

UT 15-01

Tax Type: Use Tax

Tax Issue: Aircraft Use Tax

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

THE DEPARTMENT OF REVENUE)	Docket No.	XXXX
OF THE STATE OF ILLINOIS)	Account No.	XXXX
v.)	NTL Nos.	XXXX
)		XXXX
ABC BUSINESS,)	John E. White,	
Taxpayer)	Administrative Law Judge	

RECOMMENDATION FOR DISPOSITION

Appearances: Daniel Lynch and Daniel Kelly, Lynch & Stern, LLP, appeared for ABC BUSINESS; John Alshuler, Special Assistant Attorney General, appeared for the Illinois Department of Revenue.

Synopsis:

This matter arose when ABC BUSINESS (Taxpayer) protested two Notices of Tax Liability (NTLs) the Illinois Department of Revenue (Department) issued to it to assess Aircraft Use Tax (AUT), penalties, and interest, regarding its purchase of two aircraft, and its use of those aircraft in Illinois. The issue is whether Taxpayer's use of the two aircraft was not subject to AUT, because it purchased each for resale, and because it exercised only an interim use of each, prior to its sale of them.

The hearing was held at the Department's offices in Anywhere. Taxpayer presented the testimony of one of its officers, as well as a considerable number of documents. I have reviewed that evidence, and I am including in this recommendation findings of fact and conclusions of law. For reasons that follow, I recommend that the NTLs be finalized as issued.

Findings of Fact:

1. Taxpayer is an Illinois corporation, with its principal place of business located in Anywhere, Illinois. Taxpayer Exs. 50-51 (copies of, respectively, Taxpayer's federal income tax form 1120 for tax year ending December 31, 2006 (TYE 2006), and for TYE 2007); Taxpayer Ex. 7 (copy of Aircraft Purchase Agreement regarding Taxpayer's purchase of the Learjet from XYZ Business); Hearing Transcript (Tr.) pp. 8-9 (testimony of Jane Doe, Taxpayer's vice president of marketing).
2. In May 2005, Taxpayer formed and became the sole member of Happy Feet. Taxpayer Ex. 8 (copy of Happy Feet's Operating Agreement); Taxpayer Ex. 4 (copy of print-out from web site of Illinois Secretary of State LLC File Detail Report of Happy Feet, LLC).
3. Jack Black (Jack Black) was Taxpayer's Chairman and registered agent, and Gene Green (Gene Green) was Taxpayer's President. Taxpayer Ex. 8.
4. Taxpayer was engaged in the business of leasing commercial aircraft to airlines around the world. Tr. p. 8; Taxpayer Ex. 1 (copy of cover email from Jane Doe to Gene Green, dated September 12, 2005, with attached PowerpointTM presentation slides that Jane Doe prepared to market Happy Feet' business), p. 7 (slide describing Happy Feet as being a "Newly formed corporate aircraft sales business[;] Based at Anywhere-Anyplace Municipal Airport[;] Partnered with [Taxpayer, who is] Among the largest privately-owned commercial aircraft lessors"); Taxpayer Ex. 50, p. 1, line 6 (showing income Taxpayer received from gross rents, for TYE 2006); Taxpayer Ex. 51, p. 1, line 6 (same, for TYE 2007).
5. Happy Feet applied for, and was issued a certificate of registration, for purposes of Illinois' business income tax, sales tax, and motor vehicle sales tax. Taxpayer Ex. 3 (copy of Happy

Feet' retailer's registration certificate from the Department). That is, Happy Feet was registered with the Department as an Illinois retailer. *Id.*

