

UT 14-03

Tax Type: Use Tax

Tax Issue: Claim Issues – Right To Refund

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

ABC BUSINESS)	Docket No.	XXXX
)	IBT No.	XXXX
Taxpayer)	Claim Periods	1/08 — 12/09
v.)		
THE DEPARTMENT OF REVENUE)	John E. White,	
OF THE STATE OF ILLINOIS,)	Administrative Law Judge	

RECOMMENDATION FOR DISPOSITION

Appearances: Mary Kay Martire and Lauren Ferrante, McDermott Will & Emery, LLP, appeared for ABC BUSINESS, Inc.; John Alshuler, Special Assistant Attorney General, appeared for the Illinois Department of Revenue.

Synopsis:

Following an audit by the Illinois Department of Revenue (Department), ABC BUSINESS, Inc. (Taxpayer) filed two sets of amended tax returns to correct original transaction by transaction returns it had previously filed during the audit period. The first set amended the original returns Taxpayer filed to report, self-assess, and pay Illinois use tax (hereafter, UT returns), when it purchased certain motor vehicles, called Loaner Cars, for use in a Loaner Program. The second set amended the original returns Taxpayer filed to report that it sold one of the Loaner Cars, at retail (hereafter, ROT returns), as a used car, after using it in the Loaner Program. Taxpayer filed both sets of amended returns after being notified of determinations made by Department audit staff, during the audit.

With its amended UT returns, Taxpayer reported and paid additional amounts of use tax. With its amended ROT returns, Taxpayer reported that it mistakenly failed to claim a credit, authorized by 86 Ill. Admin. Code § 130.2013, against the original ROT

liability shown due on the original ROT return. This contested case involves only a dispute over the claims for credit that Taxpayer requested in its amended ROT returns, which claims the Department denied.

The issues are whether Taxpayer is entitled to a credit authorized by 86 Ill. Admin. Code § 130.2013, and if not, whether Taxpayer is entitled to relief under Illinois' Taxpayers' Bill of Rights Act (TBORA), 20 ILCS 2520/1 *et seq.* A hearing was held at the Department's offices in Chicago. At hearing, Taxpayer offered several documentary exhibits, consisting of its books and records, Department documents, as well as the testimony of witnesses. After considering the evidence, I am including in this recommendation findings of fact and conclusions of law. I recommend the Director cancel the Denials, and issue credit memos to Taxpayer, consistent with its amended ROT returns.

Findings of Fact:

Facts Re: Taxpayer's Business and the Loaner Program

1. Taxpayer is a motor vehicle dealership, located in Illinois, which sells new and used vehicles, at retail. Taxpayer Ex. 5 (copy of Department auditor's narrative report); Taxpayer Exs. 1-2 (copies of original and amended ST-556 returns filed by Taxpayer); Hearing Transcript (Tr.), p. 13 (testimony of John Doe (John Doe), Taxpayer's owner and president).
2. Taxpayer also leases vehicles, but substantially more than 50% of its gross receipts are derived from selling vehicles. Taxpayer's Post-Hearing Brief (Taxpayer's Brief), p. 2 ("ABC Business leases motor vehicles, but substantially more than 50% of its gross receipts are derived from its motor vehicle sales"); Department's Response Brief (Department's Brief), p. 5 ("ABC Business (the 'Taxpayer') is a motor vehicle

dealership that sells new and used vehicles at retail. *** The Taxpayer leases motor vehicles, but substantially more than 50% of its gross receipts are derived from motor vehicle sales at retail.”).

3. Taxpayer also maintains a repair shop. *See* Taxpayer Exs. 11-13 (copies of, respectively, documentation from Jack Black A to dealers describing Jack Black A’s Alternate Transportation (Altrans) Programs for 2004, 2005 and 2006); Tr. pp. 14-15 (John Doe).
4. Jack Black A requires Taxpayer to offer what the parties here have referred to as the Loaner Program, which allows customers who bring their vehicles to Taxpayer for service to be offered the use of a new model Jack Black A vehicle (Loaner Car or Loaner) while the customer’s vehicle is being serviced. Taxpayer Exs. 11-13; Tr. pp. 14-22 (John Doe).
5. Taxpayer owns the Loaner Cars, and filed an Illinois form ST-556 to report an Illinois use tax liability when it purchased each one used in the Loaner Program. Taxpayer Ex. 2 (copies of original completed Illinois forms ST-556 that Taxpayer filed when reporting its acquisition of vehicles placed into service in its Loaner Program, as well as copies of completed Illinois forms ST-556-X, which Taxpayer later filed to correct the original returns it filed regarding the Loaner Car).
6. Taxpayer periodically purchased and placed new Loaner Cars into its Loaner Program, to replace Loaner Cars no longer used for that purpose. Taxpayer Exs. 11-13. Taxpayer sold the Loaner Cars, at retail, as used vehicles, when they were no longer used in its Loaner Program. Taxpayer Ex. 2.

7. Jack Black A paid Taxpayer different amounts for each Loaner Car Taxpayer used in the Loaner Program. Taxpayer Exs. 11-13; Tr. pp. 18-24 (John Doe). The amounts ranged from \$XXXX to \$XXXX in 2004, \$XXXX to \$XXXX in 2005, and \$XXXX to \$XXXX in 2006. Taxpayer Exs. 11 (p. 2), 12 (p. 3), 13 (p. 5).
8. Taxpayer created, or caused to have created, a written form, titled, Courtesy Car Agreement (Loaner Agreement), which a customer and a Taxpayer employee sign before a customer is granted use and possession of a Loaner Car. Taxpayer Exs. 10, 25 (copies of, respectively, blank and completed Loaner Agreement forms).
9. Taxpayer does not charge or collect a rental or lease fee from a customer for the use and possession of a Loaner Car. Taxpayer Exs. 10, 25; Tr. pp. 15, 19 (John Doe), 123 (testimony of Department auditor Rudolph Bujak (Bujak)).
10. The Loaner Agreement form has two pages, and page two of each provides, in pertinent part, as follows:

Lessor identified on Page 1 hereby rents to the Lessee named on Page 1 the vehicle described on Page 1 subject to the forms and provisions of Page 2 and Page 1 of this Courtesy Car Agreement, and Lessee agrees:

1. In no event shall the vehicle be used, operated or driven ... (5) over 100 miles per day maximum usage.
2. Lessee will return the vehicle to the Lessor's address as shown on Page 1, or at a place designated by Lessor, and on the date shown on Page 1, or earlier if demanded by Lessor, together with all tires, tools, accessories and equipment, in the same condition as when received, ordinary wear and tear excepted, and with the equivalent level of fuel when initially received.

11. Lessee understands and agrees that the vehicle shall be returned by 9:00 PM of the due date indicated on Page 1 herein. If said vehicle is not returned, Lessor shall have the right to impose a daily rental fee, which shall be at a minimum \$50 per day. Said fee shall be automatically added to the Lessee's repair order. ***

12. Lessee will pay Lessor on demand all time and mileage, service, minimum or other charges to be entered on Page 1, at the rates shown or computed as provided in this Loaner Agreement. ***

15. If the loaned vehicle is returned to Lessor at any place other than the Lessor's above address as shown on Page 1, or at a place designated by Lessor, the Lessee agrees to pay a return service charge of 25 cents per mile.

