

UT 18-08

Tax Type: Use Tax

Tax Issue: Use Tax On Out-Of-State Purchases Brought Into Illinois

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

THE DEPARTMENT OF REVENUE)	Docket No.	XX-ST-XXX
OF THE STATE OF ILLINOIS)	Account ID	XXXXXX-XXXXXX
v.)	NTL No.	
ALEX BUYER,)	John E. White,	
Taxpayer)	Administrative Law Judge	

RECOMMENDATION FOR DISPOSITION

Appearances: ALEX BUYER appeared pro se; Seth Schriftman, Special Assistant Attorney General, appeared for the Illinois Department of Revenue.

Synopsis:

This matter involves a Notice of Tax Liability (NTL) the Illinois Department of Revenue (Department) issued to ALEX BUYER (BUYER or Taxpayer) to assess Illinois use tax regarding his purchase of a painting from a retailer located outside Illinois, which the Department determined was purchased for use in Illinois. Taxpayer requested leave to file a late protest to that NTL, which was granted.

A hearing on Taxpayer's protest was held at the Department's offices in Chicago. The issue is whether Taxpayer owes use tax regarding the painting. I have reviewed the evidence adduced at hearing, and I am including in this recommendation findings of facts and conclusions of law. I recommend that the NTL be finalized as issued.

Findings of Fact:

1. Taxpayer is a resident of Illinois, and was an Illinois resident during the times at issue in this matter. Department Ex. 2 (copy of documents Taxpayer submitted to the Department as documents to be offered into evidence at the hearing in this matter), p. 3 (copy of Declaration of Joe Buyer, XX, ¶ 1); Hearing Transcript (Tr.), pp. 26-27 (testimony of Buyer). For convenience, I will refer to the separate documents included within Department Exhibit 2 using the fax page numbers displayed on the top left of each page.
2. On April 27, 2011, Taxpayer purchased a painting titled, AAA, by FAMOUS ARTIST, 2008 (hereafter, the Painting), from BBB Gallery Ltd. (BBB) in CITY A, FOREIGN COUNTRY. Department Ex. 2, pp. 3, 10 (copy of BBB invoice reflecting sale of the Painting to Taxpayer); Tr. pp. 25-26, 129-30 (BUYER). Taxpayer was at BBB when he purchased the Painting. Tr. pp. 129-30 (BUYER); see Department Ex. 2, p. 10.¹
3. Taxpayer paid \$XXX,XXX.00 for the Painting. Department Ex. 2, p. 10; Tr. p. 26 (BUYER).
4. BBB is a retailer of artwork. Department Ex. 2, pp. 3, 10.
5. After Taxpayer purchased the Painting, Taxpayer arranged to have others export the Painting from CITY A and import it into the United States. Department Ex. 2, p. 3,

¹ During closing argument, Department counsel stated that Taxpayer purchased the Painting from BBB while he was physically present in Illinois. Tr. p. 125. In his closing argument, Taxpayer denied that assertion, and said he purchased the Painting while he was physically present at BBB's gallery in CITY A. Tr. pp. 129-30. The only direct evidence on this point is Taxpayer's testimony (albeit offered during closing argument), which is not inconsistent with the BBB invoice (Department Ex. 2, p. 10), and not so improbable in itself as to be unworthy of belief. Fillichio v. Department of Revenue, 15 Ill. 2d 327, 333, 155 N.E.2d 3, 7 (1958). No evidence appears in the record which supports a finding that Taxpayer purchased the Painting from BBB while he was physically present in Illinois. Thus, the record supports a finding that Taxpayer purchased the Painting while he was in CITY A.

11-15 (copies of shipping and related documents showing transportation of the Painting from CITY A to Illinois); Tr. pp. 27-28 (BUYER).

6. As part of arranging for others to transport the Painting from CITY A to the United States, a United States Customs and Border Protection form 7501, titled, Entry Summary, was completed and filed with that federal agency, which reflects that the Painting entered the United States via Illinois. Department Ex. 2, pp. 3, 12 (copy of Entry Summary form); <https://www.cbp.gov/contact/ports/chicago> (U.S. Customs web site showing U.S port number 3901 is located in Rosemont, Illinois); Tr. pp. 27-28 (BUYER). The Painting entered Illinois between July 30, 2011 and August 5, 2011. Department Ex. 2, p. 12.
7. The Entry Summary contains the following declaration: “I declare that I am the ... owner or purchaser of agent thereof. I further declare that the merchandise ... was obtained pursuant to a purchase or agreement to purchase and that the prices set forth in the invoices are true.” Department Ex. 2, p. 12 (box 36 of Entry Summary); Tr. pp. 27-28 (BUYER).
8. Upon importation into the United States through Illinois, Taxpayer arranged to have the Painting delivered to the CCC Group (CCC), in Chicago, Illinois. Department Ex. 2, pp. 3, 11-15 (copies of shipping and related documents showing transportation of the Painting from CITY A to Illinois.).
9. CCC is a business Taxpayer has dealt with, and which provides, among other things, fine art transportation and storage services, in Chicago, Illinois. Department Ex. 2, pp. 3, 11-15; Tr. p. 56 (BUYER).

