABC for that Shipment only, shall be the lesser of (a) the total of all charges payable to You to ABC under this Contract and (b) U.S. \$500.

Taxpayer Ex. 2 (reverse).

20. ABC used ABC affiliates as authorized agents, and unaffiliated air carriers as independent subcontractors, when carrying out its obligations pursuant to any given HAWB contract. Taxpayer Ex. 2 (¶ V); Tr. pp. 51-61 (John Doe).
21. As of 1997, ABC had established offices in four cities – New York, Chicago, Miami and Los Angeles – because these cities had the largest diamond and jewelry markets. Tr. pp. 37-39 (John Doe); Taxpayer Ex. 2 (New York, Chicago, Miami and Los Angeles office addresses listed on face of HAWB). ABC conducted 80% of its business in these four cities during the years at issue. Tr. pp. 38-39 (John Doe).
22. ABC carries risk insurance that covers up to one hundred million dollars to reimburse customers in the event that an item is lost, stolen or damaged during transportation of an item. Taxpayer Exs. 4-6, p. 4 (of each exhibit); Tr. pp. 83, 104-105 (John Doe).
23. ABC's services are initiated in one of two ways: (1) a customer calls ABC's customer service unit, which then arranges for ABC to pick up a shipment from a customer; or (2) a customer brings a shipment directly to a ABC window in a city where ABC has an office. Tr. pp. 42-43, 46-47 (John Doe); *see also* Taxpayer Ex. 2.
24. If a customer calls for a shipment to be picked up, a crew of two to four persons will travel to the customer's location either by foot or by truck. Tr. pp. 46-47 (John Doe). The crew is usually comprised of ABC employees who wear uniforms that designate

them as ABC employees. Tr. p. 48 (John Doe). Such crews are armed. *Id.* ABC owns the uniforms and firearms. Tr. pp. 47-48 (John Doe); Taxpayer Exs. 4-6, pp. 1, 3. Pursuant to ABC's own internal regulations, such crews are always comprised of more of than one person and the crew is always armed due to the valuable nature of the property being transported. Tr. pp. 47-48 (John Doe).

25. After a shipment is picked up from a customer location and brought back to ABC's office, or dropped off by a shipper at a ABC window, the shipment is sorted and tagged by ABC employees. Tr. pp. 49-50 (John Doe). Information such as customer name, property value, and delivery location is entered into ABC's computer system. *Id.* The sorting and tagging process takes approximately one to one and a half hours and is necessary for ABC to track all of the shipments and protect its customers' goods. Tr. pp. 50-51 (John Doe). After the sorting, tagging, and data entry process is completed, the shipments are delivered by truck to an airport by a crew of at least two persons. Tr. p. 51 (John Doe). After the truck arrives at the airport, the shipments are loaded onto an independent contractor's cargo aircraft for transportation from one city to another. Tr. p. 51 (John Doe).

26. During 1997, ABC used Federal Express to provide air transportation of its shipments. Taxpayer Ex. 4 (entries for account nos. 768000 to 768035, which list amounts paid by ABC for air freight); Tr. p. 51 (John Doe). During 1998 and 1999, it used UPS. Taxpayer Exs. 5-6 (entries for account nos. 768000 to 768035); Tr. p. 51 (John Doe).

27. A customer may request that ABC assign a person to accompany a shipment on a flight in order to provide additional security for the shipment in case of an emergency

landing, etc. In this instance, an employee of ABC serves as an air courier for the shipment. Tr. pp. 52-53 (John Doe).

28. After ABC began to use UPS to provide air transportation of its shipments, the UPS airplane carrying ABC's customer's goods would fly to Louisville, Kentucky where UPS has its hub. Tr. pp. 53-54 (John Doe). In Louisville, four trucks managed by ABC are available to meet each flight. Tr. p. 53 (John Doe). John Doe estimated that, on average, there are 26 flights arriving each day in Louisville from approximately 10:00 p.m. to 2:00 a.m. with ABC shipments. Tr. pp. 53-54 (John Doe). ABC downloads its shipments from each plane first because the shipments are secured transportation. Tr. p. 54 (John Doe). The shipments are then brought from each plane to ABC's Louisville facility where they are sorted and tagged by ABC employees for final destination. Tr. pp. 51-52, 54 (John Doe).

29. ABC's employees have approximately three hours to sort and retag the individual shipments before they are reloaded on an outbound UPS flight to the city of a shipment's final destination. Tr. pp. 55-56 (John Doe).

30. When the plane arrives at the city of final destination, a truck picks up the shipment at the airport and brings it to either ABC's office or to a ABC office where arrangements are made for final delivery. Tr. p. 56 (John Doe). A crew of at least two persons either walks or drives the shipment to its final destination. Tr. pp. 47, 56 (John Doe). Alternatively, the customer may pick up the shipment at a window in those cities where ABC has an office. *Id.* In cities in which ABC has an office or facility, ABC employees perform most of the necessary services such as customer service, window operation, picking up the packages either by walking or driving, sorting the packages,

serving as air courier, and delivering the packages to the final destination. Tr. pp. 56-59 (John Doe).

Conclusions of Law:

This matter involves whether ABC is required to apportion its income pursuant to § 304(d)(1) of the IITA, 35 ILCS 5/304(d)(1), which is to say, whether ABC is a transportation company. When the Department introduced the NOD (Department Ex. 1) it issued to ABC into evidence under the certificate of the Director, it presented prima facie proof that ABC was not a transportation company. 35 ILCS 5/904(a). The Department's prima facie case is a rebuttable presumption. See Branson v. Department of Revenue, 68 Ill. 2d 247, 261, 659 N.E.2d 961, 968 (1995). A taxpayer cannot overcome the presumption merely by denying the accuracy of the Department's assessment, or merely by denying knowledge of a tax deficiency. Branson, 68 Ill. 2d at 267, 659 N.E.2d at 971; PPG Industries, Inc. v. Department of Revenue, 328 Ill. App. 3d 16, 33-34, 765 N.E.2d 34, 48-49 (1st Dist. 2002). Instead, a taxpayer is obliged to present documentary evidence that is consistent, probable and closely identified with its books and records, to show that the Department's determinations are not correct. PPG Industries, Inc., 328 Ill. App. 3d at 33-34, 765 N.E.2d at 48-49. Since the Department satisfied its statutory burden of establishing its prima facie case at hearing, ABC bears the burden of establishing that it is a transportation company.

Section 304(d) was intended to apply to members of the transportation industry, just as §§ 304(b) and (c) were intended to apply, respectively, to insurance companies and to financial organizations. Texaco-Cities Service Pipeline Co. v. McGaw, 182 Ill. 2d 262, 277, 695 N.E.2d 481, 488 (1998). Moreover, the revenue miles formulas set forth within §

304(d) are to be used to apportion all of the business income of a transportation company, and not just the business income it derives from furnishing transportation services. Texaco-Cities, 182 Ill. 2d at 276-77, 695 N.E.2d at 487-88.

Whether a person is a transportation company, and therefore required to apportion income pursuant to § 304(d), is a question of fact. See TTX Co. v. Whitley, 313 Ill. App. 3d 536, 729 N.E.2d 844 (1st Dist. 2000) (denying summary judgment because record revealed existence of disputed questions of fact regarding whether taxpayer was engaged in the business of providing transportation services). The IITA does not define “transportation” or the phrase, “furnishing transportation services.” Nor are those terms defined by any applicable regulation adopted pursuant to the IITA. Notwithstanding the lack of authoritative definitions within the IITA, Illinois law is clear that undefined words in a statute must be given their ordinary and popularly understood meaning. Texaco-Cities Service Pipeline Co. v. McGaw, 182 Ill. 2d 262, 270, 695 N.E.2d 481, 485 (1998). The starting point for discerning the meaning of any word used in a statute is the text of the statute itself. Girard v. White, 356 Ill. App. 3d 11, 17, 826 N.E.2d 517, 522 (1st Dist. 2005).

Section 304(d) provides:

(d) Transportation services. Business income derived from furnishing transportation services shall be apportioned to this State in accordance with paragraphs (1) and (2):

(1) Such business income (other than that derived from transportation by pipeline) shall be apportioned to this State by multiplying such income by a fraction, the numerator of which is the revenue miles of the person in this State, and the denominator of which is the revenue miles of the person everywhere. For purposes of this paragraph, a revenue mile is the transportation of 1 passenger or 1 net ton of freight the distance of 1 mile for a consideration. Where a person is engaged in the

transportation of both passengers and freight, the fraction above referred to shall be determined by means of an average of the passenger revenue mile fraction and the freight revenue mile fraction, weighted to reflect the person's

(A) relative railway operating income from total passenger and total freight service, as reported to the Interstate Commerce Commission, in the case of transportation by railroad, and

(B) relative gross receipts from passenger and freight transportation, in case of transportation other than by railroad.