18. The Lessee shall have exclusive possession, control and use of this motor vehicle for the entire period of this agreement

19. The terms "Lessee" and "Lessor" are for purposes of identification of parties only and shall not necessarily denote or specify the legal status of said parties.

Taxpayer Ex. 10; Tr. pp. 15-17 (John Doe).

Facts Re: Taxpayer's Initial Tax Treatment of Loaner Cars

13. Taxpayer filed an Illinois transaction by transaction tax return, form ST-556, to report and self-assess Illinois use tax on the first Loaner Cars it purchased for use in the Loaner Program, paying use tax on its full purchase price for the Loaner Car. Tr. pp. 22-23 (John Doe), 59 (testimony of Jack Black (Jack Black), Taxpayer's accountant); *see also* Taxpayer Ex. 2; Taxpayer Ex. 5, p. 5.

14. When Taxpayer substituted a new Loaner Car for one already in the Program, Taxpayer reported and self-assessed Illinois use tax on the new Loaner Car by reporting its purchase price for the new Loaner, and then deducting from that amount the value of the Loaner Car it was replacing, as a trade-in deduction. *See* Taxpayer Exs. 2, 5 (p. 5), 6 (p. 4); Tr. pp. 23 (John Doe), 46 (testimony of Jane Green (Jane Green), Taxpayer's Comptroller), 59 (Jack Black), 83 (testimony of Department audit supervisor Gus Nastos (Nastos)), 103, 108-09, 112 (Bujak).

15. When Taxpayer sold one of the Loaner Cars as a used vehicle, at retail, to a customer for use in Illinois, it reported the sale on a form ST-556. Taxpayer Exs. 2, 5. On each

such return, it charged and collected from the customer an amount of Illinois use tax, and then paid the complementary amount of ROT, based on the gross receipts it realized from that retail sale. Taxpayer Exs. 2, 5.

Facts Re: The Department's Audit of Taxpayer

16. The Department began an audit of Taxpayer's business in April 2007, for the months of July 2004 through December 2006. Taxpayer Ex. 21 (copy of Department notice of audit initiation to Taxpayer, dated April 4, 2007); Tr. pp. 23-24 (John Doe). Eric Kessel (Kessel) was originally assigned to conduct the audit, and started it, and he was later replaced, in early 2009, by Bujak. Taxpayer Ex. 21; Tr. p. 25 (John Doe), 45 (Jane Green), 83 (Nastos). Nastos supervised Kessel and Bujak during the course of the audit. Tr. p. 25 (John Doe), 82 (Nastos), 101 (Bujak); *see also* Taxpayer Ex. 9 (copy of email, dated March 4, 2011, from Nastos to Taxpayer's counsel, with attachments).
17. Bujak and Nastos met with John Doe, Jane Green and Mary Parry on November 12, and 30, 2009, to discuss the Department's audit, including the audit determinations made regarding Taxpayer's Initial Tax Treatment of the Loaner Cars. Taxpayer Ex. 6 (copy of Bujak's Audit History Worksheet), pp. 4-5.
18. During those November 2009 meetings, Bujak and Nastos notified Taxpayer that Department regulations did not permit Taxpayer to take the trade in deductions that Taxpayer reported on the original UT returns it filed for the Loaner Cars, during the audit period. Taxpayer Ex. 5, p. 5; Tr. pp. 45 (Jane Green), 59-60 (Jack Black), 104 (Bujak); *see also* 86 Ill. Admin. Code § 130.455(c)(2)(A).

19. Also during those meetings, Bujak and Nastos notified Taxpayer that Taxpayer would be entitled to a credit, in the amount of the use tax it properly paid on a Loaner Car, against the ROT due when it later sold the Loaner Car, at retail, as a used car. Taxpayer Ex. 6, pp. 4-5; Tr. pp. 45 (Jane Green), 59-60 (Jack Black), 104 (Bujak). Bujak and Nastos referred to that credit as “86-54 treatment.” Taxpayer Ex. 6, pp. 4-5; Tr. p. 104 (Bujak).
20. At or about the time the audit was concluded, the Department prepared and issued to Taxpayer a form EDA-123, titled, Notice of Proposed Tax Liability (NPL), with attachments. Taxpayer Ex. 17 (copy of NPL and attachments); Taxpayer Ex. 6, p. 6. The NPL is dated September 21, 2010. *Id.*
21. One of the schedules Bujak prepared and tendered to Taxpayer with the NPL is titled, Detailed Review of Loaners Claimed with Trade (Detailed Review), for the period from July 2004 through December 2006. Taxpayer Ex. 17, p. 3 (copy of Detailed Review). The Detailed Review is dated September 14, 2010. *Id.*
22. The Detailed Review consists of a large table or schedule showing, from left to right, column headings displaying the following information: the date Taxpayer reported taking delivery of a Loaner Car on an original UT return; the number of the UT return Taxpayer filed to report its purchase of the Loaner Car; Taxpayer’s stock number for the Loaner Car; the VIN of the Loaner Car; the purchase price reported on the UT return; the amount of tax shown due and paid on the UT return; a description of the trade-in reported on the UT return; the correct amount of tax that should have been reported on the original UT return for the Loaner Car; the tax credit available to Taxpayer (if it corrected both the original UT returns and the original ROT returns);

and finally, the penalty due for Taxpayer's failure to pay, timely, the correct amount of UT due for its use of a Loaner Car in the Loaner Program (if it did not file amended UT returns to correct its original UT returns for the Loaner Cars, and pay the correct amount of use tax due). Taxpayer Ex. 17, p. 3.

23. Within the rows of the Detailed Review, Bujak entered information that he obtained from Taxpayer's books and records regarding its purchases of Loaner Cars, and its UT returns filed for such Loaner Cars, during the audit period. Taxpayer Ex. 17, p. 3.
24. When Bujak prepared the Detailed Review schedule that he gave to Taxpayer with the NPL, he did so using what he and Nastos had previously referred to as an "86-54 credit." Taxpayer Ex. 5, p. 5; Taxpayer Ex. 17, p. 3; Tr. p. 110 (Bujak).
25. The "86-54 approach" refers to a procedure announced in an Informational Bulletin the Department published in June 1986. Informational Bulletin FY 86-54 (hereinafter, FY 86-54); Tr. p. 110 (Bujak).
26. In 2002, the Department adopted new § 130.2013 of the Illinois ROT regulations, to "codif[y] the provisions of [FY 86-54]." 86 Ill. Admin. Code § 130.2013 (effective January 17, 2002); 26 Ill. Reg. 1303 (February 1, 2002) (§ 15, Statement and Purpose of Amendment).
27. Bujak prepared the Detailed Review schedule to reflect his audit determination that Taxpayer would be entitled to a credit for the use tax properly paid regarding its use of Loaner Cars in the Loaner Program, to use to reduce the ROT that was due when Taxpayer sold the Loaner Cars, at retail, as used cars. Taxpayer Ex. 17, p. 3; Tr. p. 110 (Bujak).