10. Taxpayer arranged to have the Painting delivered to CCC in Chicago to have CCC store it there, for him. Department Ex. 2, p. 3.
11. CCC received the Painting on August 5, 2011. Department Ex. 2, p. 15 (copy of CCC invoice dated September 9, 2011 showing charges related to the Painting).
12. Taxpayer later arranged to have the Painting picked up from CCC, on or about September 9, 2011, and transported and delivered to the CITY B Art Museum, in CITY B, STATE 1, for display on a long term loan. Department Ex. 2, pp. 3, 17.
13. The Painting was physically present in STATE 1 from approximately September 23, 2011 until approximately May 23, 2013. Department Ex. 2, pp. 3-4.
14. After Taxpayer's loan of the Painting to the CITY B Art Museum terminated, Taxpayer arranged to have others transport and return the Painting to CCC, in Illinois, for an additional period of storage. Department Ex. 2, pp. 3-4, 19, 21.
15. Taxpayer did not, on or before the last day of June 2013, file a return, Form ST-44, with the Department to report his purchase of the Painting, outside Illinois, and his use of it, in Illinois. 35 ILCS 105/10 (owner/purchaser's statutory duty to timely file use tax returns when annual amount of use tax owed exceeds \$600); *see* 35 ILCS 105/12 (UTA's six year statute of limitations applicable "in the case of a failure to file a return required by this Act,"); Tr. p. 76 (BUYER, acknowledging statute of limitations regarding his purchases was six years).
16. The Department is authorized to obtain and exchange certain information affecting taxation, including information reported on U.S. Customs Entry Summaries. 20 ILCS 2505/2505-65(a); Department 2010 Instructions to Individual Income Tax Form IL-1040, p. 8 (when instructing individual taxpayers how to report and pay Illinois use

tax owed regarding retail purchases of tangible personal property purchased from retailers located outside Illinois and delivered to them in Illinois, the Instructions provide, in part, “We conduct routine audits based on information received from third parties, including the U.S. Customs Service and other states.”) (the 2010 form, and instruction forms for other tax years, are viewable at the Department’s website at <http://tax.illinois.gov/TaxForms/Incm2010/Individual/IL-1040-Instr.pdf>).

17. In a letter addressed to Taxpayer, dated January 16, 2014, the Department notified Taxpayer that it had initiated an audit of Taxpayer’s purchase of the Painting, which the Department learned about via the pertinent Entry Summary. Department Ex. 2, p. 23 (copy of January 16, 2014 Audit letter). Danny Piper (Piper) conducted the audit. *Id.*

18. The body of Piper’s January 16, 2014 Audit letter to Taxpayer provided, in pertinent part:

This letter serves as notice that on January 16, 2014, we initiated an audit of your purchase or importation of tangible personal property from a foreign country. Details of the transactions, as declared by you or your agents or broker at the U.S. Port of Entry, are identified below.

Entry number: XXXXXXXXXXXXX

Entry date: 8/5/2011

Total declared value: \$XXX,000.00

Broker name: DDD International, Inc.

Broker phone number: []

Description: Paintings, drawings (o/than of 4906) and pastels, executed entirely by hand, whether or not framed

Illinois use tax is imposed on the use, in Illinois, of tangible personal property purchased anywhere at retail. For more information, see PIO-36, Illinois Use Tax Brochure, on our website at tax.illinois.gov.

Department Ex. 2, p. 23.

19. In a letter dated February 11, 2014, Taxpayer responded to Piper's January 16, 2014 Audit letter. Department Ex. 2, p. 53 (copy of Taxpayer's February 11, 2014 letter to Department ROT Discovery section). Taxpayer's letter provided, in pertinent part, as follows:

In response to your letter dated 1/26/2014, ..., I would like to clarify for you the items your letter referenced:

- Entry number: XXXXXXXXXXXXX
Entry date: 8/5/2011, Broker DDD International

This item was a FAMOUS ARTIST painting, "AAA", 2008 which was shipped from the CCC Group in Chicago who originally took delivery of the picture, to the CITY B Art Museum via EEE Shipping Co. The pictures arrived at the CITY B Art Museum on September 23, 2011 and was exhibited there.

We hope this explanation was helpful in establishing that none of the above questioned objects qualify for the Illinois use tax.

Department Ex. 2, pp. 25-26.

20. In another letter from Taxpayer to Piper, dated March 12, 2014, Taxpayer provided information regarding the Painting. Department Ex. 2, p. 53 (copy of Taxpayer's March 12, 2014 letter). Taxpayer's letter provided, in pertinent part, as follows:

In response to your letter of February 27, 2014, I am enclosing additional documentation and explanations according to your entry numbers you inquired about.

- Entry number: XXXXXXXXXXXXX (8/5/2011)

This item is a FAMOUS ARTIST painting, "AAA", 2008 which was purchased from the BBB in CITY A and shipped to us via Chicago where it was delivered to the CCC Group storage facility and then released and sent to the CITY B Art Museum where it was on a long term loan.

I have enclosed the paperwork I have from DDD International, FFF Moving Systems Ltd., CCC Group, and lastly the Bill of Lading from EEE, Ltd who transported it along with another picture of ours to the

CITY B Museum where it was signed by ANN DOE the Registrar at the CITY B Art Museum.

I trust the submission of these documents will be the end of this inquiry.

Department Ex. 2, pp. 30-31.

21. When auditing Taxpayer's purchase of the Painting, Piper was also auditing two other Entry Summaries regarding other items of artwork consigned to Taxpayer, and shipped from outside the United States into Illinois. Department Ex. 2, pp. 30-31. Taxpayer arranged to have items referred to on such Entry Summaries stored at CCC, in Illinois, upon their entry into Illinois. *Id.*
22. One of the other items reported on the Entry Summaries involved Taxpayer's retail purchase of a sculpture from outside the United States. Department Ex. 2, pp. 30-31; Tr. pp. 88-89 (Piper). Regarding Piper's audit of that purchase, Taxpayer provided Piper with documentation showing that, after a period of storage at CCC, Taxpayer had arranged to have the sculpture transported to, and physically installed in or on, Taxpayer's CITY C, STATE 2 home and/or realty. Department Ex. 2, pp. 30-31; Tr. pp. 88-89 (Piper). Based on that evidence, Piper determined that Taxpayer had documented that the sculpture was being used solely outside Illinois, and therefore, was entitled to the exemption authorized by § 3-55(e) of the UTA. Tr. p. 89 (Piper).
23. At the conclusion of the audit, Piper determined that Taxpayer had not provided him with credible evidence showing that, after the Painting's display in STATE 1, Taxpayer had used the Painting solely outside of Illinois. Tr. pp. 74, 80 (testimony of Koss, Piper's supervisor), 89-90, 94-95 (Piper).