(2) Such business income derived from transportation by pipeline shall be apportioned to this State by multiplying such income by a fraction, the numerator of which is the revenue miles of the person in this State, and the denominator of which is the revenue miles of the person everywhere. For the purposes of this paragraph, a revenue mile is the transportation by pipeline of 1 barrel of oil, 1,000 cubic feet of gas, or of any specified quantity of any other substance, the distance of 1 mile for a consideration.

35 ILCS 5/304(d).

The first issue involves the parties' disagreement about the scope of the class required to apportion income pursuant to IITA § 304(d). The Department wants § 304(d) read narrowly, so that only those persons that it considers to be primarily engaged in furnishing transportation services are considered able to use it to apportion income. First, the Department does not consider ABC to be primarily engaged in furnishing transportation services because most of the miles that goods travel pursuant to ABC's contracts are miles traveled on equipment that ABC does not own, lease, or control. On the other hand, ABC asserts that transportation should be read broadly, and at least be understood to include those who actually furnish transportation services, even if such transportation includes movement of property on transportation equipment that the person does not own, lease or control. Specifically, ABC contends that the meaning of

transportation, when used in § 304(d) of the IITA, should be understood to have the same meaning as the definition of transportation set forth in Illinois' Commercial Transportation Law (ICTL), 625 ILCS 5/18c-1104(38). Alternatively, ABC asserts that transportation should be understood to have the same meaning as the definition of the same word in the federal Interstate Commerce Act, which definition is currently codified at 49 U.S.C. § 13102(21). Taxpayer's Post-Hearing Brief (ABC's Brief), pp. 18-19, 26.

The ICTL's definition of transportation is:

(38) "Transportation" means the actual movement of property or passengers by motor vehicle (without regard to ownership of vehicles or equipment used in providing transportation service) or rail together with loading, unloading, and any other accessorial or ancillary service provided by the carrier in connection with movement by motor vehicle or rail, which is performed by or on behalf of the carriers, its employees or agents, or under the authority or direction of the carrier or under the apparent authority or direction and with the knowledge of the carrier. Transportation of property by motor vehicle includes driveaway or towaway delivery service.

625 ILCS 5/18c-1104(38). Congress' definition of transportation within the Interstate Commerce Act (ICA) is:

(21) Transportation. The term "transportation" includes —
(A) a motor vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, regardless of ownership or an agreement concerning use; and
(B) services related to that movement, including arranging for, receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, packing, unpacking, and interchange of passengers and property.

49 U.S.C. § 13102(21).

ABC considers it significant that the Department has previously used the ICTL's definition of transportation as the meaning of "transportation services," as used in IITA § 304(d). ABC Brief, pp. 19, 26 (*citing* Private Letter Ruling IT-92-1093). It did so in a private letter ruling (PLR), which provides, "Transportation services means the actual movement of property or passengers by motor vehicle (without regard to ownership of vehicles or equipment used in providing transportation service), rail, or pipeline, together with loading, unloading, and any other accessorial or ancillary service provided by the carrier in connection with movement by motor vehicle, rail, or pipeline, which is performed by or on behalf of the carriers, its employees or agents, or under the authority or direction of the carrier or under the apparent authority or direction and with the knowledge of the carrier." PLR IT-92-1093.

ABC argues that the Department's determination that it was not a transportation company appears to be based primarily on the fact that it did not own the equipment on which the property it agreed to carry for shippers was transported. ABC's Brief, pp. 25-27. It asserts that this determination is legally erroneous because, as a simple matter of definition, whether a carrier owns the equipment on which property is carried does not determine whether the carrier is engaged in transportation. ABC's Brief, pp. 25-26.

ABC is correct that the Department's primary argument why ABC should not be considered a transportation company is because ABC does not own, lease or control the aircraft on which ABC arranged to have the shipments described in its HAWB contracts flown from one city to another. Department's Brief, pp. 7-9, 12. The Department also asserts that ABC is not primarily engaged in the business of providing transportation

because ABC did not earn at least 50% of its income from providing transportation.

Department's Brief, p. 14. As to its first argument, the Department specifically asserts:

A business that is classified as providing transportation services apportions its income based upon its revenue miles. The apportionment is based upon a fraction, "the numerator of which is the revenue miles of the person in this State, and the denominator of which is the revenue miles of the person everywhere." 35 ILCS 5/304(d)(1). A revenue mile "is the transportation of 1 passenger or 1 net ton of freight the distance of 1 mile for a consideration." *Ibid.* [A] straightforward reading of this provision would require that the taxpayer is transporting the passengers or freight on vehicles that are either owned or leased by the taxpayer and under taxpayer's control and direct supervision at the time of the transportation.

Department's Brief, pp. 7-8 (emphasis added). The Department further argues:

Sec. 304(d)(1) requires a comparison of revenue miles furnished by the Taxpayer. It does not require a mathematical calculation to realize that the distance traveled by a package in a vehicle owned or leased by Taxpayer and under Taxpayer's control was miniscule compared to the distance traveled by that same package once it was placed on a Federal Express or UPS airplane. There is no testimony that Taxpayer owned, leased or had any control over the Federal Express or UPS airplanes. This code section is intended for companies that are primarily involved in providing transportation services. Most of Taxpayer's business, measured by miles that the goods moved, involved transportation by another company over which Taxpayer had no control. The Taxpayer provided some transportation between client's facilities, Taxpayer's offices and to and from the airport, and the transfer of goods from one plane to another at the hub airport. Taxpayer provided, in effect, insurance for the goods being transferred. Taxpayer provided a lot of valuable services, but the transportation of the diamonds and jewelry by the Taxpayer was not the primary service. ABC, Inc., on the other hand provided a number of services that had nothing to do with transportation, but its primary service was the transportation of money in ABC trucks, and therefore it qualified as a transportation company.

Department's Brief, p. 9 (emphasis added).

Finally, the Department argues:

The language in Sec. 304(d) states in its discuss[ion] of transportation services that it [is] applied to "income derived from furnishing transportation services" and that the income is apportioned based on the "revenue mile" basis. *Underlines added.* The revenue mile means that the income is apportioned based upon the distance that the goods travel, and the word furnishing means that the Taxpayer provides the services for at least most of the distance. In this case, Taxpayer provides the transportation for a small fraction of the distance traveled, and the rest of the distance the transportation is subcontracted to Federal Express or UPS.

Department's Brief, p. 12 (boldface emphasis added). I focus here on the Department's argument that ABC is not a transportation company because it does not own the aircraft on which shipments of diamonds and jewelry are flown from one city to another.

I am unable to agree with the Department's claimed reading of § 304(d)(1)'s definition of revenue mile as "requir[ing] that the taxpayer is transporting the passengers or freight on vehicles that are either owned or leased by the taxpayer and under taxpayer's control and direct supervision at the time of the transportation." Department's Brief, pp. 7-8. First, nothing within the text of § 304(d)(1) provides that a person's calculation of its revenue miles is to be limited to those miles on which freight or passengers are transported by or on equipment the person owns, leases or controls. 35 ILCS 5/304(d)(1). Second, I do not read the verb "furnish" as manifesting the legislature's intent that one supplies such services only if one eschews using the transportation equipment of a subcontractor. 35 ILCS 5/304(d); The American Heritage Dictionary 342 (definition of "furnish" includes: "[t]o supply; give") (3d ed. 1994). In other words, I do not accept the Department's argument that a "straightforward" construction of § 304(d) or (d)(1) would read into those

provisions a limitation that is not plainly expressed within, or fairly implied from, the text. Munroe v. Brower Realty & Mgmt. Co., 206 Ill. App. 3d 699, 706, 565 N.E.2d 32, 37 (1st Dist. 1990) (“court has no right to read into the statute words that are not found therein either by express inclusion or by fair implication.”). The Department has certainly not pointed out any regulation in which it has adopted the interpretation it advocates here. Nor has it cited to any primary authority for its construction of IITA § 304(d) in this matter. Third, and finally, the Department’s claimed reading of § 304(d)’s phrase “furnishing transportation services” is inconsistent with longstanding Illinois law applicable to the transportation industry.

The definition of transportation in the ICTL sets forth the meaning the Illinois General Assembly has assigned to the word within the statute intended to apply to members of the transportation industry conducting business in Illinois. *See* 625 ILCS 5/18c-1102, 1103 (respectively, the ICTL’s sections in which the Illinois General Assembly articulated its statements of Legislative Intent, and State Transportation Policy).¹

¹ Sections 1102 and 1103 provide, respectively:

§ 18c-1102. Legislative Intent. The General Assembly finds that:

- (a) a comprehensive recodification of existing transportation regulatory statutes is needed to delete obsolete provisions and facilitate a coordinated approach to regulation of motor carriers, rail carriers, and brokers;
- (b) the accelerating pace of change in the transportation industry, as an outgrowth of changing economic conditions and federal legislation, necessitates the streamlining of regulatory procedures to allow for prompt action to protect the interests of the people of the State of Illinois; and
- (c) an increasing incidence of unlawful activity by unlicensed carriers and others has rendered existing enforcement mechanisms inadequate.