28. After receiving the Detailed Review schedule and other information provided by Bujak, including the oral and written information provided with the NPL, Taxpayer filed two sets of amended returns, as described below:

- Taxpayer filed amended ST-556 returns to correct the original UT returns it filed when it purchased and placed a Loaner Car into its Loaner Program. Taxpayer Ex. 1. It corrected each original UT return by eliminating the trade-in deduction, and by paying an additional amount of use tax, as reflected on Bujak’s Detailed Review schedule. *Id.*; Taxpayer Ex. 5, p. 8 (describing amnesty payments); Tr. pp. 49-50 (Jane Green), 64-67 (Jack Black).
- Taxpayer filed amended ST-556 returns to correct the original ROT returns it filed to report that it had sold one of the Loaner Cars, at retail, as a used car. Taxpayer Ex. 2. It corrected each original ROT return by reporting a credit in the amount stated on Bujak’s Detailed Review schedule. *Id.*; Tr. pp. 50-53 (Jane Green), 68-72 (Jack Black). More specifically, on each amended ROT return, Taxpayer subtracted the amount of use tax it paid for the Loaner Car (including the additional use tax paid when it amended the original UT return) from the amount of ROT it previously paid when it sold that Loaner Car, up to the amount of the ROT originally paid. Taxpayer Ex. 2; 86 Ill. Admin Code § 130.2013(h)(2).

29. The first page of a form ST-556-X, titled, Amended Sales Tax Transaction Return, contains three separate parts. *See* Taxpayer Ex. 2. Part 2 of the form directs a filer to “Check the reason you are correcting your return[.]” and provides eight numbered alternative reasons. *Id.* (Part 2, line 7 of each amended ROT return).

30. In Part 2 of each of the amended ROT returns Taxpayer filed, it checked box number 7, which provided: “I am claiming credit for tax that I previously paid to an Illinois retailer of Form ST-556 for an item that that I purchased for leasing purposes and then sold at retail but on which I did not claim this credit on the sale I made. The tax return number of the ST-556 on the file copy provided to me by the Illinois retailer when I purchased the vehicle is [].” Taxpayer Ex. 2, (Part 2, line 7 of each amended ROT return). On each of the amended ROT returns, Taxpayer included the unique return number of the original use tax return Taxpayer filed when it purchased the Loaner Car later sold at retail. *Id.*
31. Bujak’s Audit Narrative includes the following description of his audit determinations regarding Taxpayer’s use and tax treatment of Loaner Cars used in the Loaner Program:

Loaners

It was noted in claimed deduction G on the ST-556 returns that the taxpayer was selling the car to themselves and taking a trade in and possibly paying a tax due on the ST 556.

What the taxpayer was doing was taking a car out of inventory and transferring to a loaner inventory to give free loaners to their customers, when their cars were in the shop for repairs. Based on this policy, around every 6 months, they would take this “used car” out of loaner inventory and replace it with a new car. The transfer of the car from inventory to loaner inventory would thus create a ST 556 filing. The used car coming out of loaner inventory would create the trade in amount on the ST 556. If there was a difference in the “sales” price [versus] the used cars value, tax would be paid on the difference.

It states very clearly in the regulations, that the[] dealer cannot do this.

It was determined that since these vehicles, per the Brand A program, are not for sale [*sic*], that Use tax would be due on the price which was cost on the ST 556. No trade in credit is applicable.

However, it was decided that we should give credit for the tax that was paid on the ST 556 as payment for the tax due in this area. This tax

was given credit for, and the balance was assessed in the audit under STT code 10-102. Additional tax due in this area was \$XXXX.

The taxpayer did agree to this issue and most except[] for possibly 3 transactions was subsequently agreed and paid under amnesty, see below.

An issue arose in this area also as the taxpayer possibl[y] agreed to this, as the auditor believed that a 86-54 credit could be taken in this are against the tax collected on the vehicle when finally sold by the dealer as a used vehicle. When upper management was made aware of this, management disagreed w[ith] this logic, stating that 86-54 is only applicable in a rental and lease situation. Since this situation does not exist, no 86-54 credit should be given to this taxpayer.

The taxpayer prepared ST 556X returns which copies were given the auditor, the original sent to Springfield. The claim is specifically to take a credit on the sale of the vehicle when sold as a Used vehicle. These claims should be denied in full.

Taxpayer Ex. 5, pp. 5-6.

32. Before Taxpayer filed its amended UT returns, and paid the additional amount of use tax that Bujak determined was due regarding Taxpayer's purchase and use of Loaner Cars, Bujak learned that Department management had concluded that Taxpayer was not entitled to the credit authorized by ROTR § 130.2013. Tr. pp. 91-92 (Nastos), 110-11, 115 (Bujak); *see also* Taxpayer Ex. 5, pp. 5-6. Neither Bujak nor anyone else from the Department notified Taxpayer of that decision before Taxpayer filed the amended UT returns, and paid the additional amounts of use tax. Tr. pp. 110-11, 115 (Bujak).
33. After Taxpayer paid the additional amounts of use tax it reported being due, when correcting its original UT returns, the Department denied the credits claimed in Taxpayer's amended ROT returns. Department Ex. 1; *see also* Taxpayer Ex. 5, pp. 5-6; Taxpayer Ex. 6, pp. 6-7.
34. Neither Kessel, Bujak or Nastos reviewed Taxpayer's amended ROT returns. Taxpayer Ex. 26 (copy of Agreed Stipulation Regarding Testimony of Dan Dressing,

with attachments); Taxpayer Ex. 27 (copy of Agreed Stipulation Regarding Testimony of Suzanne LaTourelle, with attachments).

35. Dan Dressing (Dressing) reviewed thirty-five of Taxpayer's amended ROT returns, and Suzanne LaTourelle (LaTourelle) reviewed the remaining four. Taxpayer Exs. 26-27 (Exhibit A to each exhibit).
36. When reviewing Taxpayer's amended ROT returns, neither Dressing nor LaTourelle was aware of the audit the Department had just concluded regarding Taxpayer's business. Taxpayer Ex. 26, ¶¶ 6-9; Taxpayer Ex. 27, ¶¶ 6-9.
37. Both Dressing and LaTourelle denied Taxpayer's amended ROT returns for the same reason, which each described as follows: "I denied the ST-556-X Forms I reviewed because I concluded that [Taxpayer] was attempting to reduce its gross receipts subject to sales tax by the value of or credit given for a traded-in motor vehicle where [Taxpayer] was the owner of the motor vehicle. This practice is prohibited by 86 Ill. Admin. Code section 130.455(c)(2)(A)." Taxpayer Ex. 26, ¶ 5; Taxpayer Ex. 27, ¶ 5; *but see* Taxpayer Ex. 2 (Part 2, line 7 of each amended ROT return).
38. The Denials both provide the following, identical reasons for denying the credits Taxpayer's sought by Taxpayer's amended ROT returns, "We have reviewed the claims described on the last page of this letter and have tentatively denied them because we have not established that this tax was paid in error or that issuing a credit memorandum would not result in unjust enrichment to you." Department Ex. 1; Taxpayer Ex. 26, Exhibit A; Taxpayer Ex. 27, Exhibit A.