6. Happy Feet held itself out to the public as being engaged in the business of selling used aircraft (Taxpayer Exs. 1-2, 11-12); Taxpayer did not. Taxpayer's Brief, p. 8.
7. Taxpayer was not registered with the Department as an Illinois retailer. Taxpayer's Brief, p. 8 n.4; *see also* 35 ILCS 105/2; 35 ILCS 120/2a.
8. Taxpayer offered no evidence to show that it ever applied for, and was issued, a reseller's certificate, pursuant to § 2c of the ROTA. Taxpayer Exs. 1-51, *passim*; 35 ILCS 120/2c.
9. On May 22, 2006, Taxpayer purchased a 1980 Lear 35A aircraft (Lear) from XYZ Business. Taxpayer Ex. 7. Taxpayer's purchase price for the Lear was \$XXXX. *Id.*, p. 1.
10. Taxpayer sold the Lear to Blue Sky, an Argentina corporation, on July 23, 2007. Taxpayer Ex. 24 (copy of Aircraft Purchase Agreement between Taxpayer, as seller, and Blue Sky, as purchaser). Blue Sky' purchase price for the Lear was \$XXXX. *Id.*, p. 5 (of exhibit).
11. In between the time Taxpayer purchased and sold the Lear, it used in Illinois by causing it to be flown into and out of Illinois, and causing it regularly to physically remain in Illinois, most often at Anyplace Municipal Airport. Taxpayer Exs. 28 (copy of flight log information from FliteAware for Lear), 29 (copy of email to Jane Doe from Don Dingle, from Happy Feet, regarding dates of use for the Lear), 30 (copy of schedule titled, Complete Lear Flight Log, showing: the dates on which the Lear was flown; the airport code and origin city from which the Lear took off; and the airport code and destination city when it landed, showing Lear's arrivals and departures at different airports from June 23, 2006 through July 19, 2007).
12. On June 26, 2006, Taxpayer purchased a 1996 Pilatus PC-12 aircraft (Pilatus) from Grey

Board. Taxpayer Ex. 34 (copy of Aircraft Purchase Agreement between Grey Board, as seller, and Taxpayer, as purchaser). Taxpayer's purchase price for the Pilatus was \$XXXX.

Id., p. 2.

13. Taxpayer sold the Pilatus to Purple Pad, LLC (Purple Pad), on November 2, 2006. Taxpayer Ex. 24 (copy of Used Aircraft Purchase Agreement between Taxpayer, as seller, and Purple Pad, as purchaser). Purple Pad's purchase price for the Pilatus was \$XXXX. *Id.*, p. 2 (of exhibit).
14. In between the time Taxpayer purchased and sold the Pilatus, it used in Illinois by causing it to be repeatedly flown into and out of Illinois, and causing it regularly to physically remain in Illinois, most often at Anyplace Municipal Airport. Taxpayer Exs. 46 (copy of flight log information from FliteAware for Pilatus), 47 (copy of email to Jane Doe from Don Dingle, from Happy Feet, showing dates of use for Pilatus and another aircraft), 48 (copy of schedule titled, Complete Pilatus Flight Log, showing: the dates on which the Pilatus was flown; the airport code and origin city from which the Pilatus took off; and the airport code and destination city when it landed, from June 26, 2006 through January 2, 2007).
15. Taxpayer did not file a form ST-556, transaction return, regarding its sale of the Lear or the Pilatus, showing either sale as taxable or exempt from ROT. 35 ILCS 120/4; 86 Ill. Admin. Code § 130.540(b), (e).
16. On October 20, 2011, the Department issued an NTL to Taxpayer to assess AUT, plus penalties and interest, regarding Taxpayer's purchase and use of the Lear. Department Ex. 1.
17. On June 12, 2012, the Department issued an NTL to Taxpayer to assess AUT, plus penalties and interest, regarding Taxpayer's purchase and use of the Pilatus. Department Ex. 1.
- 18.

Conclusions of Law:

Before addressing the parties' respective arguments, it will help to briefly describe the nature and purpose of the Aircraft Use Tax Act (AUTA), and the difference between it and the acts which makes up what is colloquially referred to as Illinois' sales tax.