Where the language of any provision in this Chapter is substantially similar to the language in the predecessor statute, the legislative intent expressed in this Chapter shall be the same as the legislative intent embodied in the

That statutory definition is consistent with Congress's definition of transportation in the federal ICA. *Compare* 49 U.S.C. § 13102(23) *with* 625 ILCS 5/18c-1104(38). The issue here is whether ABC is a member of the transportation industry, and required to apportion its business income pursuant to the IITA provision the legislature intended to be used by members of that industry. Texaco-Cities, 182 Ill. 2d at 277, 695 N.E.2d at 488.

Illinois courts have often referred to the ICTL's definitions of similar terms when certain words and/or phrases relating to transportation have been used by the Illinois General Assembly, and not defined, within Illinois' tax acts. So, for example, the courts in Admiral Disposal Co. v. Department of Revenue, 302 Ill. App. 3d 256, 706 N.E.2d 118 (2nd Dist. 1999) and XL Disposal Corp., Inc. v. Zehnder, 304 Ill. App. 3d 202, 709 N.E.2d

predecessor statute as construed by the courts of this State and, where appropriate, reports of the Illinois Motor Vehicle Laws Commission.

§ 18c-1103. State Transportation Policy. It is hereby declared to be the policy of the State of Illinois to actively supervise and regulate commercial transportation of persons and property within this state. This policy shall be carried out in such manner as to: (a) promote adequate, economical, efficient and responsive commercial transportation service, with adequate revenues to carriers and reasonable rates to the public, and without discrimination; (b) recognize and preserve the inherent advantages of, and foster sound economic conditions in, the several modes of commercial transportation in the public interest; (c) develop and preserve a commercial transportation system properly supportive of the broad economic development goals of the State of Illinois; (d) create economic and employment opportunities in commercial transportation and affected industries through economic growth and development; (e) encourage fair wages and safe and suitable working conditions in the transportation industry; (f) protect the public safety through administration of a program of safety standards and insurance; (g) insure a stable and well-coordinated transportation system for shippers, carriers and the public; and (h) cooperate with the federal government, the several states, and with the organizations representing states and commercial transportation service providers and consumers.

293 (4th Dist. 1999) took into account the ICTL's definitions and provisions to determine, under Illinois' use tax act, whether two garbage haulers were carriers for hire, and thus exempt from tax, or private carriers that were not exempt. Admiral Disposal Co., 302 Ill. App. 3d at 259-260, 706 N.E.2d at 120-21 (citing ICTL's definitions); XL Disposal Corp., Inc., 304 Ill. App. 3d at 208-10, 709 N.E.2d at 297-99 (same). I take note that both of those cases were decided following administrative review of contested cases heard within the Department's Office of Administrative Hearings. In each agency decision, the ALJ whose recommended decision was adopted by the Director as the agency's decision had also taken into account the ICTL when construing the statutory exemptions at issue.

Before either the Department or the Illinois appellate court passed on the issues presented by the Admiral and XL Disposal cases, the court in Square D Co. v. Johnson, 233 Ill. App. 3d 1070, 599 N.E.2d 1235 (1st Dist. 1992) similarly distinguished between the taxability of tangible personal property purchased and used by carriers for hire (not taxable) and tangible personal property purchased and used by private carriers (taxable). Square D, 233 Ill. App. 3d at 1070, 599 N.E.2d at 1235. Additionally, Illinois courts have commonly referred to applicable federal transportation statutes where a litigant's duties or rights were affected because it engaged in transportation for hire in interstate commerce. *E.g.* Montgomery Ward & Co., Inc. v. McBreen & Assoc., 40 Ill. App. 3d 69, 351 N.E.2d 324 (1st Dist. 1976) (referring to the effect of certain provisions of the Carmack Amendment to the ICA).

Since Illinois courts and the Department have frequently looked to the ICTL's definitions when interpreting terms used in Illinois tax acts, I agree with ABC that it is reasonable to refer to and accept the ICTL's definition of transportation when determining

whether ABC was, in fact, a member of the transportation industry (Texaco-Cities, 182 Ill. 2d at 276-77, 695 N.E.2d at 487-88), and furnishing transportation services. TTX Co., 313 Ill. App. 3d at 545, 729 N.E.2d at 850. The ICTL’s definition of transportation clearly provides that transportation is to be determined “without regard to ownership of vehicles or equipment used in providing transportation service” 625 ILCS 5/18c-1104(38). That is consistent with Congress’ definition of the same term in the ICA. 49 U.S.C. § 13102(21).

The Department’s response to ABC’s argument regarding the applicability of the ICTL’s definition of transportation to IITA § 304(d) is as follows:

Taxpayer argues that it does meet the definition of “transportation” under the Illinois Commercial Transportation Law (“ICT Law”) 625 ILCS 5/18c-1104, and that a departmental letter ruling has construed transportation under 35 ILCS 304 to mean approximately the same thing, although the letter ruling does not refer to the ICT Law directly. IT 92-0192, 10/13/92. Without admitting that the ICT Law controls the definition of “transportation” under Sec. 304, an objective reading of the ICT Law indicates that Taxpayer is not primarily engaged in the transportation business, but is either a broker or a freight forwarder.

Under the ICT Law:

“Transportation” means the actual movement of property or passengers by motor vehicle (without regard to ownership of vehicles or equipment used in providing transportation service) or rail together with loading, unloading, and any other accessorial or ancillary service provided by the carrier in connection with movement by motor vehicle or rail, which is performed by or on behalf of the carriers, its employees or agents, or under the authority or direction of the carrier or under the apparent authority or direction and with the knowledge of the carrier. Transportation of property by motor vehicle includes driveaway or towaway delivery service.

[Emphasis added]

625 ILCS 5/18c-1104(38). This language indicates that the drafters of the statute intended that the transportation would be a “hands-on” operation, the carrier would not be

subcontracting the transportation to another entity without any control over the employees who would be operating the vehicles that would be moving the merchandise.

Department's Brief, pp. 12-13.

The Department's response misconstrues the ICTL's definition of transportation by completely reading out of it the legislature's plainly expressed intent that transportation be determined "(without regard to ownership of vehicles or equipment used in providing transportation service)" It is improper to read a statute in a way that renders part of the text a nullity. In re County Collector of Kane Co., 132 Ill. 2d 64, 547 N.E.2d 107 (1989) ("In construing a statute or an ordinance, a court should not adopt a construction which renders words or phrases in a statute superfluous."). Further, the clauses the Department underlines and emphasizes are connected by the disjunctive, "or." That means that the "actual movement of property or passengers by motor vehicle (without regard to ownership of vehicles or equipment used in providing transportation service)," which actual movement includes "loading, unloading, and any other accessorial or ancillary service provided by the carrier in connection with movement by motor vehicle or rail," constitutes transportation if the movement is:

- "performed by ... the carriers, its employees or agents ...", or
- "performed ... on behalf of the carriers, its employees or agents ...", or
- "performed ... under the authority or direction of the carrier ...", or
- "performed ... under the apparent authority or direction of the carrier and with the knowledge of the carrier."

625 ILCS 5/18c-1104(38).

Here, even though ABC did not own the UPS or Federal Express aircraft on which it arranged to have diamonds and jewelry flown from one city to another, there can be no serious dispute that the actual movement of that property on aircraft not owned, leased or

controlled by ABC was nevertheless performed “on behalf of ABC,” just as it was performed “under the authority and direction of ABC.” 625 ILCS 5/18c-1104(38); Taxpayer Ex. 2 (¶ V). That conclusion is made clear by the unambiguous text of the contracts ABC uses. Each HAWB specifies that ABC’s customer, whom the contract designates as You, “understand[s] and agree[s] that ABC may, in its absolute discretion, choose to perform the Services or any part of them itself, by its own employees or agents or by independent subcontractors. ABC obligations to You are not affected by that choice and Your rights and obligations remain as stated in this Contract.” Taxpayer Ex. 2 (Conditions of Contract, ¶ V). In those HAWB’s, ABC does not specify the identity of the subcontractors it might choose to use to provide air freight of its shipper’s goods, and the shippers, presumably, do not care. ABC, after all, expressly assumes responsibility to the shipper for the actual monetary value of the property lost or damaged up to the declared value of the shipment for customs purposes. Taxpayer Ex. 2 (Conditions of Contract, ¶¶ IX-X). The shipper can choose the level of service desired, and ABC’s liability depends on the type of service chosen by the shipper. *Id.* Finally, the HAWB’s description of each distinct service provided by ABC make clear that such services include the actual transfer of possession of property from someone to ABC, the actual movement of that property from one place to another, and the subsequent delivery of that property to a destination or consignee chosen by the shipper. Taxpayer Ex. 2 (Conditions of Contract, ¶ IX). Under the plain terms of the HAWB’s, and under the plain meaning of the ICTL’s definition of transportation, the service ABC provides to customers is transportation.