24. Based on the absence of evidence from Taxpayer showing that Taxpayer had used the Painting solely outside of Illinois after its display in STATE 1, Piper determined that Taxpayer had likely arranged to have the Painting returned to Illinois. Department Ex. 3 (copy of Piper’s typed notes); Tr. p. 94 (Piper). Piper’s determination was correct. Department Ex. 2, pp. 3-4, 19, 21.
25. Since Piper determined that Taxpayer had likely arranged to have the Painting returned to Illinois, he determined that Taxpayer had not used the Painting solely outside of Illinois after Taxpayer initially stored the Painting in Illinois. Department Ex. 3; Tr. pp. 103-04 (Piper). Based on the best available information, Piper determined that Taxpayer’s use of the Painting in Illinois was not entitled to the exemption authorized by § 3-55(e) of the UTA. Department Ex. 3; Tr. pp. 103-04 (Piper).
26. On June 10, 2014, the Department issued NTL number CNXX XXXX XXXX XXXX to Taxpayer, which assessed Illinois use tax, penalties, and interest regarding his purchase and use of the Painting in Illinois. Department Ex. 1 (copy of NTL). The amounts assessed in the NTL are as follows:

	Liability	Payments/Credits	Unpaid Balance	
Audit Tax		X,X00.00	0.00	X,X00.00
Audit Late Payment Penalty		XXX.00	0.00	XXX.00
Late Payment Penalty Increase		X,XXX.00	0.00	X,XXX.00
Late Filing Penalty Increase		XXX.00	0.00	XXX.00
Interest		XXX.XX	0.00	XXX.XX
Assessment Total		\$X,XXX.XX	0.00	\$X,XXX.XX

Department Ex. 1.

27. On or about July 14, 2014, Taxpayer arranged to have the Painting picked up from CCC and transported to his home in CITY C, STATE 2, where it was hung and

displayed. Department Ex. 2, pp. 4, 21 (copy of Bill of Lading prepared by FFF Packing and Transport, Inc. regarding transportation of the Painting from CCC to Taxpayer's CITY C, STATE 2 address).

28. On February 19, 2015, Taxpayer was granted leave to file a late protest regarding NTL number CNXX XXXX XXXX XXXX. Department Ex. 2, pp. 38-39 (copies of, respectively, Department's Chief Administrative Law Judge's letter granting Taxpayer a late discretionary hearing, and Taxpayer's written request to file a late protest, and to have a hearing, regarding the NTL).

Conclusions of Law

What is colloquially known as Illinois sales tax consists of two separate, complementary taxes, the retailers' occupation tax (ROT) and the use tax. Weber-Stephen Products, Inc. v. Department of Revenue, 324 Ill. App. 3d 893, 898, 756 N.E.2d 321, 324 (1st Dist. 2001) (*quoting* Brown v. Zehnder, 295 Ill. App. 3d 1031, 1034, 693 N.E.2d 1255, 1258 (1998)). The retailers' occupation tax act (ROTA) imposes an occupational tax upon retailers, who are persons engaged in the business, in Illinois, of selling tangible personal property at retail. 35 ILCS 120/1-2; Weber-Stephen, 324 Ill. App. 3d at 898, 756 N.E.2d at 324. For convenience, in this recommendation, I will substitute the word "goods" for the statutory phrase "tangible personal property." Under the ROTA, Illinois retailers are required to remit to the State a percentage of the gross receipts of every retail sale. 35 ILCS 120/2; Weber-Stephen, 324 Ill. App. 3d at 898, 756 N.E.2d at 324.

The Use Tax Act (UTA) was enacted as a complement to the ROTA. Turner v. Wright, 11 Ill. 2d 161, 170, 142 N.E.2d 84, 89 (1957). The UTA imposes a tax "upon the privilege of using in this State tangible personal property purchased at retail from a

retailer” 35 ILCS 105/3. Unless otherwise exempted, use tax applies to the use of “any kind of tangible personal property that is purchased anywhere at retail from a retailer, as ‘retailer’ is defined in the Use Tax Act.” 86 Ill. Admin. Code § 150.101(a). The UTA applies to goods purchased from a retailer located outside of the United States, and whose owner arranges to have such goods imported into the United States, for use in Illinois. 35 ILCS 105/10; Caterpillar Tractor Co. v. Department of Revenue, 47 Ill. 2d 278, 282, 265 N.E.2d 675, 678 (1970) (“We see no reason to assume that the General Assembly did not intend that the use tax should serve the same purpose with respect to purchases of imported articles as it was intended to perform toward articles purchased out of State”).

The Illinois General Assembly incorporated into the UTA certain provisions of the complementary ROTA. 35 ILCS 105/12. Among them is § 5 of the ROTA, which provides that, in the event a required return is not filed, the Department shall determine the amount of tax due using its best judgment and information. 35 ILCS 120/5. It also provides that, under such circumstances, the Department’s determination of tax due constitutes prima facie proof that tax is due in the amount determined by the Department. 35 ILCS 120/5. In this case, the Department established its prima facie case when it introduced Department Exhibit 1, consisting of a copy of the NTL, under the certificate of the Director. Department Ex. 1; 35 ILCS 105/12; 35 ILCS 120/5. That exhibit, without more, constitutes prima facie proof that Taxpayer owes Illinois use tax in the amount determined by the Department. 35 ILCS 105/12; 35 ILCS 120/5; Copilevitz v. Department of Revenue, 41 Ill. 2d 154, 156, 242 N.E.2d 205, 206-07 (1968).