The AUTA imposes a tax “on the privilege of using, in this State, any aircraft as defined in Section 3 of the Illinois Aeronautics Act acquired by gift, transfer, or purchase after June 30, 2003.” 35 ILCS 157/10-15. The AUTA is the one of two tax statutes the Illinois General Assembly enacted — the other being the Watercraft Use Tax Act (WUTA) — which were modeled after the previously enacted Vehicle Use Tax Act (VUTA). *Compare* 35 ILCS 157/10-1 *et seq.* (effective June 20, 2003) *and* 35 ILCS 158/15-1 *et seq.* (effective July 30, 2004) *with* 625 ILCS 5/3-1001 *et seq.* (formerly Ill. Rev. Stat. ch. 95½, ¶¶ 3-1001 to 3-2006 (1980)). Each of those respective statutes impose a tax on the privilege of using, in Illinois, certain types of tangible personal property (hereafter, goods) that are acquired in transactions that would not constitute a sale at retail, as that phrase is defined within the Retailers' Occupation Tax Act (ROTA) and the Use Tax Act (UTA). 35 ILCS 157/10-15; 35 ILCS 158/15-1; 625 ILCS 5/3-1001; 35 ILCS 105/2; 35 ILCS 120/1; *see also* Greenwalt v. Department of Revenue, 198 Ill. App. 3d 129, 555 N.E.2d 775 (2d Dist. 1990) (MVUT upheld as constitutional).

The ROTA is designed to tax persons engaged in the occupation of selling goods at retail in Illinois, to purchasers for use or consumption. 35 ILCS 120/2; Hagerty v. General Motors Corp., 59 Ill. 2d 52, 54-55, 319 N.E.2d 5, 6 (1974). The UTA is designed to complement the ROTA, and imposes a tax, at the same rate as the retailers' occupation tax (ROT), upon the privilege of using in this State goods purchased at retail. 35 ILCS 105/3; Hagerty, 59 Ill. 2d at 54-55, 319 N.E.2d at 6. Early cases decided under the ROTA occasionally noted that the

legislative intent was to impose a tax only on the last transaction in a stream of commerce, that is, the sale from a retailer to a person who purchased goods for use or consumption. *E.g.*, Modern Dairy Co., Inc. v. Department of Revenue, 413 Ill. 55, 67, 108 N.E.2d 8, 15 (1952) (“Considering the purpose of the Retailers' Occupation Tax Act, it is reasonable to assume the legislature intended the term ‘use’ to include any employment of a thing which took it off the retail market so that it was no longer the object of a tax on the privilege of selling it at retail.”).

That same intent, however, is not present within the AUTA, the VUTA and the WUTA. Each of those acts was designed to impose a tax upon each person who acquires title to or ownership of aircraft, motor vehicles, and watercraft, for use in Illinois, each and every time such items are transferred from one owner or titleholder to another, unless one of the expressed statutory exceptions or exemptions applied.

Section 10-35 of the AUTA, provides, in pertinent part:

Sec. 10-35. Powers of Department. *** In the administration of, and compliance with, this Law, the Department and persons who are subject to this Law shall have the same rights, remedies, privileges, immunities, powers, and duties, and be subject to the same conditions, restrictions, limitations, penalties, and definitions of terms, and employ the same modes of procedure, as are prescribed in the Use Tax Act, as now or hereafter amended (except for the provisions of Section 3-70), which are not inconsistent with this Law, as fully as if the provisions of the Use Tax Act were set forth in this Law. In addition to any other penalties imposed under law, any person convicted of violating the provisions of this Law, shall be assessed a fine of \$1,000.

35 ILCS 157/10-35.

Since the AUTA incorporates the UTA’s definition of terms, the word “using,” within AUTA § 10-15’s phrase, “the privilege of using, in this State, any aircraft ... acquired by gift, transfer, or purchase after June 30, 2003”, should be construed consistent with the UTA’s definition of “use” — unless some particular aspect of the UTA’s definition is inconsistent with

the AUTA. 35 ILCS 157/10-35. Within § 2 of the UTA, the Illinois General Assembly defined “use” to mean:

the exercise by any person of any right or power over tangible personal property incident to the ownership of that property, except that it does not include the sale of such property in any form as tangible personal property in the regular course of business to the extent that such property is not first subjected to the use for which it was purchased, and does not include the use of such property by its owner for demonstration purposes. . . . “Use” does not mean the demonstration use or interim use of tangible personal property by a retailer before he sells that tangible personal property. ***

35 ILCS 105/2.

With that general background complete, it is time to address the parties’ arguments and whether Taxpayer’s use of the two aircraft are subject to, or exempt from, AUTA. Taxpayer initially makes a passing argument that its use of the Lear and Pilatus was not subject to AUT because its use was exempt under UTA § 3-55(e). Taxpayer’s Brief, p. 3. That particular subsection provides:

Sec. 3-55. Multistate exemption. To prevent actual or likely multistate taxation, the tax imposed by this Act does not apply to the use of tangible personal property in this State under the following circumstances:

(e) The temporary storage, in this State, of tangible personal property that is acquired outside this State and that, after being brought into this State and stored here temporarily, is used solely outside this State or is physically attached to or incorporated into other tangible personal property that is used solely outside this State, or is altered by converting, fabricating, manufacturing, printing, processing, or shaping, and, as altered, is used solely outside this State.

35 ILCS 105/3-55(e).

The documentary evidence, however, shows that Taxpayer did not bring the aircraft into Illinois for temporary storage. To the contrary, Taxpayer has documented that, after it purchased the Lear, it caused it to be flown into Illinois on June 23, 2006, where it landed and remained at the Anyplace Municipal Airport, until it took off again on June 28, 2006 and landed at the Green

Field County Airport. Taxpayer Ex. 30. I take note that the Anyplace Municipal Airport is, geographically, the closest airport to the Passover office of Happy Feet. Taxpayer Ex. 1, p. 7; Taxpayer Ex. 11, (Bates stamp page) 97; <http://www.travelmath.com/nearest-airport/Passover,+IL> (last viewed on September 18, 2014); People v. Stiff, 391 Ill. App. 3d 494, 504, 904 N.E.2d 1174, 1183 (5th Dist. 2009) (“Using Google Maps, we take judicial notice ... that the distance between Mary Pary's residence and Sangria's residence is 295 feet.”); 5 ILCS 100/10-40(c) (“Notice may be taken of matters of which the circuit courts of this State may take judicial notice.”). And that was not the only time Taxpayer caused the Lear to be flown into or out of Illinois.

Taxpayer Exhibit 30, Complete Lear Flight Log, contains 91 entries, of which 64 document that the Lear either took off from, or landed at, an Illinois airport. Taxpayer Ex. 30. This documentary evidence proves that Taxpayer did not temporarily store the Lear in Illinois. *Id.*; 35 ILCS 105/3-55(e). Rather, by repeatedly causing it to take off and land at Illinois airports, it exercised rights and powers over the Lear, in Illinois, incident to its ownership of that aircraft. Taxpayer Ex. 30; 35 ILCS 105/2. Taxpayer’s exercise of rights and powers over the Lear, incident to its ownership of the aircraft, means that it actually and repeatedly used the aircraft in Illinois. 35 ILCS 105/2; 35 ILCS 157/10-35.

Similar evidence documents Taxpayer’s actual use of the Pilatus. Taxpayer Exhibit 48, Complete Pilatus Flight Log, has 71 entries, 54 of them being for dates between when Taxpayer purchased the Pilatus, and before it sold it. *Compare* Taxpayer Exs. 34, 44 *with* Taxpayer Ex. 48. Of those 54 entries on the flight log, 43 of them document that the Pilatus either took off from, or landed at, an Illinois airport. Taxpayer Ex. 48. The documented evidence of repeated use dashes

Taxpayer's suggestion that it brought either aircraft into Illinois only for temporary storage. *Id.*; Taxpayer Ex. 30.

Taxpayer's primary defense against the assessments is that it purchased the aircraft for the purposes of resale, and that its use of them fits within the UTA's express exclusion that "[u]se does not mean the demonstration use or interim use of tangible personal property by a retailer before he sells that tangible personal property." 35 ILCS 105/2; Taxpayer's Brief, pp. 1, 3-7; Taxpayer's Reply. Taxpayer concludes that, since its use of the aircraft was not a taxable use under the UTA, then, for purposes of the AUTA, it was not making a taxable use of those aircraft in Illinois. Taxpayer's Brief, *passim*.

The Department responds that the UTA's exception of "demonstration use or interim use of ... property by a retailer before he sells that ... property" was intended to apply only to the privilege afforded to registered retailers, or to registered resellers. *See* Department's Brief, pp. 5-6; *see also* 86 Ill. Admin. Code § 150.306. It also argues that the evidence at hearing clearly showed that Taxpayer was engaged in the business of leasing aircraft, not selling them, and that its sales of the two aircraft at issue here should be considered isolated sales, under the UTA's definition of the term "retailer." Department's Brief, p. 6; 35 ILCS 105/2.