The Department’s construction of the ICTL’s definition of transportation limits the meaning of that word to only the actual movement of property or passengers performed by

a carrier, its employees or agents, on equipment it owns, leases or controls. Department Brief, pp. 7-9, 12. This construction perfectly compliments the Department's proffered construction of § 304(d), but it is directly contrary to the Illinois General Assembly's manifest intent that transportation "means the actual movement of property or passengers by motor vehicle (without regard to ownership of vehicles or equipment used in providing transportation service)" 625 ILCS 5/18c-1104(38). I recommend that the Director accept the ICTL's plain language, rather than a construction that would defeat the legislative intent underlying that statutory text.

Since I agree that the ICTL's definition of transportation is applicable when construing the phrase "furnishing transportation services" in IITA § 304(d), I must further acknowledge that, since at least 1953, the Illinois General Assembly had expressly classified carriers of property for hire as being engaged in the business of transportation. In Elgin Storage & Transfer Co. v. Perrine, 2 Ill. 2d 28, 116 N.E.2d 868 (1953), the Illinois Supreme Court construed the legislative intent of the Illinois General Assembly when it enacted the Motor Carrier for Property Law (MCPL), which was the statutory predecessor of the ICTL. The court in Elgin was called upon to review a declaratory judgment action filed to enjoin the enforcement of the newly enacted MCPL. Elgin, 2 Ill. 2d at 29, 116 N.E.2d at 869. The exemption set forth in § 3(g) of that act formed the sole basis for the plaintiff's challenge to the statute, which subsection set forth an exemption from regulation for "Motor vehicles while being used for the transportation of agricultural supplies, livestock, agricultural products or commodities." Elgin, 2 Ill. 2d at 29, 32, 116 N.E.2d at 869-70. The Elgin court approached the question by analyzing the purpose of the MCPL

vis-à-vis the exemptions set forth in § 3 thereof (which exemptions are currently codified in § 4102 of the ICTL, 625 ILCS 18c-5/4102). Elgin, 2 Ill. 2d at 31, 116 N.E.2d at 869-70.

The Elgin Court held:

[I]t may be said, in general, that the Illinois Motor Carrier of Property Act, establishes a plan for the regulation of motor carriers of property for hire similar to the regulation of public utilities under the Illinois Public Utilities Act. [citations omitted] ... An analysis of the act shows that it is not the regulation of motor vehicles as such, but the regulation of the business of transportation, for the legislature expressly declares, in section I thereof, that it is "the business of the transportation of property for hire by motor vehicle" which is to be supervised and regulated. It is, therefore, with the expressed legislative purpose and design in mind that the exemptions in section 3 must be read and in particular paragraph (g) thereof.

The touchstone of modern statutory construction is not the purport of the text but the import of its context. To read subparagraph (g) literally, as plaintiff urges, would be to permit any carrier, otherwise subject to the act, to avoid the regulation to which he was intended to be subjected by the devise of transporting some (and no one knows how much or how little) of the specified agricultural commodities. The plaintiff's own argument, by demonstrating the complete impracticability of such a construction, also demonstrates that it was not the construction intended by the legislature. We hold, therefore, that section 3(g) was intended to do no more than to emphasize the exemption of those who are not engaged in the business of motor transportation for hire but who haul their own agricultural supplies and commodities
....

Elgin, 2 Ill. 2d at 34-35, 116 N.E.2d at 869-70 (emphasis added). Thus, the Elgin Court's holding may be understood as resolving who the Illinois General Assembly considered to be engaged in the business of transportation for hire, as well as who it considered *not* to be so engaged.

As the decisions in Admiral and XL Disposal suggest, the Department has previously given effect to Illinois transportation law's distinctions between those engaged

in the business of transportation for hire, and those not so engaged. This agency respect is crystallized by the Department's position in TTX Co., where the Department asked the court to conclude, as a matter of law, that "the reasonable construction of section 304(d) requires that the phrase 'furnishing transportation services' be limited to a carrier of freight or passengers." TTX Co., 313 Ill. App. 3d at 545, 729 N.E.2d at 850. The Department's own, prior position in TTX reflects that Illinois law has long considered carriers for hire, which class includes both common carriers and contract carriers, as being engaged in the business of transportation for hire. Elgin, 2 Ill. 2d at 34-35, 116 N.E.2d at 869-70; Allied Delivery System, Inc. v. Illinois Commerce Comm., 93 Ill. App. 3d 656, 417 N.E.2d 777 (1st Dist. 1977) ("Under the Illinois Motor Carrier of Property Law, there are two types of motor carriers of property: common carriers and contract carriers. [citations omitted] Operation of a motor vehicle in the intrastate transportation of property for hire as either a common carrier or a contract carrier requires a permit of authority issued by the Commission.").

There is no dispute here that each and every time ABC was hired by a customer, the customer prepared, and both ABC and the customer signed, a uniquely-numbered, written bilateral contract, commonly known as a HAWB. Taxpayer Ex. 2; Tr. pp. 33-36 (John Doe). Under the plain terms of those HAWB contracts, ABC both held itself out as a contract carrier, and it actually provided transportation of each shipment to a destination point set forth on the HAWB by the shipper. Taxpayer Ex. 2. The documentary evidence thus establishes that ABC held itself out and actually conducted business in Illinois during the years at issue as a contract carrier for hire. Both Illinois and federal law have long and consistently considered contract carriers for hire to be members of the transportation

industry. Regular Common Carrier Conference v. United States, 803 F.2d 1186, 1187-88 (1986) (interpreting 49 U.S.C. § 10102(14)(B) (defining “motor contract carrier”));² Elgin, 2 Ill. 2d at 34-35, 116 N.E.2d at 869-70; Maurice Transport Co., Inc. v. Amoco Oil Co., Inc., 144 Ill. App. 3d 156, 161-62, 494 N.E.2d 738, 742 (4th Dist. 1986) (“Plaintiff, as a contract carrier, is a motor carrier of property for-hire that furnishes transportation services designed to meet the distinct needs of individual shippers pursuant to ‘individual written bilateral contracts.’ ”).

The decision in TTX is instructive on the parties’ dispute over the scope of § 304(d). The TTX court rejected the Department’s argument that § 304(d) be understood to apply *only* to carriers of freight or property. TTX, 313 Ill. App. 3d at 545, 729 N.E.2d at 850. The court, in other words, considered the Department’s position an unduly restrictive view of the class of persons required to use IITA § 304(d) to apportion business income. Here, however, the Department urges an even narrower construction of IITA § 304(d). Whereas in TTX, the Department urged the limitation of the applicability of § 304(d) only to carriers for hire, it now argues for a conclusion that ABC, a contract carrier for hire, is *not* engaged in furnishing transportation services. The Department has cited no case, statute or regulation that supports such a construction of § 304(d). Moreover, the TTX court’s refusal to limit the applicability of § 304(d) to only carriers for hire strongly militates against concluding that an even narrower construction is proper. Since Illinois and federal transportation law consider contract carriers for hire to be engaged in the business of transportation for hire, I recommend that the Director similarly treat ABC as a

² Section 10102 of the ICA now pertains specifically to interstate transportation by rail (49 U.S.C. § 13102), and the ICA’s definition of contract carriage can be found at 49 U.S.C. § 13102(4).

member of the transportation industry, and conclude that it is required to apportion its business income pursuant to IITA § 304(d). Texaco-Cities, 182 Ill. 2d at 277, 695 N.E.2d at 488.

Next, the Department responds that, even if I apply the ICTL's definition of transportation to IITA § 304(d), ABC should still not be considered to be primarily engaged in furnishing transportation services, because its business is more in the nature of a broker or freight forwarder, which terms are also defined in the ICTL. Department's Response, pp. 12-14. Since ABC conducts business in interstate commerce, whether it is, in fact, a broker or a freight forwarder is more properly determined by comparing its operations with the definitions of these terms as set forth under federal law. 49 U.S.C. § 13102(2), (8) (respectively, definitions of broker and freight forwarder under the ICA). Under the ICA, "[a] property broker arranges the transportation of property by an authorized motor carrier, but is not permitted to act as a carrier." Transportation Revenue Management, Inc. v. First NH Investment Services Corp., 886 F.Supp. 884, 886 n.2 (D.D.C. 1995); 49 C.F.R. § 1045.2). Again, ABC holds itself out and actually acts as a contract carrier for hire. Taxpayer Ex. 2. Thus, ABC is not a broker. 49 U.S.C. § 13102(2).

And while I agree with the Department that ABC's business operations closely dovetail with the activities of a freight forwarder, as that term is defined in the ICA, the Department fails to offer any cogent reason why I should conclude that a freight forwarder is not engaged in the business of furnishing transportation services. Both Illinois and federal courts have long recognized that interstate freight forwarders are engaged in the business of providing transportation for hire, since they act as carriers for hire.