The presumption of correctness that attaches to the Department's prima facie case extends to all elements of taxability. Branson v. Department of Revenue, 68 Ill. 2d 247, 258, 659 N.E.2d 961, 966-67 (1995) (Department's introduction of Notice of Penalty Liability establishes prima facie proof that taxpayer acted with the required mental state); Soho Club, Inc. v. Department of Revenue, 269 Ill. App. 3d 220, 232, 645 N.E.2d 1060, 1068 (1st Dist. 1995) (Department's introduction of Notice of Tax Liability establishes prima facie proof that taxpayer is engaged in the occupation that is subject to taxation). Thus, in this case, the Department's NTL reflects its determinations, among other things, that: BBB was a retailer; Taxpayer's purchase of the Painting was at retail; Taxpayer purchased the Painting for use in Illinois, the state in which he resided; and that Taxpayer had not previously filed a return to report his purchase of the Painting, and its delivery into Illinois. *See* Department Ex. 1; 35 ILCS 105/12; 35 ILCS 120/5.

The Department's prima facie case is overcome, and the burden shifts 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 were not correct. Copilevitz, 41 Ill. 2d at 157-58, 242 N.E.2d at 207; Balla v. Department of Revenue, 96 Ill. App. 3d 293, 296, 421 N.E.2d 236, 238 (1st Dist. 1981).

Issues and Arguments:

The first issue is whether Taxpayer's arrangement to store the Painting at CCC constitutes a use of the Painting in Illinois. Tr. p. 67 (BUYER). At hearing, Taxpayer asserted that he never intended to use the Painting in Illinois, and that he had arranged to have it exhibited at the CITY B Art Museum even before he purchased it. Tr. p. 12

(opening statement). He also contended that the Painting was never in his possession or use in Illinois. Tr. p. 15. Taxpayer argues that the term “use” should be construed using the commonly understood definition of the term, giving as examples, driving a car, washing dishes in a dishwasher, or hanging a painting that is in one’s possession. *Id.* He reasoned that his storage of the Painting at CCC was not a use of it, as it would have been if the Painting were hanging on his wall or physically present on his property. Tr. pp. 16-17, 67 (“A painting isn’t in use if it’s in someone else’s storage.”).

The second issue involves § 3-55(e) of the UTA, which is commonly referred to as the temporary storage exemption. Taxpayer first contends that his storage of the Painting is exempt under § 3-55(e). Tr. pp. 67-68. Alternatively, if his arrangement to store the Painting at CCC is not covered by that statutory exemption, Taxpayer reasons that that statutory exemption must be found to be void for vagueness. I address each issue in turn.

Analysis

The underlying facts here are not in dispute. Taxpayer purchased the Painting from a retailer who was located outside the United States, and then arranged to have the Painting imported into the United States, via Illinois. Department Ex. 2, pp. 3, 12; Tr. pp. 25-28 (BUYER). After the Painting was imported into the United States, Taxpayer arranged to have it delivered to CCC, a business with which he dealt, and which is located in Illinois, to have it stored there. Department Ex. 2, pp. 3, 11-15; Tr. pp. 27-28 (BUYER). CCC stored the Painting for Taxpayer from August 5, 2011 through September 9, 2011. Department Ex. 2, pp. 3, 11-15, 17. On September 9, 2011, another company picked up the Painting from CCC, and then transported it to CITY B, STATE 1,

where Taxpayer had arranged that it be displayed at an art museum for a long term loan. Department Ex. 2, pp. 3-4, 17, 19, 21. The parties do not dispute that the Painting was accepted by the museum on September 23, 2011 and remained physically present in STATE 1 from that date through May 23, 2013. Department Ex. 2, pp. 3-4, 17, 19, 21. In late May 2013, Taxpayer arranged to have the Painting returned to CCC in Illinois, where he arranged to have CCC again store it for him for approximately another fourteen months. Department Ex. 2, pp. 3-4, 19, 21. After that second period of Illinois storage, Taxpayer arranged to have the Painting again picked up from CCC, and transported to and hung at his house in STATE 2. Department Ex. 2, pp. 4, 21. The parties do not dispute these basic facts, they dispute the legal effect of them.

Issue 1

The first issue is whether Taxpayer's storage of the Painting in CCC's Illinois storage facility constitutes a use of the Painting in Illinois, for use tax purposes. Put more plainly, is storage use? Since the evidence and facts are not in dispute, this is a mixed question of law and fact. Carpetland U.S.A. v. Ill. Dept. of Emp. Sec., 201 Ill. 2d 351, 776 N.E.2d 166 (2002).

The UTA defines "use" as follows:

"Use" means 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 a use for which it was purchased, and does not include the use of such property by its owner for demonstration purposes: 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. "Use" does not mean the demonstration use or interim use of tangible personal property by a retailer before he sells that tangible personal

property. For watercraft or aircraft, if the period of demonstration use or interim use by the retailer exceeds 18 months, the retailer shall pay on the retailers' original cost price the tax imposed by this Act, and no credit for that tax is permitted if the watercraft or aircraft is subsequently sold by the retailer. "Use" does not mean the physical incorporation of tangible personal property, to the extent not first subjected to a use for which it was purchased, as an ingredient or constituent, into other tangible personal property (a) which is sold in the regular course of business or (b) which the person incorporating such ingredient or constituent therein has undertaken at the time of such purchase to cause to be transported in interstate commerce to destinations outside the State of Illinois: 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.