Analysis

Persons who wish to engage in the business of selling at retail in Illinois are required to apply for a certificate of registration with the Department, before making any such sales. 35 ILCS 120/2a. That is because "[i]t is unlawful for any person to engage in the business of selling tangible personal property at retail in [Illinois] without a certificate of registration from the Department." *Id.*; People v. Parvin, 125 Ill. 2d 519, 523, 533 N.E.2d 813, 814 (1988). A person who violates ROTA § 2a, by engaging in the business of making retail sales of goods, in Illinois,

without a certificate of registration, is guilty of a Class A misdemeanor. 35 ILCS 120/13.

The legislature requires persons seeking to engage in the occupation of selling at retail to apply with the Department for a certificate of registration, because the State has determined that unregistered retailers tend to ignore the other statutory duties imposed by the ROTA, like the duty to keep records, or the duty to file returns to report the amount of gross receipts the person realizes from selling at retail, or the duty to pay the ROT due on such receipts. 35 ILCS 120/2a; 35 ILCS 120/3. The Illinois Supreme Court described one example of such an unregistered retailer, in Tri-America Oil Co. v. Department of Revenue, 102 Ill. 2d 234, 236, 464 N.E.2d 1076, 1077 (1984):

The plaintiff, Tri-America Oil Company, is both a wholesale and retail seller of gasoline. It owns and operates three gas stations from which it sells gasoline to the general public at retail. During the period in question here, January 1975 through December 1977, it also owned 20 to 25 other stations which it leased to independent dealers who purchased gasoline at wholesale from Tri-America and resold the gasoline at the leased stations at retail for use and consumption by the public.

Tri-America did not pay taxes under the Retailers' Occupation Tax Act (Ill.Rev.Stat.1975, ch. 120, par. 440 *et seq.*) and the Municipal Retailers' Occupation Tax Act (Ill.Rev.Stat.1975, ch. 24, par. 8-11-1) on sales to any of the leased stations. It claimed that these were exempt from the taxing statutes as sales for resale and not sales for use and consumption. During an audit by the Department of Revenue, Tri-America produced proper resale or registration numbers issued by the Department for all but one station in Anywhere. The exception was a station leased from Tri-America and operated by Miguel and Alfonso Chavez (Chavez). Chavez neither applied for nor received a resale tax number from the Department of Revenue, and it is clear that no taxes have been paid on the gasoline which Tri-America sold to the station operated by Chavez.

Tri-America Oil Co., 102 Ill. 2d at 236, 464 N.E.2d at 1076-77.

Here, contrary to Taxpayer's suggestion that it held itself out as a retailer (Taxpayer's Reply, pp. 2-3), Taxpayer never performed even the first statutory duty required of persons seeking to engage in the occupation of selling at retail in Illinois. Taxpayer concedes that it was

not registered as an Illinois retailer. Taxpayer's Brief, p. 8 n.4 ("Unlike Happy Feet, ABC Business did not have a retailer's license."). Happy Feet was registered as an Illinois retailer (Taxpayer Ex. 3); but Taxpayer was not. Taxpayer's Brief, p. 8 n.4. Taxpayer is not the same person as Happy Feet. Taxpayer Ex. 8; 805 ILCS 180/5-1 ("[a] limited liability company is a legal entity distinct from its members."). Happy Feet was engaged in the business of selling aircraft at retail (Taxpayer Exs. 3, 11-12); Taxpayer was not. Taxpayer's Brief, p. 8 n.4.