Text of ROTR § 2013

39. Section 130.2013 of the Department's ROTR provides, in pertinent part:

Section 130.2013 Persons in the Business of Both Renting and Selling Tangible Personal Property—Tax Liabilities, Credit

a) Purchases of Tangible Personal Property for Rental

Use Tax is due whenever tangible personal property is purchased for use. For Illinois sales tax purposes, lessors of tangible personal property under true leases are deemed to be the users of that property. Consequently, lessors incur a Use

Tax liability (and applicable local occupation tax reimbursement obligations) based on their cost price of the items they purchase for rental purposes. (See Section 130.2010 of this Part.) The only exception is the rentor of an automobile under a lease term of one year or less. (See 86 Ill. Adm. Code 180.101.) (Further references in this Section to “Use Tax” due on a purchase includes the Use Tax and all applicable local occupation tax reimbursement obligations due on that purchase.)

Persons who sell tangible personal property to lessors who will rent or lease that property incur Illinois and local Retailers’ Occupation Tax liabilities on their gross receipts from such sales. Consequently, when a lessor purchases tangible personal property for rental purposes, he should pay his Use Tax liability to his supplier. If the lessor does not pay the Use Tax to his supplier, he must self-assess and pay it directly to the Department. Persons who are lessors and whose only selling activity consists of selling items that come off lease and are no longer needed for rental purposes cannot purchase for resale.

If an item is placed in a rental inventory, it has been purchased for rental purposes and Use Tax is due. “Rental inventory” means that the owner, in order to state his intended use of the property as rental property, has recorded the property in his books and records as rental property in accordance with generally accepted accounting principles. Depreciation of property used for rental purposes demonstrates an intent to include that property in rental inventory.

b) Purchases of Tangible Personal Property for Resale

If a retailer purchases tangible personal property for resale, no tax is due on that transaction so long as all of the requirements of Section 130.1405 of this Part are satisfied. If an item is purchased for resale and placed in a sales inventory immediately after it is purchased, the Department will determine that it has been purchased for resale for so long as it remains in the sales inventory. “Sales inventory” means that the owner, in order to demonstrate his intention to

resell the property, has recorded the property in his books and records as being for sale in accordance with generally accepted accounting principles.

c) Purchases of Tangible Personal Property by Persons Who Both Rent It and Sell It to Others but Who Do Not Maintain Separate Rental and Sales Inventories

Some persons function as combination lessors/retailers and do not maintain separate rental and sales inventories. These persons purchase tangible personal property to rent to others and also purchase tangible personal property to sell to others without making such property available for rental. The question of whether the combination lessor/retailer, who does not maintain separate sales and rental inventories, incurs a Use Tax liability when purchasing items for his combined inventory depends on whether he is primarily engaged in the business of renting or is primarily engaged in the business of selling. In order to make that determination, the Department will look to this lessor/retailer’s gross receipts.

1) If the gross receipts from Illinois locations are primarily from rentals, the combination lessor/retailer who does not maintain separate rental and sales inventories is primarily a lessor who incurs a Use Tax liability on items purchased for rental purposes and a Retailers’ Occupation Tax liability on all items sold at retail. This combination lessor/retailer can give suppliers certificates of resale, but only for items that will be resold without being rented. If the lessor/retailer knows, at the time of purchase, that a percentage of the items being purchased will be resold without being rented, he may give his supplier a certificate of resale specifying the percentage of items that will be resold without being rented and pay tax only on those items that will be rented before they are sold. The combination lessor/retailer who does not maintain separate rental and sales inventories and who is primarily a lessor incurs a Use Tax liability on all items that are rented before they are sold.

2) If the gross receipts from Illinois locations are primarily from sales, including sales of items coming off lease and sales of items encumbered by leases, the combination lessor/retailer who does not maintain separate inventories is primarily a retailer. This combination lessor/retailer can purchase his entire inventory tax-free by providing certificates of resale to his suppliers. He may use items for rental purposes without incurring a Use Tax liability if the items are used in demonstrations to potential buyers or are put to some other interim use. (See 86 Ill. Adm. Code 150.306.)

e) Sales of Items Coming Off Lease That Are No Longer Needed in a Rental Inventory

The question of whether a lessor's sale of tangible personal property coming off lease that is no longer needed for the lessor's rental inventory is subject to Retailers' Occupation Tax liability depends on whether the seller is strictly a lessor, or whether the seller is otherwise engaged in the business of selling like-kind property.

1) A person who is strictly a lessor and whose only sales are of items no longer needed for his rental inventory does not incur Retailers' Occupation Tax liability on those sales.

For example, a lessor of computer equipment who does not maintain a sales inventory of computer equipment and who does not otherwise hold himself out as being in the business of selling like-kind property, incurs no Retailers' Occupation Tax liability on sales of computer equipment that he no longer wants in his rental inventory. This would be true even though the lessor advertised such sales and was required to make a considerable number of such sales over time. As long as all of the sales are of equipment no longer needed for the lessor's rental inventory, they constitute non-taxable isolated or occasional sales. (See Section 130.110 of this Part.)

2) However, the rule is different if the lessor is otherwise engaged in the business of selling like-kind property at retail. A lessor of tangible

personal property who sells like-kind property apart from his sale of items no longer needed for his rental inventory incurs Retailers' Occupation Tax liability on all retail sales of that property including sales of items no longer needed for his rental inventory. This is true because a person who is engaged in the business of selling tangible personal property cannot make an isolated or occasional sale of like-kind tangible personal property.

A) For example, a lessor of computer equipment who also maintains a sales inventory of computer equipment incurs Retailers' Occupation Tax liability whenever he makes retail sales of computer equipment, including sales of computer equipment no longer needed in his rental inventory. The result would be the same even if the lessor/seller did not maintain a separate sales inventory, as such, but offered computer equipment for sale apart from items coming off lease that are no longer needed for his rental inventory. This would be the case where the lessor advertised or otherwise held himself out as a supplier of computer equipment apart from the items coming off lease and no longer needed for his rental inventory. In this situation, the lessor/seller would incur a Retailers' Occupation Tax liability on all his sales of computer equipment for use or consumption and must collect the complementary Use Tax from his customers.

3) The rule is also different with respect to the sale of used motor vehicles by leasing and rental companies. A person who is engaged in the business of leasing or renting motor vehicles to others and who sells a motor vehicle that is no longer needed in his rental inventory to a user or consumer incurs a Retailers' Occupation Tax liability on that sale. See Section 130.111 of this Part. In this context, a "motor vehicle" means a passenger car defined in Section 1-157 of the Illinois Vehicle Code as *a motor vehicle of the First Division including a multipurpose passenger vehicle that is designed*

for carrying not more than 10 persons. [625 ILCS 5/1-157] Vehicles not considered “passenger vehicles” as defined in Section 1-157 of the Illinois Vehicle Code (for example, trucks) are subject to the provisions of subsections (e)(1)-(2) of this Section.

f) Transfers of Tangible Personal Property from a Sales Inventory to a Rental Inventory and Vice Versa by Persons Who Both Rent and Sell that Tangible Personal Property to Others

1) If an item is moved from a sales inventory to a rental inventory, Use Tax is due based on the cost price of that item. In this situation, the Use Tax must be self assessed and paid on a return filed for the month in which the item was moved to the rental inventory.