Aquascutum of London, Inc. v. S.S. American Champion, 426 F.2d 205, 210 (2d Cir. 1970) (describing freight forwarder’s dual role as carrier vis-à-vis its customer, and shipper vis-à-vis the other carriers that it hires/uses to provide additional transportation of property); Montgomery Ward & Co., Inc. v. McBreen & Assoc., 40 Ill. App. 3d 69, 351 N.E.2d 324 (1st Dist. 1976) (same); 14 Am. Jur. 2d *Carriers* § 651 (“Under the Interstate Commerce Act the term ‘carrier’ includes a freight forwarder”) (2006).

Finally, the Department asserts that I should defer to its interpretation that, “in order to be classified as a transportation company under 35 ILCS 5/304(d) ... at least 50 percent of the taxpayer’s income must come from providing transportation, and not just subcontracting it” Department Brief, p. 14. Even at first blush, however, I can conceive of instances where the majority of an admitted carrier’s revenues or income might be derived from activities other than furnishing transportation services. Take, for example, the situation in Texaco Cities, where the carrier “sold major segments of its pipeline assets and associated real estate, including its entire contingent of pipeline assets in Illinois.” Texaco-Cities, 182 Ill. 2d at 265, 695 N.E.2d at 483. The Illinois Supreme Court has held that the legislative intent underlying IITA § 304(d) was to provide for entity-based apportionment, and not activity-based apportionment. *Id.* at 277, 695 N.E.2d at 488. Were the Department’s current litigation stance consistently applied, and if the revenues Texaco Cities derived from its sale of pipeline had been greater than its revenues from furnishing transportation by pipeline, then an admitted carrier, like ABC here (*see* Department’s Brief, p. 15) — would be treated as not being “primarily” engaged in the business of furnishing transportation services. I refer to the fact situation in Texaco Cities as just one example of how the Department’s current litigation stance could be used to

frustrate the legislative intent to have members of the transportation industry use § 304(d) to apportion business income.

Here, ABC filed its Illinois income tax returns as one of the members of ABC unitary group of transportation companies. Department Exs. 7-9. Within the Illinois income tax regulation the Department adopted to interpret the IITA's definition of unitary business group, the Department characterizes transportation as a general line of business. 86 Ill. Admin. Code § 100.9700(h)(2). When asking that I defer to its interpretation of § 304(d), however, the Department both concedes that ABC was engaged in transportation, and simultaneously urges that ABC's primary business was something other than transportation, without ever specifically identifying what that primary business is. *Compare id. with* Department's Brief, pp. 9 (“[ABC] provided, in effect, insurance for the goods being transferred.”), 13 (“Taxpayer provides a number of services, and could argue that it is an insurance company, a financial institution, engaged in the transportation business as a carrier, a broker or a freight forwarder. The issue is whether it is in the transportation business”).

Notwithstanding the Department's relative income interpretation of IITA § 304(d), furnishing transportation for hire *was* ABC's general line of business, since it held itself out and actually conducted business as a contract carrier for hire. Regular Common Carrier Conference, 803 F.2d at 1187-88; Elgin, 2 Ill. 2d at 34-35, 116 N.E.2d at 869-70; 86 Ill. Admin. Code § 100.9700(h)(2). Thus, even if ABC might have received a greater portion of its income from an activity other than from furnishing transportation services — and there is no competent evidence of that here — I fail to see why that relative income disparity would be determinative of whether ABC was, in fact, a transportation company.

In sum, I recommend that the Director conclude that the question of whether ABC, or any taxpayer, is a member of the transportation industry calls for a qualitative analysis, and not a quantitative analysis that purports to compare either the relative amounts of income earned by the taxpayer, or that compares the relative number of miles goods or passengers are moved on the taxpayer's equipment, versus miles moved on equipment owned by someone else.

In Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 116 S.Ct. 1730, 135 L.Ed.2d 25 (1996), the Supreme Court noted that it “den[ie]d deference ‘to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice,’ [citation omitted] The deliberateness of such positions, if not indeed their authoritativeness, is suspect.” Smiley, 517 U.S. at 741, 116 S.Ct. at 1733, 135 L.Ed.2d 25. I cannot recommend that the Director defer to the Department's litigation position here, because it is being used in an attempt to treat a contract carrier for hire as though it was not furnishing transportation services. The Department's position is not supported — and is, in fact, directly contradicted — by applicable statutes (35 ILCS 5/304(d); 625 ILCS 5/18c-1104(38)), case law (Texaco-Cities, 182 Ill. 2d at 277, 695 N.E.2d at 488; *see also* Aquascutum of London, Inc., 426 F.2d at 210), and by prior administrative practice. TTX, 313 Ill. App. 3d at 542, 729 N.E.2d at 848 (“The Department construes section 304(a) to apply only to carriers”); 86 Ill. Admin. Code § 100.9700(h)(2); PLR IT-92-1093.

But if I am wrong on whether one's use of § 304(d)'s apportionment requires an inquiry on the question of primacy, I also conclude that furnishing transportation services for hire was ABC's primary business. Federal transportation law has established its own “primary business test”, first pursuant to adjudications made by the Interstate Commerce

Commission (ICC), and then pursuant to an act of Congress, when it codified the test within 49 U.S.C. § 10524. Red Ball Motor Freight, Inc. v. Shannon, 377 U.S. 311, 315, 84 S.Ct. 1260, 1263, 12 L.Ed.2d 341 (1964); Russell v. Jim Russell Supply, Inc., 200 Ill. App. 3d 855, 868-70, 558 N.E.2d 115, 125-26 (5th Dist. 1990). The test was developed to ascertain whether a person claiming to be a private carrier was actually engaged in transportation for hire, and merely purporting to act as a private carrier to avoid regulation by the ICC, or the law applicable to carriers for hire. Red Ball, 377 U.S. at 313-16, 84 S.Ct. at 1262-64, 12 L.Ed.2d 341. Congress repealed the statutory source for the test before the first of the years at issue, as part of its broader economic deregulation of the transportation industry. See generally, 49 U.S.C. § 11501 *et seq.* (1995).³

The aim of the primary business test was to determine whether a carrier was engaged in private carriage or engaged in transportation for hire. As the name and the nature of the test imply, if a person was engaged in transportation for hire, then transportation for hire was its primary business. Red Ball, 377 U.S. at 313-16, 84 S.Ct. at 1262-64, 12 L.Ed.2d 341; Nuclear Diagnostic Laboratories, Inc., Contract Carrier Application, 131 M.C.C. 578, 1979 WL 11177 (June 4, 1979). Neither party specifically addresses the primary business test in their briefs. Perhaps that is because there is no real dispute that ABC actually held itself out and conducted business in interstate commerce as

³ As of January 1, 1995, Congress preempted state economic regulation related to price, route or service of most motor carriers of property. 49 U.S.C. § 11501(h)(1) (1995). Matters not covered by the preemption include, *inter alia*, a state's safety regulatory authority (e.g., the authority to regulate minimum amounts of insurance to be carried, or highway route limitations based on weight or hazardous nature of the cargo carried) (*see* 49 U.S.C. § 11501(h)(2) (1995)), and a state's authority to regulate standard transportation practices (e.g., the authority to regulate uniform practices such as bills of lading used) (*see* 49 U.S.C. § 11501(h)(3) (1995)).

a contract carrier for hire during the years at issue. Taxpayer Exs. 1-2; Department's Brief, pp. 9, 12, 15.

In Russell, the court acknowledged the utility of the primary business test for purposes other than as originally designed by the ICC. Russell, 200 Ill. App. 3d 855, 866, 558 N.E.2d 115, 124. The Russell court noted approvingly the Wisconsin supreme court's use of the test in a tax context, when determining whether a person was entitled to an exemption from use tax for trucks and parts sold to and used by common or contract carriers. *Id.*, citing Gensler v. Wisconsin Department of Revenue, 70 Wis. 2d 1108, 236 N.W.2d 648 (1975). I also note that, in the Department's administrative decision in Admiral Disposal, the Director also acknowledged the primary business test as the means by which one ordinarily determines the primary business of a carrier. See <http://www.revenue.state.il.us/legalinformation/hearings/mv/mv97-4.pdf> (on line copy of the Department's administrative decision in Admiral Disposal, pp. 14-15, available at the Department's web site). Thus, both Illinois courts and the Department have recognized transportation law's primary business test as the means by which one determines whether a carrier's primary business is transportation for hire, or transportation that is a mere incident of a primary business that is other than transportation for hire.