Taxpayer similarly concedes that it was Happy Feet that held itself out to the public as being engaged in selling aircraft. Specifically, it writes, "Although the Aircraft were acquired in ABC BUSINESS's name and held on ABC BUSINESS's books, they were held out to the public as being owned by Happy Feet, a sister company that specialized in corporate aircraft (and which held an Illinois retailer's license)." Taxpayer's Brief, p. 8. In the footnote to that sentence, Taxpayer wrote, "ABC BUSINESS does not dispute that the Aircraft were acquired in ABC BUSINESS's name and held on ABC BUSINESS's books rather than Happy Feet'. Unlike Happy Feet, ABC BUSINESS did not have a retailer's license. However, the fact that the Aircraft were held out to the public as being part of the Happy Feet fleet is probative of ABC BUSINESS's intent vis-à-vis these particular Aircraft." Taxpayer's Brief, p. 8 n.4.

But Taxpayer's intent to resell the aircraft does not matter unless it did so as a retailer of aircraft. 35 ILCS 105/2; 35 ILCS 157/10-35. That is why Taxpayer's reliance on Weaver-Yemm Chevrolet, Inc. v. Department of Revenue, 87 Ill. App. 3d 83, 409 N.E.2d 126 (3d Dist. 1980), and an agency decision it attached to its Brief, cannot help it here. *See* Taxpayer's Brief, pp. 4-7 & Ex. A. Both of those cases involved the taxability of goods purchased and used by a registered Illinois retailer, in a manner which, each respective retailer claimed, was not subject to use tax. Regardless how Taxpayer used the Lear and the Pilatus in Illinois, Taxpayer did not purchase or

use either aircraft as a retailer. Taxpayer's Brief, p. 8 n.4. The ROTA imposes duties on, and provides privileges to, retailers. 35 ILCS 120/2a; 35 ILCS 120/3; 35 ILCS 120/6; 35 ILCS 120/7; Jones v. Department of Revenue, 60 Ill. App. 3d 886, 377 N.E.2d 202 (5th Dist. 1978). The UTA excepts from the definition of use — which is the privilege upon which use tax is imposed — rights and privileges exercised over goods purchased for resale by retailers. 35 ILCS 105/2. Those exceptions are intended to complement the ROTA. 35 ILCS 120/1; Sunstrand Corp. v. Department of Revenue, 34 Ill. App. 3d 694, 339 N.E.2d 351 (2d Dist. 1975). Taxpayer was not a retailer, and it accepted none of the duties required of retailers by the ROTA, regarding its ownership, use, and sale of the Lear and the Pilatus.

On this point, had Taxpayer actually been engaged in the business of selling aircraft at retail, it would have been required to file a transaction return to report each separate sale of an aircraft, even if a particular sale may have been exempt from ROT. 35 ILCS 120/3; 86 Ill. Admin. Code § 130.540(b), (e). On each such return, Taxpayer would have been required to report the amount of the gross receipts it realized from each such sale. *Id.* It would have also been required to report whether the receipts from such a sale were exempt from ROT. 35 ILCS 120/3; 86 Ill. Admin. Code § 130.540(b), (e). But Taxpayer offered no evidence to show that it filed a transaction return with the Department when it sold the Lear, or when it sold the Pilatus. *See* Taxpayer Exs. 1-51. Taxpayer did not act like a retailer regarding its sales of the aircraft, and the Department has not made a determination that Taxpayer was acting as a retailer, in Illinois, regarding such sales. *See* Department's Brief, p. 6.

Regarding Taxpayer's claim that it held itself out as being engaged in selling at retail, I note that Taxpayer's partial quotation of the UTA's definition of retailer, so as to eliminate the last part of the quoted sentence, is misleading, because it removes critical context. *See*

Taxpayer's Brief, pp. 2-3 n.1; Taxpayer's Reply, p. 2. The full sentence is:

A person who holds himself or herself out as being engaged (or who habitually engages) in selling tangible personal property at retail is a retailer hereunder with respect to such sales (and not primarily in a service occupation) notwithstanding the fact that such person designs and produces such tangible personal property on special order for the purchaser and in such a way as to render the property of value only to such purchaser, if such tangible personal property so produced on special order serves substantially the same function as stock or standard items of tangible personal property that are sold at retail.