35 ILCS 105/2.

One can see that all of the express exceptions from the statutory definition of use involve rights or powers exercised by specifically identified classes of persons, more specifically, by retailers, resellers, and manufacturers. *Id.*; Electric Energy Inc. v. Hamer, 373 Ill. App. 3d 733, 869 N.E.2d 153 (5th Dist. 2007) (company engaged in business of producing electricity was not a manufacturer of fly ash remaining after it purchased and consumed coal by burning, and therefore was not entitled to a refund of a percentage of the use tax it paid when purchasing such coal). In this case, Taxpayer makes no claim that he was a registered retailer or reseller of goods like the Painting. Thus, none of the conclusions made in this recommendation are intended to refer to the storage of goods purchased outside of Illinois by retailers, resellers, or manufacturers, and held for either resale or production, in the regular course of their respective businesses in Illinois.

When one eliminates the exceptions from the statutory definition, the Illinois legislature has 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" 35 ILCS

105/2. William O'Donell, Inc. v. Bowfund Corp., 114 Ill. App. 2d 107, 110, 252 N.E.2d 53, 55 (1st Dist. 1969) (“The use tax is not a tax which arises out of the use or operation of tangible personal property, but rather it is a tax placed upon the exercise of powers or rights incident to ownership.”).

“The legislature has the power to make any reasonable definition of the terms in a statute, and such definitions, for the purpose of the act, will be sustained.” Modern Dairy Co. v. Department of Revenue, 413 Ill. 55, 66, 108 N.E.2d 8, 14 (1952). Moreover, the legislature may broaden or narrow the meaning a term might otherwise have. People v. Johnson, 231 Ill. App. 3d 412, 595 N.E.2d 1381 (2d Dist. 1992). In this case, the UTA’s statutory definition of use was intended to complement the ROTA’s definition of “sale at retail,” which includes the phrase “use or consumption” Beatrice Foods v. Lyons, 12 Ill. 2d 274, 277, 146 N.E.2d 68, 69-70 (1957). Since Illinois courts have long held that the legislature’s use of the words “use or consumption,” in the ROTA’s definition of sale at retail, was intended to be broadly understood and applied (*id.*), the UTA’s complementary definition of “use” is similarly intended to have a broad meaning and application.

When applying the statutory definition of use to the facts of this case, moreover, I am guided not only by the plain text of UTA § 2, but also by other, related, sections of the UTA. Antunes v. Sookhakitch, 146 Ill. 2d 477, 484, 588 N.E.2d 1111, 1114 (1982) (“To ascertain the legislative intent, the court must look first to the language of the statute, examining the language of the statute as a whole, and considering each part or section in connection with every other part or section.”). In particular, § 4 of the UTA provides that: “[e]vidence that tangible personal property was sold by any person for

delivery to a person residing or engaged in business in this State shall be prima facie evidence that such tangible personal property was sold for use in this State.” 35 ILCS 105/4. The plain text of that provision reflects the Illinois General Assembly’s intent that a resident’s (or a person who is engaged in business in Illinois) mere arrangement to have goods delivered into Illinois for the owner/purchaser, would evince the owner/purchaser’s exercise of rights and powers over such goods sufficient to warrant the imposition of tax. *See Bowfund Corp.*, 114 Ill. App. 2d at 110, 252 N.E.2d at 56 (“Plaintiff [O’Donell, a lessor] became obligated to pay the use tax as soon as it brought the equipment into Illinois and delivered it to the defendant [Bowfund, a lessee] pursuant to the agreement.”).

Based on the plain text of UTA §§ 2 and 4, and contrary to Taxpayer’s reasoning at hearing, Illinois courts have made clear that the UTA’s statutory definition of use is broader than the commonly understood meaning of the noun form of the same word. *Bowfund Corp.*, 114 Ill. App. 2d at 110, 252 N.E.2d at 55. The statutory definition, moreover, expressly provides that “use means the exercise *by any person* of any right or power over tangible personal property incident to the ownership of that property” 35 ILCS 105/2 (emphasis added). The words “by any person” mean that the person exercising rights or powers over the goods need not be the owner, it could also be someone in Illinois who is acting on the owner’s behalf, or with the owner’s permission. So, in *Miller Brewing Co. v. Korshak*, 35 Ill. 2d 86, 90-91, 219 N.E.2d 494, 496 (1966), the Illinois Supreme Court held that the Miller Brewing Co., which had arranged to have signs manufactured outside Illinois, and then shipped into Illinois to be displayed by liquor distributors, in Illinois, to help sell Miller’s products, had exercised rights and

powers over such signs, in Illinois, incident to its ownership of them.

Based on the UTA's statutory definition of use, Taxpayer's argument that he did not use the Painting in Illinois when he arranged to have it stored at CCC's business, must be rejected. Taxpayer reasons that he did not use the Painting in Illinois since he — himself — did not store the Painting, or physically possess it, at his Illinois residence. Tr. pp. 16-17, 67. But the UTA does not make taxation dependent upon whether the purchaser/owner is the person having actual physical possession, in Illinois, of goods purchased outside Illinois. *E.g.*, Philco Corp. v. Department of Revenue, 40 Ill. 2d 312, 239 N.E.2d 805 (1968) (“the power to allow property one owns to be used for one's benefit is the exercise of an incident of ownership under the [UTA]”) (internal quotation marks omitted); *accord* Miller Brewing Co., 35 Ill. 2d at 90-91, 219 N.E.2d at 496.