Here, a comparison of the primary business test's criteria and the evidence of record reveals that ABC's primary business is transportation for hire. When making these comparisons, I keep in mind that ABC is not claiming to be engaged in private carriage. On the contrary, ABC wants the Department to respect that it held itself out and actually conducted business as an interstate contract carrier for hire, and to treat it accordingly. Nor does ABC engage in the practice of making buy-sell agreements, which several of the

criteria are designed to investigate. Red Ball, 377 U.S. at 313-16, 84 S.Ct. at 1262-64; Russell, 200 Ill. App. 3d at 868, 558 N.E.2d at 125.⁴

1. *Whether the carrier is the owner of the property transported.* ABC did not own any of the diamonds and/or jewelry it transported, so the first, second and fifth factors do not indicate private carriage. Taxpayer Ex. 2.

2. *Whether orders for the property are received prior to its purchase by the carrier.* ABC does not purchase goods that it thereafter delivers and purports to sell to others. Taxpayer Ex. 2; Tr. pp. 42-47 (John Doe). Therefore, it does not take or fill any orders for property that it thereafter delivers to consignees.

3. *Whether the carrier utilizes warehousing facilities and the extent of this use as a storage place.* ABC leases office space where it, *inter alia*, receives property from shippers, or from which it dispatches employees and/or agents who receive goods from shippers. Taxpayer Exs. 4-6; Tr. pp. 37-39, 46-48 (John Doe). It also leases space at airports, where it consolidates shipments for air carriage, and where it later breaks down and makes ready such property for delivery to consignees at destination points. Taxpayer

⁴ The Russell court described the common characteristics of a sham buy-sell agreement:

A typical buy-and-sell arrangement is one under which the carrier “buys” property at a shipping point, transports it to a delivery point and there “sells” it to the real purchaser, the “profit” to the carrier amounting to the price of the transportation between the two points. [citations omitted] Certain criteria characteristic of the spurious buy-and-sell device have been developed by the I.C.C. Among these are the large investment of assets or payroll in transportation operations; negotiating the sale of goods transported in advance of dispatching a truck to pick them up; direct delivery of the transported goods from the truck to the ultimate buyer, rather than from warehoused stocks; solicitation of the order by the supplier rather than the truck owner; and inclusion in the sales price of an amount to cover transportation costs. ***

Russell, 200 Ill. App. 3d at 868, 558 N.E.2d at 125.

Exs. 4-6; Tr. pp. 51-54 (John Doe). There is no evidence that ABC warehouses customer's goods, or its own goods that it transports pursuant to a primary business that is other than transportation for hire.

4. *Whether the carrier undertakes any financial risks in the transportation-connected enterprise.* ABC undertook considerable financial risks by assuming financial liability for the stated value of its shipper's goods, but only if such goods were lost or damaged during transit. Taxpayer Exs. 2, 4-6 (p. 4 of exhibits 4-6); Tr. pp. 83, 1-04-05 (John Doe).

5. *Whether the carrier includes in the sale price an amount to cover transportation costs and its relation to the distance the goods are transported.* ABC sells no goods; the prices it charges customers are for transportation of the shipper's goods. Taxpayer Ex. 2; Department Ex. 6.

6. *Whether the carrier transports or holds out to transport for anyone other than itself.* ABC transports for shippers, and not for itself. Taxpayer Ex. 2. ABC holds itself out as a contract carrier for hire. *Id.*; Department Ex. 6. There is no evidence to show that ABC holds itself as performing any business other than transportation for hire. *See* Taxpayer Exs. 1-2; Department Ex. 6.

7. *Whether the carrier advertises itself as being in a noncarrier business.* ABC does not hold itself out as being engaged in any business other than transportation for hire. Taxpayer Exs. 1-2.

8. *Whether its investment in transportation facilities and equipment is the principal part of its total business investment.* The evidence shows that the principal part of ABC's total business investment was not attributable to transportation facilities and equipment. Taxpayer Exs. 4-6. ABC used some new transportation equipment, i.e., trucks. Taxpayer

Exs. 4-6; Tr. pp. 73-74, 94-95 (John Doe). But the evidence also showed that ABC used some trucks previously owned and used by its parent, ABC, which, once transferred to ABC, had low book value because such equipment was already fully depreciated. Tr. pp. 82, 93, 103-04, 119-21 (John Doe). And of course, there is no dispute that ABC did not own the aircraft on which it arranged to have its shipper's goods flown from one city to another.

9. *Whether the carrier performs any real service other than transportation from which it can profit.* Whatever services are provided are directly related to transportation for hire. While John Doe testified that ABC's assumption of liability for the disclosed value of the goods transported, if lost, was a principal reason why customers chose to transport diamonds and jewelry with ABC, that guarantee was not a service that was unrelated to transportation for hire. ABC's primary business was not, "in effect, [to provide] insurance for the goods being transferred." Department's Brief, p. 9. ABC's contracts expressly provide that it "WAS NOT AN INSURER." Taxpayer Ex. 2 (¶ VIII). As an express part of those contracts, ABC merely subjected itself to the duty to which common-law had long subjected carriers of property for hire. Taxpayer Ex. 2 (¶ IX, [ABC's] responsibility for loss); 13 C.J.S. *Carriers* § 385 (1990) ("Carriers have a duty, vis-à-vis their relationship to shippers, to safeguard the shipper's interests.") Further, ABC's financial records report no income from selling insurance to customers. Taxpayer Exs. 4-6. Rather, they reflect expenses associated with purchasing insurance to cover its potential liability flowing from the loss or damage, in transit, of its shipper's goods. *Id.*; Department Ex. 6.

10. *Whether the respondent at any time engages for-hire carriers to effect delivery of the products, as might be expected, for example, when it is called upon to fill an order and its own equipment is otherwise engaged.* Whenever a HAWB requires transportation via air from one city to another, ABC regularly uses the services of an independent subcontractor air freight carrier. Taxpayer Ex. 2 (¶ V).

11. *Whether the products are delivered directly from the shipper to the consignee (i.e., without intermediate warehousing).* There is no dispute that ABC's business most often involved its receipt of property directly from a shipper, its carriage of that property directly from a shipper to a connecting air carrier for air transportation between two cities, and once at the air carrier's destination, from the air carrier directly to the consignee. Taxpayer Ex. 2; ABC's Brief, pp. 7-9; Department's Brief, pp. 3-5, 15. Thus, ABC handles the front and back ends directly, with the only break in its direct transportation of shipper's property being the time such property is transported by the connecting air carrier.

12. *Whether solicitation of the order is by the supplier rather than the truck owner.* ABC does not purchase goods that it purports to sell and deliver to others, so there is no supplier that solicits orders of goods that ABC then buys, delivers, and purports to sell to others. Taxpayer Ex. 2; Department Ex. 6.

After reviewing and comparing the evidence in light of the primary business test's criteria, I conclude that ABC was just what it held itself out to be — a contract carrier for hire in interstate commerce. Since it was, in fact, engaged in transportation for hire, that was its primary business. Red Ball, 377 U.S. at 313-16, 84 S.Ct. at 1262-64, 12 L.Ed.2d 341; Russell, 200 Ill. App. 3d at 868, 558 N.E.2d at 125.

After considering all of the documentary evidence introduced at hearing, as well as the credible testimony that was consistent with such books and records, I conclude that ABC has rebutted the Department's prima facie case. The evidence supports ABC's claim that, during the years at issue, it was a transportation company, and that it was required to apportion its business income pursuant to IITA § 304(d)(1). After a taxpayer has rebutted the Department's prima facie case, the burden shifts to the Department to prove its case using competent evidence. The Department offered no such competent evidence here.

Conclusion:

I recommend that the Director cancel the NOD, pursuant to statute.

John E. White
Administrative Law Judge

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

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

v.

**ABC SERVICES, INC.,
TAXPAYER**

**No. 00-IT-0000
FEIN: 00-00000000
Tax yrs.: 12/97-12/98**

**John E. White,
Administrative Law Judge**

DIRECTOR'S DECISION

I have determined that the Administrative Law Judge's Recommendation for Disposition finding in favor of the Taxpayer is based on an erroneous interpretation of section 304(d) of the Illinois Income Tax Act ("ITA"), 35 ILCS 5/304(d). Therefore, pursuant to Ill. Admin. Code tit. 86, § 200.165, I reject that decision and issue the following decision:

Introduction

The facts of this case are quite simple. While the Taxpayer may have arranged to have its customers' diamonds and jewelry transported between various cities, the Taxpayer did not actually transport the valuables itself. Rather, the Taxpayer contracted with independent third parties to provide air courier services. The record contains no calculation of the ton miles traveled by the Taxpayer in Illinois or everywhere, which are necessary components of the apportionment formula prescribed by ITA section 304(d). For the most part, if Taxpayer provided anything it was security for the valuables that were being transported by Federal Express or United Parcel Service. Without presenting any evidence computing the revenue miles

traveled, the Taxpayer cannot possibly meet its burden of proving that it should apportion its income as a transportation company.

Findings of Fact

1. ABC Services, Inc. (ABC) was, during the years at issue, a wholly-owned subsidiary of ABC's, Inc. (ABC's). Dept. Ex. 2, at 2.