35 ILCS 105/2.

In the sentence Taxpayer partially quotes, the legislature was making clear that a person that held itself as being engaged in the business of selling special order, or custom made goods, would be considered a retailer with respect to such goods, if the goods served substantially the same function as other similar goods sold at retail. *Id.*; Rodman v. Department of Revenue, 51 Ill. 2d 314, 315-16, 282 N.E.2d 706, 707-08 (1972). This provision has nothing to do with Taxpayer, or with its business of leasing aircraft. No evidence shows that Taxpayer held itself out as being engaged in the business of selling custom made or special order aircraft. Again, Happy Feet— a different person — held itself out as being engaged in business of selling used, custom retro-fitted aircraft, through its Genesis program. Taxpayer Exs. 1, 11-12. Taxpayer did not. Taxpayer's Brief, p. 8 n.4.

Read together, the UTA's statutory definitions of terms, § 2c of the ROTA, and the Illinois Supreme Court's decision in Tri-America Oil Co., all reflect a legislative intent that the UTA's exceptions from the definition of a taxable "use" of goods, at least for those uses by a retailer, were intended to apply only to those retailers or resellers who are registered with the Department. In addition to defining use, § 2 of the UTA provides:

“Sale at retail” means any transfer of the ownership of or title to tangible personal property to a purchaser, for the purpose of use, and not for the purpose of resale in any form as tangible personal property to the extent not first subjected to a use for which it was purchased, for a valuable consideration: Provided that the property purchased is deemed to be purchased for the purpose of resale, despite first being used, to the extent to which it is resold as an ingredient of an intentionally produced product or by-product of manufacturing. For this purpose, slag produced as an incident to manufacturing pig iron or steel and sold is considered to be an intentionally produced by-product of manufacturing. **“Sale at retail” includes any such transfer made for resale unless made in compliance with Section 2c of the Retailers' Occupation Tax Act, as incorporated by reference into Section 12 of this Act.** Transactions whereby the possession of the property is transferred but the seller retains the title as security for payment of the selling price are sales.

35 ILCS 105/2 (emphasis added).

The highlighted text creates an express presumption that a purchase of goods by a person claiming to be purchasing for resale is subject to use tax, unless the sale is made in compliance with ROTA § 2c. *Id.* The ROTA’s definition of sale at retail includes the same presumption of taxability:

“Sale at retail” shall be construed to include any transfer of the ownership of or title to tangible personal property to a purchaser, for use or consumption by any other person to whom such purchaser may transfer the tangible personal property without a valuable consideration, and to include any transfer, whether made for or without a valuable consideration, for resale in any form as tangible personal property unless made in compliance with Section 2c of this Act.

35 ILCS 120/1.

Section 2c of the ROTA provides:

Sec. 2c. If the purchaser is not registered with the Department as a taxpayer, but claims to be a reseller of the tangible personal property in such a way that such resales are not taxable under this Act or under some other tax law which the Department may administer, such purchaser (except in the case of an out-of-State purchaser who will always resell and deliver the property to his customers outside Illinois) shall apply to the Department for a resale number. Such applicant shall state facts which will show the Department why such

applicant is not liable for tax under this Act or under some other tax law which the Department may administer on any of his resales and shall furnish such additional information as the Department may reasonably require.

Upon approval of the application, the Department shall assign a resale number to the applicant and shall certify such number to him. The Department may cancel any such number which is obtained through misrepresentation, or which is used to make a purchase tax-free when the purchase in fact is not a purchase for resale, or which no longer applies because of the purchaser's having discontinued the making of tax exempt resales of the property.

The Department may restrict the use of the number to one year at a time or to some other definite period if the Department finds it impracticable or otherwise inadvisable to issue such numbers for indefinite periods.

Except as provided hereinabove in this Section, a sale shall be made tax-free on the ground of being a sale for resale if the purchaser has an active registration number or resale number from the Department and furnishes that number to the seller in connection with certifying to the seller that any sale to such purchaser is nontaxable because of being a sale for resale.

Failure to present an active registration number or resale number and a certification to the seller that a sale is for resale creates a presumption that a sale is not for resale. This presumption may be rebutted by other evidence that all of the seller's sales are sale for resale, or that a particular sale is a sale for resale.