Further, and as this case reflects, a purchaser/owner's arrangement to store valuable artwork, or collectible goods in general, is one of the rights and powers that owners commonly exercise over such goods. Taxpayer arranged to have all of the goods regarding which he was being audited taken to and stored at CCC, after he had arranged to have such goods imported into the United States, through Illinois. Department Ex. 2, pp. 3-4, 30-31; Tr. pp. 16-17. Taxpayer, moreover, testified that CCC was one of the two businesses located in Chicago which provided storage and shipping services regarding art work, like the Painting. Tr. pp. 16-17 (BUYER). What I inferred from Taxpayer's testimony on this point was that he was expressing an opinion of the quality of, and the costs related to, the services those businesses provided. And one of the services that CCC repeatedly provided to Taxpayer, in Illinois, was the storage of Taxpayer's artwork, including the Painting.

Taxpayer's testimony on this point reminds one that "[t]he noun 'storage' is specifically defined as meaning 'the act of depositing in a store or warehouse for safekeeping' and, consistent therewith, the verb 'store' is defined as meaning 'to deposit in a store or warehouse for safekeeping.'" United Air Lines, Inc. v. Mahin, 49 Ill. 2d 45, 52, 273 N.E.2d 585, 588 (1971) (internal quotation marks original), *vacated and remanded on other grounds*, 410 U.S. 623, 93 S.Ct. 1186, 35 L.Ed.2d 545 (1973),² *judgment affirmed following remand*, 54 Ill. 2d 431, 298 N.E.2d 161 (1973). The United Air Lines decision is significant to the first issue in this case for two reasons. First, the Court acknowledged that the commonly understood definition of the word storage implicitly connotes safekeeping.

Second, and more importantly, the United Air Lines decision significantly affects my conclusions in this case because, in that case, the Court held that United's act of storing fuel, in Illinois, which it purchased at retail outside Illinois, was, itself, a taxable use of such fuel. United Air Lines, Inc., 49 Ill. 2d at 55-56, 273 N.E.2d at 590 ("Such storage, under the plain words of the statute, does not qualify under the temporary storage

² The United Air Lines case arose after the Department changed its interpretation of the use tax liability of carriers who purchased fuel outside of Illinois, had it delivered into and stored in Illinois, and then loaded onto aircraft and/or vehicles the carriers used in interstate and international commerce. United Air Lines, Inc., 410 U.S. at 626, 93 S.Ct. at 1189, 35 L.Ed.2d 545. In essence, the Department's prior interpretation, referred to as the "burn off rule," was that such taxpayers were liable only for the amount of fuel actually consumed, in Illinois, in such vehicles. This interpretation persisted from 1955 through 1963. *Id.* In 1963, the Department notified the public that it had changed its interpretation, and that such taxpayers would, in the future, owe use tax on all fuel purchased outside Illinois, delivered to and stored in Illinois, and loaded onto such taxpayers' vehicles, in Illinois. *Id.*

The United States Supreme Court affirmed the Illinois court's holding that the Department's new interpretation did not violate the Commerce Clause of the United States Constitution, but vacated and remanded the case because the Illinois Supreme Court had split, three to two, on the question of whether the Department's prior interpretation of the UTA, the "burn-off rule," violated the Commerce Clause of the United States Constitution. United Air Lines, Inc., 410 U.S. at 624, 632, 93 S.Ct. at 1188, 1192, 35 L.Ed.2d 545.

exemption and, as the authorities already discussed reveal, *either the storage itself or the withdrawal therefrom are uses which may be taxed without offending the commerce clause of the Federal constitution.*”) (emphasis added). The United States Supreme Court, moreover, upheld the Illinois Supreme Court’s holding that United’s storage of fuel in Illinois constituted a use of that fuel in Illinois, under Illinois’ use tax statute. United Air Lines, Inc., 410 U.S. at 626, 93 S.Ct. at 1189, 35 L.Ed.2d 545 (“Since this general use tax, apart from its exceptions, reached all tangible personal property, *it applied by its terms to fuel stored for use in vehicles.*”) (emphasis added); *id.* at 628, 93 S.Ct. at 1190 (“the Supreme Court of Illinois concluded that the Illinois use tax applied to storage by United before loading and that this application was constitutional.”); *id.* at 629, 93 S.Ct. at 1190 (“As in Edelman, we see no reason to ignore, or to disagree with, the state court’s determination that the taxable event is storage rather than consumption.”).

Here, Taxpayer, an Illinois resident, arranged to have the Painting he purchased at retail outside Illinois, delivered into Illinois and then stored, in Illinois, at a business with which he dealt, and which he trusted to safely keep the Painting. Department Ex. 2, pp. 3-4, 15, 19, 21; Tr. pp. 64-65 (BUYER). The evidence reflects that Taxpayer purposefully chose CCC as a place to safeguard his newly purchased, and valuable, Painting, until he was ready to exercise — or ready to direct that others exercise — additional rights and powers over it. Department Ex. 2, pp. 3-4; Tr. pp. 64-65 (BUYER). By arranging to have others deliver the Painting into Illinois, and to have others store and safeguard the Painting for him, in Illinois, Taxpayer exercised rights and powers over the Painting, in Illinois, which were incidental to his ownership of it. When applying Illinois law to the undisputed facts here, I conclude that Taxpayer used the Painting in Illinois, as use is

defined in § 2 of the UTA. 35 ILCS 105/2; United Air Lines, Inc., 49 Ill. 2d at 55-56, 273 N.E.2d at 590; *id.*, 410 U.S. at 626, 629, 93 S.Ct. at 1189-90, 35 L.Ed.2d 545.

Issue 2

The second issue is whether Taxpayer's use of the Painting in Illinois was an exercise of rights and powers that is exempt pursuant to § 3-55(e) of the UTA. Section 3-55(e) of the UTA exempts a purchaser/owner's temporary storage, in Illinois, of goods purchased at retail outside of Illinois, which are delivered into Illinois, under certain circumstances. 35 ILCS 105/3-55(e). Since, generally, an owner's storage, in Illinois, of goods purchased at retail outside of Illinois, is an exercise of rights and powers which is subject to use tax (United Air Lines, Inc., *supra*), the statutory exemption for temporary storage means that the legislature intended this particular type of storage to remain tax free. Sookhakitch, 146 Ill. 2d at 484, 588 N.E.2d at 1114 ("In construing a statute, the court must give effect to the intent of the legislature.").