2) If an item is moved from a rental inventory to a sales inventory, Retailers’ Occupation Tax is due on the gross receipts from sale when the item is sold to a user or consumer. In this situation, the lessor/seller would collect the complementary Use Tax from the purchaser. However, a credit, as provided in subsection (h), may be available for Use Tax and local Retailers’ Occupation Tax reimbursements paid to an Illinois supplier when the item was purchased for the rental inventory.

h) Persons Who Sell Tangible Personal Property After Using It for Rental Purposes

1) As is set out in subsection (e)(1):

A) A lessor whose only sales are sales of items coming off lease that are no longer needed for his rental inventory incurs no Retailers’ Occupation Tax liability on those sales.

B) Lessors who are otherwise engaged in the business of selling like-kind property incur Retailers’ Occupation Tax liability on all their sales, including sales of items coming off lease that are no longer needed for their rental inventories.

C) Lessors and renters of automobiles incur Retailers’ Occupation Tax liability when they make retail sales of passenger cars coming off

lease that are no longer needed for their rental inventories.

2) A lessor who incurs a Retailers’ Occupation Tax liability on the sale of an item can take a credit against that liability for any Use Tax and any local Retailers’ Occupation Tax reimbursements that he paid to a supplier registered to collect Illinois tax when he purchased that particular item. However, this credit cannot exceed the amount of Retailers’ Occupation Tax incurred by the lessor/retailer when he sells the item.

3) If a lessor filed a return and paid the tax directly to the Department, the lessor must file a claim to recover it. (See Subpart O.) However, this claim cannot exceed the amount of Retailers’ Occupation Tax incurred by the lessor/retailer when he sells the item.

4) The credit is available to all lessors who are required to pay Retailers’ Occupation Tax when selling an item after having used that item for rental purposes, including lessors of motor vehicles. The credit is available to all lessors (and renters) of motor vehicles who incur Retailers’ Occupation Tax liability on sales so long as Use Tax was paid to an Illinois retailer when the lessor (or renter) purchased the particular motor vehicle being sold. If the lessor (or renter) did not pay Use Tax to an Illinois dealer when he purchased the motor vehicle being sold but, instead, filed a return and paid the tax directly to the Department, the credit is not available and it must not be taken. (If the lessor filed a return and paid the tax directly to the Department, the lessor must file a claim to recover it. See Subpart O.)

5) There is no credit available for taxes paid by a rentor under the Automobile Renting Occupation and Use Tax Act [35 ILCS 155].

i) Documentation to Support the Credit

When the credit described at subsection (h) is claimed, the lessor/seller must retain documentation demonstrating that Use Tax was paid to a supplier registered to collect Illinois tax when he purchased the item being sold and in what amount. A paid receipt from the supplier for

the item on which the credit is being claimed showing the amount of Use Tax paid as a separate item is sufficient to document the credit for all items other than motor vehicles.

For motor vehicles, the credit is to be documented by a copy of the transaction reporting return filed by the Illinois dealer from whom the lessor purchased the motor vehicle.

86 Ill. Admin. Code § 130.2013 (2002).

That transaction reporting return will show the amount of Use Tax that the lessor paid to the Illinois dealer. If the lessor paid Use Tax to the Department by filing a Use Tax transaction return when the vehicle was purchased, the credit is not available and must not be taken. (In this situation, the lessor would have to file a Claim for Credit to recover the Use Tax. See Subpart O of this Part.)

Conclusions of Law:

Section 6b of the ROTA provides that the Department's denial of a taxpayer's claim for credit constitutes prima facie proof that the taxpayer is not entitled to a credit. 35 ILCS 120/6b. When the Department offered its Denials into evidence, the Department established its prima facie case that Taxpayer was not entitled to the credit claimed. *Id.*; Department Ex. 1; Tr. p. 11. The Department's prima facie case is a rebuttable presumption. Branson v. Department of Revenue, 168 Ill. 2d 247, 262, 659 N.E.2d 961, 968 (1995) ("the Department's establishment of a prima facie case for a tax penalty operates, in effect, as a rebuttable presumption of willfulness."). The presumption is overcome, and the burden shifts back to the Department to prove its case, only after a taxpayer presents evidence that is consistent, probable and identified with its books and records, to show that the Department's determinations are wrong. Copilevitz v. Department of Revenue, 41 Ill. 2d 154, 156-57, 242 N.E.2d 205, 206-07 (1968); A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3d 826, 832, 527 N.E.2d 1048, 1052 (1st Dist. 1988).

Issue 1: Does ROTR § 130.2013 Apply to Taxpayer

Arguments

Taxpayer argues that it meets all of the requirements of the credit authorized by ROTR § 130.2013, and that it leases or rents Loaner Cars for consideration that it receives from Jack Black A. Taxpayer's Brief, pp. 7-9. It cites to the statutory definition of a "lease" in § 1-137 of the Illinois Vehicle Code, which does not require the payment of consideration by the lessee to the lessor. *Id.*; 625 ILCS 5/1-137. It also stresses that the plain text of its Loaner Agreements, which a customer and a Taxpayer employee must sign when a customer is granted the right to use one of Taxpayer's Loaner Cars,

expressly grant the customer possession and use of the Loaner Car, for the period of use. Taxpayer's Brief, pp. 9-10; Taxpayer Exs. 10, 25.

Taxpayer also argues that, to the extent that other statutes require that consideration be paid for a lease or rental, such statutes do not require such consideration be paid by the lessee or renter. Taxpayer's Brief, p. 9. On this point, Taxpayer cites to the Automobile Renting Occupation and Use Tax Act's (AROTA's) definition of "renting[.]" and reasons that it meets that definition of renting "because it receives consideration from Jack Black A, which reimburses [it] for each vehicle placed in the [Car Loaner] Program." *Id.*; 35 ILCS 155/1.

Taxpayer's most compelling argument is that the Department has already, and repeatedly, determined that a motor vehicle dealer's provision of free loaner cars to customers, under circumstances closely parallel to its provision of Loaner Cars here, constituted the dealer's rental or leasing of vehicles, for purposes of the AROTA. Taxpayer's Brief, pp. 9-10 & Ex. C. To support that argument, it attached to its brief a copy of a published, redacted, agency decision in Department of Revenue v. ABC Chevrolet, Inc., ST-01-32, which the Department issued in 2001. Taxpayer's Brief, Ex. C (hereafter, ABC Chevrolet, Inc.) (a pdf copy of ABC Chevrolet, Inc. may be viewed at: <http://tax.illinois.gov/LegalInformation/Hearings/st/st01-32.pdf>).

Taxpayer also cited to two private letter rulings the Department issued in 1993. Taxpayer's Brief, p. 11. In the first letter ruling cited by Taxpayer, the Department provided the following response to the writer requesting Department information:

This is to acknowledge receipt of your letter of May 25, 1993. In your letter you ask several questions about the taxability of your fleet of

loaner/rental vehicles. Our answers will follow your questions and will be indicated by bold face type. Your questions are as follows.