35 ILCS 120/2c (emphasis added).

Here, when Taxpayer purchased each of the aircraft, neither of those purchases could have been made in compliance with § 2c of the ROTA, because Taxpayer had not registered with the Department as either a retailer or reseller of aircraft, or of any goods. 35 ILCS 105/2; Taxpayer's Brief, p. 8 n.4. As a result, had the transactions been at retail, Taxpayer's purchases of the two aircraft, for use in Illinois, would have been presumed to be subject to use tax. 35 ILCS 105/2. That same presumption applies for purposes of the AUTA. 35 ILCS 157/10-35.

When describing the legislative intent underlying ROTA § 2c, the Tri-America Oil Co.

Court noted:

The taxing statutes are designed to prevent retailers who are not registered with the Department from purchasing products from wholesalers. The registration or resale number issued by the Department is required in order to assure the wholesaler that the business to which he sells is properly registered

with the Department, which can then look to the retailer to collect and pay the tax required on retail sales. If a wholesaler fails to cooperate with this collection scheme by selling his product to a retailer without requiring proof under section 1 of a registration or a resale number, the wholesaler may expose himself to payment of the taxes the retailer incurred for sales at retail.

Tri-America Oil Co., 102 Ill. 2d at 236, 464 N.E.2d at 1077-78.

One might be tempted to think that, in the first quoted sentence, the Court meant to say that Illinois' tax laws "are designed to prevent retailers who are not registered with the Department from purchasing products from wholesalers [*tax free*]." *See id.* But that would be a mistake. Section 2c of the ROTA must be read together with §§ 2a and 13. The tax laws are not only designed to prevent unregistered retailers from purchasing goods from wholesalers tax free, they are also designed to subject unregistered retailers to criminal prosecution. 35 ILCS 120/2a; 35 ILCS 120/13; People v. Parvin, 125 Ill. 2d 519, 533 N.E.2d 813 (1988). Illinois' tax laws, in short, are designed to try to insure that unregistered retailers never operate, at all.

The evidence shows that Taxpayer did not hold itself out to the public as being engaged in the business of selling used aircraft at retail; Happy Feet did. Taxpayer Exs. 1-2, 11-12; Taxpayer's Brief, p. 8 & n.4. Nor did Taxpayer hold itself out as a retailer to the State. Taxpayer's Brief, p. 8. Taxpayer was not registered with the Department as a retailer, and it has never claimed to be an Illinois registered reseller. Taxpayer's Brief, p. 8 & n.4. Further, Taxpayer did not act the way a retailer was required to act — had it been a retailer — regarding its sales of the two aircraft for which the Department assessed AUT. It did not file a transaction return to notify the Department of the information required to reported for each such transaction. *See* 35 ILCS 120/3; 86 Ill. Admin. Code § 130.540(b), (e). Finally, since Taxpayer was not registered with the Department, it could not have been lawfully engaged in the business of selling aircraft at retail in Illinois. 35 ILCS 120/2a; 35 ILCS 120/13; Taxpayer's Brief, p. 8 &

n.4.

On this last point, I want to make it clear that I am not finding as a fact, or making any conclusion, that Taxpayer was acting, in Illinois, as a pirate retailer, like the Chavezes in Tri-America Oil Co., 102 Ill. 2d at 236, 464 N.E.2d at 1076-77. Rather, my conclusion is that the evidence supports the Department's argument that Taxpayer's sales of the two aircraft were isolated or occasional sales by a person who did not hold itself out as being engaged in the occupation of selling such property at retail, and which sales did not constitute engaging in the business of selling at retail. Department's Brief, pp. 5-6; 35 ILCS 120/1.

The evidence further shows that Taxpayer exercised rights and powers over the Lear and the Pilatus, in Illinois, by regularly causing each aircraft to take off from, and land and remain at, Illinois airports, during the time it owned each aircraft. Taxpayer Exs. 30, 48. Taxpayer used the Lear and Pilatus in Illinois, and was subject to AUT on the privilege of using them in Illinois, incident to its ownership of those aircraft. Taxpayer Exs. 30, 48; 35 ILCS 157/10-15; 35 ILCS 157/10-30; 35 ILCS 105/2.

Conclusion:

I recommend that the Director finalize the NTLs as issued, with penalties and interest to accrue pursuant to statute.

September 30, 2014

John E. White
Administrative Law Judge