Section 3-55(e) of the UTA provides as follows:

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).

A statute which exempts property from taxation should be strictly construed in

favor of taxation. Telco Leasing, Inc. v. Allphin, 63 Ill. 2d 305, 310, 347 N.E.2d 729, 731 (1976). A party claiming an exemption has the burden to prove clearly and conclusively that he is entitled to the exemption, and every presumption is against the intention of the State to exempt property from taxation. *Id.* at 310, 347 N.E.2d at 731-32.

The condition repeatedly expressed within the plain text of the temporary storage exemption is that, after property that has been acquired outside Illinois and brought into Illinois and stored here temporarily, the property either:

- is used solely outside Illinois or
- is physically attached to or incorporated into other tangible personal property that is used solely outside Illinois, or
- is altered by converting, fabricating, manufacturing, printing, processing, or shaping, and, as altered, is used solely outside Illinois.

35 ILCS 105/3-55(e). If a taxpayer presents clear and convincing evidence showing that any of the three alternatives apply, it will have shown that it is entitled to the statutory exemption for its exercise of rights and powers over the goods during the period of temporary storage in Illinois.

Taxpayer argues that the evidence showing that he shipped and loaned the Painting to the CITY B Art Museum constitutes clear evidence that the Painting was used solely outside Illinois. Tr. p. 11 (BUYER). He also testified that he arranged to have the Painting shipped to and loaned to the CITY B Art Museum even before he purchased it in London. *Id.*, p. 12. Based on that fact, Taxpayer argued that he never intended to first use the Painting in Illinois. *Id.* (“So there was never a first intent to use the goods within the State of Illinois”).

Notwithstanding Taxpayer’s arguments, however, there is no dispute that, after Taxpayer arranged to have the Painting removed from its initial storage in Illinois, and

loaned to the CITY B Art Museum for about 20 months, Taxpayer arranged to have the Painting returned to Illinois, where he again arranged to have CCC store and safeguard the Painting for him, for another fourteen months. Department Ex. 2, pp. 3-4, 19, 21. By doing so, Taxpayer again exercised rights and powers over the Painting, in Illinois, incident to his ownership of it. In short, Taxpayer once again used the Painting in Illinois.

Based on these undisputed facts, Taxpayer has not presented — and cannot present — clear and convincing evidence to show that, after the period of initial temporary storage at CCC, the Painting was used solely outside Illinois. Instead, the evidence clearly and convincingly supports the Department’s determination that Taxpayer was not entitled to the temporary storage exemption regarding his use of the Painting in Illinois. Department Ex. 1; Department Ex. 2, pp. 3-4, 19, 21; 35 ILCS 105/3-55(e).

Taxpayer’s Constitutional Arguments:

Taxpayer offers different arguments that the Department’s assessment of use tax here, and that UTA § 3-55(e), itself, is unconstitutional. Tr. pp. 8-18. Before addressing any such arguments, however, I must first acknowledge that the Department, as a state agency, is not empowered to declare a legislative act unconstitutional (*see* 20 ILCS 2505/39b (Powers of the Department)), as is a court, pursuant to Article VI of the Illinois Constitution. *See* Ill. Const., art. VI, § 1; Texaco-Cities Service Pipeline Co. v. McGaw, 182 Ill. 2d 262, 278, 695 N.E.2d 481, 489 (1998). Second, all statutes are presumed to be constitutional, and the party challenging the constitutionality of a statute bears the burden of rebutting this presumption and clearly establishing a constitutional violation. In re R.C., 195 Ill. 2d 291, 296, 745 N.E.2d 1233, 1237 (2001). Finally, and for the reasons

expressed below, the undisputed facts here do not support any of Taxpayer's constitutional arguments.

I first address Taxpayer's argument that Illinois lacks nexus with his purchase of the Painting. Tr. pp. 13-15. Regarding nexus, Taxpayer first argues that the intent underlying the UTA was to reduce the avoidance of taxation by Illinois purchasers who purchased goods outside Illinois for use in Illinois. Taxpayer reasons that BBB had no Illinois operations, and no nexus with Illinois, and that he could not have purchased the Painting from any retailer in Illinois. I understand Taxpayer's argument to be that, since the goods he purchased here could not have been obtained from any Illinois retailer, he has not avoided any complementary ROTA that might have been paid by an Illinois retailer from his purchase of the Painting. Taxpayer cites Quill Corp. v. North Dakota, 504 U.S. 298, 306, 112 S.Ct. 1904, 1909, 119 L.Ed.2d 91 (1992) for the proposition that a taxing state has to have nexus with the seller before it could impose tax on the transaction. Tr. p. 14.

But the Department did not assess ROT against BBB; it assessed use tax against Taxpayer. "The Due Process Clause 'requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax,' " Quill Corp. v. North Dakota, 504 U.S. 298, 306, 112 S.Ct. 1904, 1909, 119 L.Ed.2d 91 (1992). Here, Taxpayer is resident of Illinois, he purchased the Painting at retail outside Illinois, and he exercised rights and privileges over that Painting by arranging to have others import the Painting into the United States, through Illinois, and to take delivery of the Painting in Illinois. Department Ex. 2, pp. 3-4, 12-15. Under the plain text of UTA § 4,

those undisputed facts provide prima facie evidence that Taxpayer purchased the Painting for use in Illinois. 35 ILCS 105/2, 4.