3. Loaner: Partial reimbursement from Xxxxx to offset expense.

We assume that you are referring to loaner cars provided to customers who have warranties that provide for replacement vehicles during the period repairs are being done. You then receive reimbursement from the warrantor (usually the manufacturer) for the loaner car costs. Under these conditions, we believe that the proceeds received from the manufacturer constitute receipts which are subject to the AROT. You are, in effect, renting a vehicle to the manufacturer which it provides to its customers. The AROT is triggered when the possession, or right to possession, of an automobile is transferred for valuable consideration for a period of 1 year or less. It is immaterial, for purposes of the act, that the person actually using the automobile is not paying the consideration for the rental.

PLR ST-93-0507.

In the other private letter ruling, the Department provided the following information to the writer:

This is in response to your letter dated November 16, 1992, in which you state the following:

“Per our phone conversation with Miss Xxxxx we were informed that no rental sales tax is required to be remitted on loaners or rental vehicles that are given to our customers on a no charge basis.

“Please send us a letter of confirmation to this affect. Or send a copy of the Illinois DOR code that supports this statement.”

For your general information, we are enclosing a copy of 86 Ill. Admin. Code Part 190, regarding the Automobile Renting Tax. The Automobile Renting Occupation Tax does apply to transactions where a dealer provides a customer with a courtesy car or a loaner car at no charge to the customer. The tax is based upon the rental price paid to the rentor. If nothing is paid to the dealer, then no tax is due.

PLR ST-93-0078.

Taxpayer also notes that, after the audit period at issue in the ABC Chevrolet Inc. case, the Illinois General Assembly amended the AROTA, and added the following text,

as the statutory definition of “gross receipts”:

“Gross receipts” from the renting of tangible personal property or “rent” means the total rental price or leasing price. In the case of rental transactions in which the consideration is paid to the rentor on an installment basis, the amounts of such payments shall be included by the rentor in gross receipts or rent only as and when payments are received by the rentor.

“Gross receipts” does not include receipts received by an automobile dealer from a manufacturer or service contract provider for the use of an automobile by a person while that person’s automobile is being repaired by that automobile dealer and the repair is made pursuant to a manufacturer’s warranty or a service contract where a manufacturer or service contract provider reimburses that automobile dealer pursuant to a manufacturer’s warranty or a service contract and the reimbursement is merely made to recover the costs of operating the automobile as a loaner vehicle.

35 ILCS 155/2; P.A. 91-193, § 5 (effective July 20, 1999). Taxpayer argues that “[i]f loaner cars programs like [Taxpayer’s] Program did not create leases, there would have been no need to amend the AROT[A] to add this exemption.” Taxpayer’s Brief, p. 12.

The Department responds that the ROTR § 130.2013 credit does not apply to Taxpayer. Department’s Brief, p. 6. More specifically, it argues that Taxpayer was not engaged in the business of renting or leasing the Loaner Cars, because Taxpayer did not make any charge to a customer for the use of a Loaner Car. *Id.* That was also Bujak’s response, at hearing, when asked whether Department management decided to deny the credit to Taxpayer, because Taxpayer charged its customers zero as the rental or lease fee for the Loaner Cars. Tr. p. 123 (Bujak). The Department, however, cites to no authority to support its implied argument that ROTR § 130.2013 was intended to apply only if the receipts or gross receipts from renting or leasing property are paid by a lessee or renter.

See Department's Brief, *passim*. Nothing in the text of the regulation expresses such a limitation. 86 Ill. Admin. Code § 130.2013.

Compounding the absence of legal support for its argument, the Department's responsive brief also completely ignores Taxpayer's citation to publications showing that the Department has repeatedly determined that a motor vehicle retailer's provision of loaner cars to customers, at no cost to the customer, but with compensation being paid to the retailer by another for such use by customers, constituted the business of leasing or renting such vehicles. See Department's Brief, *passim*; compare also *id.* p. 6 ("One can hardly say one is in the business of leasing or renting automobiles if one is not paid by the customer for the use of the automobile.") with ABC Chevrolet, Inc., pp. 10 ("Because the taxpayer enters into that [Car Rental Agreement], it represents that it will rent automobiles."), 13-14 ("By statute, the fact that a person (i.e. manufacturer) other than the car owner is tendering the consideration to the rentor (i.e. the dealer) does not change the fact that the dealer is receiving 'gross receipts' that are subject to, in this case, the ART"). In short, what the Department ignores, and what Taxpayer has shown, is that, not only can it be said that one is in the business of leasing or renting automobiles, even if the compensation comes from someone other than the customer, but the one saying it has been the Department. ABC Chevrolet, Inc.; PLR ST-93-0507; PLR ST-93-0078.

Analysis

The issue is whether the Taxpayer is entitled to the credit authorized by ROTR § 130.2013, such that the use tax it paid regarding the Loaner Cars may be credited against the ROT due when it later sold the Loaner Cars, at retail, as used vehicles. There have been no Illinois court cases construing the applicable regulation. Thus, the starting point

must be the text of the regulation itself. Courts apply the same rules when interpreting administrative regulations as they do when construing statutes. Weyland v. Manning, 309 Ill. App. 3d 542, 547, 723 N.E.2d 387, 391 (2d Dist. 2000). If the language of the regulation is clear, there is no need to look for other aids for construction. *Id.*

When considering whether the ROTR § 130.2013 credit applies to Taxpayer, I first take into account the parties' agreement that Taxpayer's business includes both selling and leasing motor vehicles, and that its receipts from leasing activities constitute substantially less than 50% of its gross receipts. Taxpayer's Brief, p. 2; Department's Brief, p. 5. Given this agreement over the nature of Taxpayer's business, as a general matter, ROTR § 130.2103 applies to Taxpayer. 86 Ill. Admin. Code § 130.2013(h)(1)(B) ("Lessors who are otherwise engaged in the business of selling like-kind property incur Retailers' Occupation Tax liability on all their sales, including sales of items coming off lease that are no longer needed for their rental inventories."). On its face, this means that the ROTR § 130.2013 credit would apply when Taxpayer sold, at retail, one of the vehicles it previously leased — that is, one that it leased to a person for a period of more than one year. *Id.* But the more specific question is whether the credit applies to Taxpayer's use and subsequent retail sale of Loaner Cars used in the Loaner Program.

Had there never been any agency practice regarding a retailer's provision of loaner cars to customers, without charge to customers, one might be inclined to accept the Department's argument that Taxpayer's failure to charge customers a rental fee warrants a conclusion that Taxpayer was not, in fact, renting or leasing them. The authority for such a conclusion, however, would not come from decisions construing or applying Illinois tax statutes. *See, e.g.* Leonardi v. Chicago Transit Authority, 341 Ill. App. 3d

1038, 793 N.E.2d 880 (1st Dist. 2003). Instead, such authority might be found in cases arising under more general contract law. So, for example, in Leonardi, the court described a lease of real property as follows:

A lease provides a lessee with exclusive possession of the leased premises. [all citations omitted] To qualify as a lease contract, "there must be an agreement as to the extent and bounds of the property, the rental price and time and manner of payment, and the term of the lease."