2. ABC's, in turn, was a wholly-owned subsidiary of the XYZ Group (XYZ). Dept. Ex. 2, at 2.

3. On its combined Illinois income tax returns, ABC's reported ABC as a member of ABC's unitary business group of transportation companies. Dept. Exs. 7-9, at 6.

4. ABC's incorporated ABC in 1988. TP Ex. 1; Tr. at 77.

5. On its application to transact business in Illinois, filed with the Secretary of State on February 7, 1994, ABC described its corporate purpose as "Armored and secured transportation and the arranging for same including related services." TP Ex. 1, at 2.

6. Prior to 1989, ABC was an operating division of ABC's that handled diamond and jewelry transportation. Tr. at 77-78. ABC's separately incorporated ABC because of differences ABC's noted between the business of transporting currency and transporting diamonds and jewelry. Tr. at 78-80. As of 1999, ABC performed only the administrative functions of the business. Tr. at 81. Later, ABC assumed more functions, such as walker (someone who picks up or delivers the valuables) and window (an office where customers can drop off or pick up valuables). Tr. at 81. ABC did not acquire the trucks initially, opting instead to use ABC's infrastructure. Tr. at 82.

7. No matter which entity delivered the valuables, ABC remained liable and carried insurance. Tr. at 83. Customers would hire ABC because common carriers do not provide

liability insurance for their valuables, and the “core” of ABC’s business was providing liability insurance for the customer. Tr. at 30, 36. As such, ABC provided security for the valuables. Tr. at 48.

8. In 1999, ABC’s name was changed to ABCs Global Services USA, Inc. Tr. at 23-24.

9. ABC contracted to provide air courier services for the shipment of diamonds and jewelry. Dept. Ex. 2, at 2; TP Ex. 2; Tr. at 33-36. As part of this courier service, ABC provided for pickup and delivery of the valuables through walkers, trucks or window service. Tr. at 42, 48-50. In Chicago, New York, Los Angeles and Miami, where ABC had offices, the majority of the pickup and delivery service was provided by walkers or at windows. Tr. at 50. ABC also leased trucks from ABC’s or third parties, and ABC’s operated the trucks in several locations, including Louisville and Memphis. Tr. at 73-74. In 1998 and 1999, ABC owned at least one of its own trucks, but the Taxpayer’s witness did not know how many. Tr. at 74, 94.

10. ABC’s services were initiated in one of two ways: (1) a customer called ABC’s customer service unit, which then arranged for ABC to pick up a shipment; or (2) a customer brought a shipment directly to a ABC window in a city where ABC had an office. Tr. at 42-43, 46-47.

11. A crew of two to four, depending on the value of the shipment, picked up and delivered packages, which were sorted at ABC offices or a ABC’s location. Tr. at 43, 49, 51. Crew members were armed and wore ABC uniforms. Tr. at 48.

12. Walking crews would be used for efficiency, but when walkers could not be used, then ABC picked up or delivered valuables in trucks. In addition to the crew, a liability officer rode on each truck. Tr. at 47.

13. Window service meant a customer brought the diamonds or jewelry to a ABC window, where ABC employees would sort and tag the items. Tr. at 42-43, 50-51. Customers could also pick up packages at the destination window. Tr. at 45.

14. Shipments were tagged according to their destination and placed into pouches for air transport. Tr. at 50-51.

15. Information such as customer name, property value and delivery location was entered into the computer system. Tr. at 44. The sorting and tagging process took approximately one to one and one-half hours. Tr. at 50-51.

16. ABC customers included diamondmatters (i.e., diamond dealers) and jewelers, such as Tiffany's, Nieman Marcus, Sears, QVC and small diamond companies, whereas ABCs' customers were usually financial institutions. Tr. at 29-30, 41, 78-79.

17. The comparative liability issues of ABC and ABC's differ because ABC allows its customers to determine the value of a shipment ("said to contain basis"), whereas ABC's always counts the value of the currency that it is transporting. Tr. at 79-80. Additionally, the transportation services provided by ABC usually involved air travel, while those offered by ABC's usually did not. Tr. at 83-84.

18. On its federal income tax return for 1999, XYZ reported that ABC's principal business activity was providing "air courier service[s]," according to NAICS code number 492110. Dept. Ex. 4, at 5.

19. The U.S. Census Department describes NAICS code number 492110 as "establishments primarily engaged in providing air, surface, or combined courier delivery services of parcels generally between metropolitan areas or urban centers. The establishments of

this industry form a network including courier local pickup and delivery to serve their customers' needs." <http://www.census.gov/epcd/ec97/def/492110.HTM>.

20. On schedules prepared and submitted as part of its federal consolidated returns, ABC's reported the revenues ABC realized as being attributable to the air courier business. Dept. Ex. 6.

21. Customers arranging for ABC to provide air courier services completed a form entitled "Shipper's Letter of Instructions." TP Ex. 2; Tr. at 33-36.

22. The Shipper's Letter of Instructions also is commonly known as a house air waybill (HAWB). *See, e.g. ABC's Ltd. v. South African Airways*, 93 F.3d 1022, 1025 & n.1 (2nd Cir. 1996); *see also* 810 ILCS 5/201(6) (Illinois Commercial Code definition of "Airbill" as "a document serving for air transportation as a bill of lading does for marine or rail transportation, and includes an air consignment note or air waybill.").

23. Each HAWB used by ABC includes a unique 11-digit number in a box with the following caption: "HAWB No:" TP Ex. 2.

24. When signed by both the shipper and ABC, the HAWB constitutes a written, integrated, bilateral agreement. TP Ex. 2, at I.1, XII.

25. The HAWB also contained language by which ABC held itself out as a "contract carrier and not a common carrier or a bailee",⁵ and specified that it "is not an air carrier or an indirect air carrier for purposes of the [Warsaw] Convention." TP Ex. 2, at I.1. When spelling out ABC's liability for possible loss, the HAWB stated:

[Taxpayer] is acting on Your behalf solely as Your forwarding agent and is establishing a direct contractual relationship between You and the air carrier for

⁵ The Taxpayer was not registered with either the Department of Transportation or Interstate Commerce Commission, and when necessary used ABC's registration number to ship packages on a passenger airline. Tr. at 88.

the carriage by air of Your Property. ABC's accepts no responsibility whatsoever during the air portion of the Shipment.

TP Ex. 2, at IX.C.

26. In other HAWB provisions, ABC retained the right to use subcontractors and disavowed being an insurer. TP Ex. 2, at V, VII.

27. ABC used ABC's affiliates and third-parties to carry out its obligations pursuant to the HAWBs. Tr. at 51, 56, 59-61.

28. ABC carried risk insurance that covered up to \$100 million to reimburse customers in the event that an item was lost, stolen or damaged during transport. TP Exs. 4-6, at 4; Tr. at 83, 104-105.

29. As of 1997, ABC had established offices in four cities—New York, Chicago, Miami and Los Angeles—because these cities had the largest diamond and jewelry markets. Tr. at 37-39; TP Ex. 2. ABC conducted 80% of its business in these four cities during the years at issue.

30. ABC used Federal Express in 1997 to provide air transportation and United Parcel Service in 1998 and 1999. TP Exs. 4-6; Tr. at 51. These independent carriers were used 90% of the time to transport diamonds or jewelry from one city to another. Tr. at 31-32, 38-39.

31. Upon request, air couriers would escort a customer's valuables to the destination. In other words, a ABC employee traveled with the diamonds or jewelry on a passenger aircraft. Tr. at 52.

32. Once ABC began contracting with UPS, the packages were transported to the UPS hub in Louisville, where one of four trucks managed by ABC met each of the approximately 26 daily flights carrying ABC shipments. Tr. at 53-54. ABC packages were removed from the UPS planes first because they were secured transportation.

33. The shipments were taken to the ABC facility, where they were sorted and tagged. Tr. at 51-52, 54. ABC employed about 40 to 50 people at that facility, which processed at least 1,000 shipments daily. Tr. at 55. ABC employees had about three hours to sort and tag the packages before they were reloaded on an outbound UPS flight to their final destination. Tr. at 55-56.

34. A truck would pick up the shipment at the destination airport and bring it to either a ABC office or ABC's location, which made arrangements for final delivery. Tr. at 56.

35. The General Ledgers reported the following expenditures for "ground support":

Year	Amount
1997	\$8,682,113.60
1998	\$8,944,287.97
1999	\$8,805,136.62

TP Exs. 4-6.