The Agreement is not a lease nor does it satisfy the requirements of a valid lease. Although the Agreement defined the extent and bounds of the property as seen in the map attached to the Agreement, the Agreement does not provide for rent. ***

Leonardi, 341 Ill. App. 3d at 1043, 793 N.E.2d at 884.

Based on the text of the Loaner Agreements, one might conclude that the legal relationship between Taxpayer and its customers vis-à-vis the Loaner Cars term was that of bailor (Taxpayer) and bailee (customers), with the Loaner Agreements being written bailment agreements. *See Interlake, Inc. v. Kansas Power & Light Co.*, 79 Ill. App. 3d 679, 398 N.E.2d 945 (1st Dist. 1979). Illinois law defines a bailment as:

(T)he rightful possession of goods by one who is not an owner. The characteristics common to every bailment are the intent to create a bailment, delivery of possession of the bailed items, and the acceptance of the items by the bailee ***. A bailment can be established by express contract or by implication, with the latter designated as implied-in-fact or implied-in-law ***.

Interlake, Inc., 79 Ill. App. 3d at 682-83, 398 N.E.2d at 948 (*quoting Berglund v. Roosevelt University*, 18 Ill. App. 3d 842, 844, 310 N.E.2d 773, 775, 776 (1974)). While every lease of personal property constitutes a bailment, not every bailment is a lease.

That said, the inclination to treat Taxpayer's Loaner Agreements as something other than a lease or rental agreement, because Taxpayer did not collect any consideration from a customer, would be inconsistent with the Department's long history of determining that a manufacturer's compensation to a motor vehicle dealer who provides loaner cars to customers constitutes the rent the dealer receives for providing loaner cars to customers. ABC Chevrolet, Inc., pp. 10, 13-14; PLR ST-93-0507 ("Under these conditions, we believe that the proceeds received from the manufacturer constitute receipts which are subject to the AROT. You are, in effect, renting a vehicle to the manufacturer which it provides to its customers.").

Moreover, the approach taken in ABC Chevrolet is consistent with the Illinois appellate court's more recent agreement that a retailer's gross receipts may include payments given to a retailer from someone other than a purchaser. *See Ogden Chrysler Plymouth, Inc. v. Bower*, 348 Ill. App. 3d 944, 955, 809 N.E.2d 792, 802 (1st Dist. 2004) ("In this way, the Department's regulations also appear to indicate that Chrysler's payments [to Ogden] constitute taxable gross receipts." *** Thus, although not binding, the Department's [letter] rulings addressing arrangements similar to the Program reach a similar conclusion: that the payments [from a manufacturer to the retailer] constitute gross receipts subject to the ROT."). Here, ROTR § 130.2013 repeatedly refers to gross receipts or receipts from leasing or renting. 86 Ill. Admin. Code § 130.2013(c) ("In order to make that determination, the Department will look to this lessor/retailer's gross receipts."), (g) ("Receipts from the rental of tangible personal property under a true lease are not subject to Retailers' Occupation Tax liability. (See Section 130.2010.) However, receipts from the rental of automobiles under lease terms of one year or less are subject to

automobile renting occupation tax liability. (See 86 Ill. Adm. Code 180.)”). Ogden supports a conclusion that the Department’s use of the phrases, receipts or gross receipts from leasing, in ROTR § 130.2013, may be understood to include payments made by someone other than the individuals to whom Taxpayer granted the short-term right to possess and use a Loaner Car. Taxpayer Exs. 10, 25. That is, Ogden supports Taxpayer’s argument that the amounts Jack Black A pays to Taxpayer, for making Loaner Cars available to Taxpayer’s customers to use and possess, are the receipts or gross receipts Taxpayer realizes from renting or leasing the Loaner Cars. Ogden Chrysler Plymouth, Inc., 348 Ill. App. 3d at 955, 809 N.E.2d at 802; ABC Chevrolet, Inc.; PLR ST-93-0507.

The Director’s adoption of the recommendation in ABC Chevrolet, Inc., and the Department’s longstanding public determinations that a manufacturer’s compensation to a motor vehicle dealer who provides loaner cars to customers constitutes the rent the dealer receives for providing loaner cars to customers — while not binding to me, the Director or a court — reflect an agency practice that is much more consistent with the decision in Ogden than it is with the Department’s litigation position here. Ogden Chrysler Plymouth, Inc., 348 Ill. App. 3d at 955, 809 N.E.2d at 802; ABC Chevrolet, Inc.; PLR ST-93-0507; PLR ST-93-0078.

In sum, while there may some intuitive appeal to the Department’s mere argument that Taxpayer is not renting or leasing its Loaner Cars because it does not charge customers for their use or possession of them, what cannot be ignored is the fact that the Department has consistently, and repeatedly, arrived at the opposite conclusion, under similar circumstances. ABC Chevrolet, Inc.; PLR ST-93-0507; PLR ST-93-0078. The Department has provided no authority for its litigation position here, which is, itself,

contrary to longstanding agency practice. It is certainly possible that this case presented an opportunity for the Department to articulate good, even compelling, reasons for revising its prior, published determinations regarding loaner cars. See Greer v. Illinois Housing Development Authority, 122 Ill. 2d 462, 506, 524 N.E.2d 561, 581 (1988) (“... an agency is not required to adhere to a certain policy or practice forever”). But this record does not inform whether that is the case, or if so, what those reasons may be.

Further, even if Taxpayer was not renting Loaner Cars to customers, the Department had previously treated the consideration paid by a manufacturer, like Jack Black A, here, as gross receipts from renting loaner cars *to the manufacturer*, for use by customers. PLR ST-93-0507 (“You are, in effect, renting a vehicle to the manufacturer which it provides to its customers.”). Moreover, the identical phrase, receipts or gross receipts, as used in both the ROTA and ROTR § 130.2013, cannot be read expansively for purposes of taxation, but strictly or narrowly, for purposes of applying a tax credit. The burden of proof might change (Balla v. Department of Revenue, 96 Ill. App. 3d 293, 296, 421 N.E.2d 236, 238 (1st Dist. 1981) (“Ordinarily, the taxing authority has the burden of proof regarding a taxpayer's liability to the government. *** However, when a taxpayer claims that he is exempt from a particular tax, or where he seeks to take advantage of deductions or credits allowed by statute, the burden of proof is on the taxpayer.”)), but the identical statutory phrases should be construed consistently. Guillen v. Potomac Insurance Co. of Illinois, 203 Ill. 2d 141, 152, 785 N.E.2d 1, 8 (2003) (“where the same words appear in different parts of the same statute, they should be given the same meaning unless something in the context indicates that the legislature intended otherwise.”).

In addition, while the parties agree that Taxpayer did not collect anything from its customers when they took possession of a Loaner Car, the Loaner Agreements expressly allow Taxpayer to charge and collect monies from a customer in different ways. For example, Taxpayer could charge a customer if it failed to return a Loaner Car on the same day Taxpayer had completed its service on the customer's car. Taxpayer Exs. 10, 25 (p. 2 of each exhibit). By the plain terms of the Loaner Agreement, the charge to the customer would be an additional \$XXXX being added to the customer's repair bill. *Id.* Taxpayer also notified customers that they could be charged if they failed to return the Loaner Car with as much gas as the Loaner Car had when the customer took possession of it. *Id.* In that event, the agreement provided that the customer would be charged for each gallon of gas Taxpayer had to replace. *Id.*

After the legislature's 1999 amendment to the AROTA, the Department could no longer measure AROT by the receipts paid to a retailer by a manufacturer or service contract provider. 35 ILCS 155/2; P.A. 91-193, § 5 (effective July 20, 1999); ABC Chevrolet, Inc., pp. 11-12. But the statutory amendment did not require, or cause, the Department to revoke or rescind any of its prior letter rulings treating motor vehicle dealers as being engaged in the business of renting or leasing the loaner cars provided free to customers. Rather, the legislature simply excluded the consideration a manufacturer or service contract provider paid to a retailer, for making loaner cars available by the retailer to customers, from the definition of gross receipts subject to tax under the AROTA. 35 ILCS 155/2; P.A. 91-193, § 5 (effective July 20, 1999). Given such circumstances, had Taxpayer actually exercised its contractual right to charge and collect monies from a Loaner Car customer, in the form of additional service or repair

charges, or fuel charges (*see* Taxpayer Ex. 10), I would be surprised if the Department did not treat such amounts as being taxable pursuant to the AROTA. *See* ABC Chevrolet, Inc.; PLR ST-93-0507; PLR ST-93-0078.

The documentary evidence shows that, as a regular part of its business, Taxpayer takes part in a Loaner Program operated between Jack Black A and authorized Jack Black A retailers. Taxpayer Exs. 11-13. When Taxpayer purchases a Loaner Car for use in the Loaner Program, it removes the vehicle from its inventory of new vehicles available for sale and places it into its inventory of Loaner Cars. Taxpayer Exs. 11-13; 86 Ill. Admin. Code § 130.2013(f)(1). Jack Black pays compensation to Taxpayer for each Loaner Car Taxpayer placed into service in the Loaner Program. Taxpayer Exs. 11 (p.2), 12 (p. 3), 13 (p. 5). However, since Taxpayer's receipts for providing Loaner Cars to customers come solely from the Jack Black, such receipts are excluded from the AROTA's definition of gross receipts, and are not subject to the tax imposed by the AROTA. 35 ILCS 155/2; P.A. 91-193, § 5 (effective July 20, 1999).

The documentary evidence further shows that Taxpayer entered into a Loaner Agreement with a customer each time it granted a customer the use and possession of a Loaner Car. Taxpayer Exs. 10, 25; ABC Chevrolet, Inc., p. 10 ("Because the taxpayer enters into that [Car Rental Agreement], it represents that it will rent automobiles."). The terms of the Loaner Agreement allow Taxpayer to charge customers under certain circumstances, but the evidence did not show that Taxpayer actually charged any of its customers for any such amounts. Taxpayer Exs. 10, 25. After Taxpayer removed a Loaner Car from the Loaner Program inventory, Taxpayer sold it as a used car, at retail. Taxpayer Ex. 2; 86 Ill. Admin. Code § 130.2013(f)(2), (h)(1)(C).

Finally, the documentary evidence shows that, when Taxpayer purchased a Loaner Car during the Audit Period, it filed an original UT return to report that purchase, and to pay the amount of use tax it determined was due. Taxpayer Ex. 1; 86 Ill. Admin. Code § 130.2013(f)(1). Taxpayer filed an original ROT return when it sold a vehicle previously used as a Loaner Car, and paid the amount of ROT due, but without claiming a credit authorized by ROTR § 130.2013. Taxpayer Exs. 2, 17 (p. 3).

The documentary and other credible evidence supports Taxpayer's claim that its use of Loaner Cars in the Loaner Program constitutes the business of renting or leasing such vehicles to Jack Black, for valuable consideration. Taxpayer Exs. 10-13, 25; 86 Ill. Admin. Code § 130.2013(h); PLR ST-93-0507 ("You are, in effect, renting a vehicle to the manufacturer which it provides to its customers."). That documentary and other credible evidence is sufficient to rebut the Department's determination that Taxpayer was not renting or leasing the Loaner Cars used in the Loaner Program, as well as the Department's determination that Taxpayer was not entitled to the credit authorized by ROTR § 130.2013.

Once a taxpayer offers documentary and other credible evidence that overcomes the Department's prima facie case, the burden shifts to the Department to prove its case by a preponderance of the competent evidence. Miller v. Department of Revenue, 408 Ill 574, 581-82, 97 N.E.2d 788, 792 (1951). Here, however, the Department offered no evidence to support its mere argument that the ROTR § 130.2013 credit did not apply to Taxpayer's use and subsequent sale of Loaner Cars.

Nor does the evidence support either of the stated bases for the Department's Denials. The Denials notified Taxpayer that the credits sought in Taxpayer's amended

ROT returns were being denied because the Department determined that one of two things occurred: Taxpayer had not established that it paid tax in error; or, alternatively, giving Taxpayer a credit memorandum would result in unjust enrichment. Department Ex. 1.

But Taxpayer has never claimed that the ROT it paid when it filed one of the original ROT returns was not due, based on the gross receipts realized from selling the Loaner Car. What it is arguing is that it erroneously paid more ROT than it actually owed, because it failed to offset the ROT due by the amount of the credit authorized by ROTR § 130.2013. Taxpayer Ex. 2. The evidence shows that the credit authorized by ROTR § 130.2013 was available to Taxpayer; therefore, it overpaid the correct amount of ROT due, in error. *Id.*

The Department's alternative basis for denying Taxpayer's claims for credit is that issuing a credit to Taxpayer would result in unjust enrichment. Department Ex. 1. But the ROTR § 130.2013 credit is, on its face, a privilege the Department has expressly adopted as a rule, following notice and comment. 86 Ill. Admin. Code § 130.2013 (2002). The Department instituted the credit to allow a retailer to use the amount of use tax it paid regarding certain tangible personal property — that is, property purchased and used by the retailer by making it available for lease or rental to others — to offset or “pay” some of the ROT liability for which it would be liable when it later sells such property, at retail. *Id.*; *see also* Taxpayer's Reply, p. 4 (citing to and quoting Black's Law Dictionary for definition of “tax credit”). Since the credit authorized by ROTR § 130.2013 applied to Taxpayer's use of the Loaner Cars, its ability to use the credit for its intended purpose is not unjust.

Issue 2: Whether Taxpayer is Entitled to Relief Under the TBORA

Since Taxpayer has demonstrated that it is leasing or renting the Loaner Cars used in the Loaner Program, and is entitled to the credits claimed, there is no need to address Taxpayer's alternative argument.

Conclusion:

The documentary evidence, and credible testimony closely tied to Taxpayer's books and records, show that Taxpayer was leasing or renting the Loaner Cars used in Jack Black's Loaner Program, to Jack Black, for use by Taxpayer's (and Jack Black's) customers, and was, therefore, entitled to the credits authorized by ROTR § 130.2013. I respectfully recommend that the Director cancel the Department's Denials, and issue 39 credit memoranda to Taxpayer in the amounts reported on Taxpayer's amended ROT returns.

August 25, 2014

John E. White
Administrative Law Judge