36. Taxpayer paid the following amounts for "vehicle insurance":

Year	Amount
1997	\$6,000.00
1998	\$6,000.00
1999	No Entry

37. Taxpayer expended \$2,031,587.58 in administrative salaries and wages. TP Ex. 6.

Conclusions of Law

This matter involves whether ABC is required to apportion its business income pursuant to ITA section 304(d)(1). The Notice of Deficiency issued to the Taxpayer, introduced as

Department Exhibit 1, constitutes prima facie evidence that ABC was not a transportation company. 35 ILCS 5/904(a). A taxpayer cannot overcome this rebuttable presumption merely by denying the accuracy of the Department's assessment or knowledge of the tax. *Branson v. Department of Revenue*, 68 Ill. 2d 247, 267 (1995); *PPG Industries, Inc. v. Department of Revenue*, 328 Ill. App. 3d 16, 33-34 (1st Dist. 2002). Instead, a taxpayer is obliged to present documentary evidence that is consistent, probable and closely identified with its books and records, to show that the Department's determinations are not correct. *PPG*, 328 Ill. App. 3d at 33-34. ABC bears the burden of establishing that it is a transportation company for purposes of apportioning its income pursuant to ITA section 304(d) by a preponderance of the evidence. *Balla v. Department of Revenue*, 96 Ill. App. 3d 293, 295 (1st Dist. 1981).

ITA section 304(d) applies to members of the transportation industry, just as sections 304(b) and (c) were intended to apply, respectively, to insurance companies and financial organizations. *Texaco-Cities Service Pipeline Co. v. McGaw*, 182 Ill. 2d 262, 277 (1998). Section 304(d) sets forth the manner in which the business income of a company that furnishes transportation services is to be apportioned: "multiplying such income by a fraction, the numerator of which is the revenue miles of the person in this State, and the denominator of which is the revenue miles of the person everywhere. A revenue mile is defined to be the transportation of 1 passenger or 1 ton of freight the distance of 1 mile for compensation." 35 ILCS 5/304(d)(1). Thus, the plain meaning of the statute requires a taxpayer to derive income from actually transporting passengers or freight for hire in order to use that special formula.

When enacted in 1969, the Illinois Income Tax Act ("IITA") was based largely upon the Multistate Tax Compact, which Illinois originally adopted in 1967. "The Illinois Income Tax Act: 1969 Legislative History Proceedings Before the Senate Public Finance Committee," Ill.

Dept. of Revenue, at 32 (testimony of Charles W. Davis). One of the drafters of the Illinois Income Tax Act, Charles W. Davis, a partner at Hopkins, Sutter, Owen, Mulroy, Wentz & Davis and former chief counsel for the Internal Revenue Service, explained that because the Compact did not address the multistate income of insurance companies, financial organizations and transportation companies, for example, the draft legislation relied on special apportionment rules for those classes of taxpayers employed by Michigan, Minnesota and Pennsylvania in order to draw upon that body of experience. *Id.* at 32-33. *See also* “Official Commentary on the Illinois Income Tax Act,” 1 Ill. Tax Rep. (CCH) ¶ 14-023, at 1912 (1987) (“As has been noted, the Compact provides no rules for the allocation of business income of insurance companies, financial organizations, and transportation companies. Subsections (b), (c) and (d), respectively, of section 304 deal with these classes of income by providing allocation rules which are essentially identical with those of the Michigan income tax.”).

Although the term “transportation services” is not defined in either the IITA or the Uniform Division of Income for Tax Purposes Act, the Illinois circuit court has previously found that ITA section 304(d) “requires a taxpayer to derive income from transporting passengers or freight for hire.” *Wabash R.R. Co. v. Department of Revenue*, 92 L 51150, slip op. at 6 (Cir. Ct. Cook County May 1, 1996). Here, the Administrative Law Judge adopted the definition of “transportation” in the Illinois Commercial Transportation Law, 625 ILCS 5/18c-1104(38), but in the *Wabash* case, the circuit court rejected the taxpayer’s argument that regulation by the Interstate Commerce Commission (“ICC”) leads to the conclusion that it furnishes transportation services, finding no relationship between the regulatory functions of the ICC and Department of Revenue. *Id.*

Similarly, in *TTX Co. v. Whitley*, 313 Ill. App. 3d 536 (1st Dist. 2000), the Department moved for summary judgment, arguing that the taxpayer did not meet the statutory requirement for apportionment as a transportation company because it did not haul freight or passengers. TTX responded that it played an integral role in the transportation industry and should be considered to provide transportation services, at least indirectly, if not directly. *Id.* at 540. TTX designed a fleet of rail cars used in intermodal service that accommodate trailers and containers freely interchangeable between rail and motor carrier. TTX earned a fee for the use of its cars on a per diem and miles traveled basis, whether loaded or empty. *Id.* at 538. According to the Department, “because TTX itself is not a carrier and hauls neither passengers nor freight directly for one mile it cannot use the single factor apportionment formula to apportion its income to Illinois.” *Id.* at 542. The circuit court granted summary judgment in favor of the Department. Noting that “transportation services” is not defined in either the IITA or the regulations, the appellate court determined that reasonable inferences could be drawn from the evidence that TTX provides services that are substantially similar to those performed by railroads, “and those services should be evaluated with railroad activities as points of reference.” *Id.* at 545. Therefore, “in light of the very unique relationship TTX ha[d] to the railroad industry,” the appellate court determined that the reasonable differing inferences that could be drawn from the facts precluded the entry of summary judgment and remanded the case for an evidentiary hearing. *Id.* at 545.

Unlike *TTX*, this case does not turn on the unique relationship between shippers of freight and those that service them. Rather, this case involves a security company that subcontracts the shipment by air of diamonds and jewelry for its customers. The evidence does not lend itself to reasonable differing inferences as to whether the Taxpayer performs services substantially

similar to a package deliverer. Indeed, the Taxpayer used Federal Express or UPS to transport the packages, while it provided security along the way. Thus, the Taxpayer is not in the business of shipping passengers or freight and is not entitled to apportion its income under IITA section 304(d).

This same interpretation has been given a comparable term in Mich. Comp. Laws § 208.57. *City-Car Terminal, Inc. v. Department of Treasury*, 340 N.W.2d 98 (Mich. Ct. App. 1983),⁶ considered whether the taxpayer's activities constituted transportation services for purposes of the special apportionment rule. The taxpayer loaded and unloaded new motor vehicles between marshalling areas and railroad cars. *Id.* at 99. In arguing that loading and unloading trains should be considered a transportation service, the taxpayer pointed to the definition of "transportation" in the Interstate Commerce Act, which included "all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of the property transported." *Id.* at 100 (quoting 49 U.S.C. § 1(3)(a)) (emphasis removed). However, like the circuit court in the *Wabash* case, the Michigan appellate court noted that undefined terms in Michigan's Single Business Tax Act are construed harmoniously with federal income tax principles and declined to import a definition from the Interstate Commerce Act, which has an unrelated regulatory purpose. *Id.*

Instead, considering that the special rule for transportation services represents a departure from the normal apportionment provisions, the court concluded that the legislature "intended the term 'transportation services' to be limited to the service of providing transportation rather than to include services performed in connection with transportation." *Id.* The court further stated that the apportionment formula for transportation services, i.e. the ton miles approach, "cannot

⁶ This case was distinguished on the facts in *Comtrans, Inc. v. Michigan Department of Treasury*, 2000 WL 546805 (Mich. Tax Tribunal, February 10, 2000), but the definition of "transportation services" as opined in *City-Car* remained undisturbed.

be sensibly applied to taxpayers who are not themselves transporting goods or services for consideration but who are merely providing services in connection with such transportation by others.” *Id.* at 101. Accordingly, the court held “that only the actual service of transporting goods, services, or materials falls within the definition of ‘transportation services.’” *Id.* at 101.

I find the *City-Car* decision persuasive, and an analogy can be drawn to the facts in the instant matter. Based on the evidence offered at the hearing, the Taxpayer clearly provided security and arranged for the transportation of its customer’s valuables rather than actually transporting goods for consideration. While the Taxpayer received shipments at the airport hubs for sorting and tagging, thereby expending millions of dollars on ground support, *see* TP Exs. 4-6, the record contains no computation of the amount of miles traveled in shuttling the packages between the various airports and its facilities. Indeed, the “core” of the Taxpayer’s business was providing liability insurance for its customers. Tr. at 36. As in *City-Car*, the ton miles apportionment formula cannot sensibly be applied to a taxpayer that merely operated as a conduit for the transportation of diamonds and jewelry between cities. In essence, the Taxpayer provided security services in conjunction with transportation performed by others, in this case Federal Express and United Parcel Service, that accounted for 90% of its business. Under the reasoning of *City-Car*, that does not constitute transportation services for purposes of ITA section 304(d). The fact that the Taxpayer paid very little premiums for vehicle insurance further underscores this conclusion.

Conclusion

Because the decision rendered by the Administrative Law Judge is based upon an erroneous interpretation of the Department's statute, pursuant to Ill. Admin. Code tit. 86, § 200.165, I reject that decision. Based on my determination that the Taxpayer is not in the

business of providing transportation services within the meaning of ITA section 304(d), ABC was properly excluded from the ABC's unitary business group of transportation companies, and the Notice of Deficiency should be finalized as issued.