In addition, and after Taxpayer arranged to have others take delivery of the Painting in Illinois, his state of residence, it is also undisputed that Taxpayer arranged to have others take the Painting to CCC, in Illinois, and twice stored there, until he arranged to have others exercise other rights and powers over the Painting, incident to his ownership of it. These undisputed facts demonstrate not only a minimum connection that Illinois shares with the person and the transaction being taxed, for due process purposes. They also demonstrate that Illinois had substantial nexus with Taxpayer, with the transaction sought to be taxed, and with goods which were physically present in Illinois.³ Quill Corp., 504 U.S. at 313, 112 S.Ct. at 1913-14, 119 L.Ed.2d 91; United Air Lines, Inc. v. Mahin, 49 Ill. 2d 45, 52, 273 N.E.2d 585, 588 (1971) (internal quotation marks original), *vacated and remanded on other grounds*, 410 U.S. 623, 93 S.Ct. 1186, 35 L.Ed.2d 545 (1973), *judgment affirmed following remand*, 54 Ill. 2d 431, 298 N.E.2d 161 (1973).

Next, Taxpayer cites to a publication titled, Five Common Questions on US sales and Use Taxes, a partial copy of which is found at page 52 of Department Exhibit 2. Tr. pp. 11-12; Department Ex. 2, p. 52. Taxpayer argues that that publication shows that other states exempt from their respective use tax acts an owner's first use of goods outside the taxing state, if they are used outside the state for a certain period of time. Tr.

³ Although Taxpayer cited Quill at hearing (Tr. p. 14), he never directly presented a Commerce Clause challenge to the NTL. Even if he had, however, both the United States Supreme Court and the Illinois Supreme Court agree that "[i]t is not the purpose of the Commerce Clause to protect state residents from their own state taxes." Geja's Cafe, 153 Ill. 2d at 256, 606 N.E.2d at 1219 (*quoting* Goldberg v. Sweet, 488 U.S. 252, 266, 109 S.Ct. 582, 591, 102 L.Ed. 2d 607, 620 (1989)).

p. 13. Taxpayer reasons that the absence of any such time period within UTA § 3-55(e) for use outside Illinois makes it unenforceable, because, “[w]hen a law does not specifically enumerate the practices that are either required or prohibited, it is unduly vague.” *Id.*

But the article Taxpayer relies on is not Illinois law; the UTA is. *Compare* Department Ex. 2, p. 52 *with* Illinois Const. 1970, Art. IX, § 1 (“The General Assembly has the exclusive power to raise revenue by law except as limited or otherwise provided in this Constitution. The power of taxation shall not be surrendered, suspended, or contracted away.”); 35 ILCS 105/1 *et seq.* The UTA, moreover, *does* provide notice to all interested persons that use tax would not apply to goods used in Illinois by certain persons, based on their first use of such goods outside Illinois. The first such provision is found within UTA § 3-55(a), and the second is found at § 3-70. 35 ILCS 105/3-55(a); 35 ILS 105/3-70). Section 3-55(a) 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:

(a) The use, in this State, of tangible personal property acquired outside this State by a nonresident individual and brought into this State by the individual for his or her own use while temporarily within this State or while passing through this State.

35 ILCS 105/3-55(a).

Section 3-70 provides, in pertinent part:

Sec. 3-70. Property acquired by nonresident. The tax imposed by this Act does not apply to the use, in this State, of tangible personal property that is acquired outside this State by a nonresident individual who then brings the property to this State for use here and who has

used the property outside this State for at least 3 months before bringing the property to this State.

Where a business that is not operated in Illinois, but is operated in another State, is moved to Illinois or opens an office, plant, or other business facility in Illinois, that business shall not be taxed on its use, in Illinois, of used tangible personal property, other than items of tangible personal property that must be titled or registered with the State of Illinois or whose registration with the United States Government must be filed with the State of Illinois, that the business bought outside Illinois and used outside Illinois in the operation of the business for at least 3 months before moving the used property to Illinois for use in this State.

35 ILCS 105/3-70.

While Taxpayer is certainly correct that the text of UTA § 3-55(e) does not contain any mention of exemptions for owners of goods first used outside Illinois, that is because such exemptions are found elsewhere in the UTA, and have nothing to do with temporary storage. Sections 3-55(a) and 3-70, moreover, both provide either exemptions or exceptions to use tax to nonresidents of Illinois, regarding their use of goods acquired outside Illinois. Those provisions offer no protection to Taxpayer, here, since he is an Illinois resident. Department Ex. 2, p. 3.

Further, the evidence does not support Taxpayer's argument that his first use of the Painting occurred outside Illinois, when he loaned it to the CITY B Art Museum. The documentary evidence offered in this matter shows that, before Taxpayer arranged to have the Painting shipped to STATE 1, Taxpayer had already exercised rights and powers over the Painting in Illinois, by arranging to have it delivered here, and then again, when he arranged to have others take the Painting to CCC, so CCC could keep the Painting safely stored for him. Department Ex. 2, pp. 3-4, 12-15. For use tax purposes, Taxpayer did not first use the Painting in STATE 1. 35 ILCS 105/2; United Air Lines, Inc., 49 Ill.

2d at 55-56, 273 N.E.2d at 590; *id.*, 410 U.S. at 626, 629, 93 S.Ct. at 1189-90, 35 L.Ed.2d 545.

Moving now to Taxpayer's primary constitutional argument, he asserts that UTA § 3-55(e) is void for vagueness. Taxpayer's vagueness challenge is based on the contention that the section's use of the phrase "used solely outside [Illinois]" does not provide adequate notice of the type of use intended to be exempt. *See* Tr. pp. 76-77 (Taxpayer asking Koss, "I'm asking you if the paragraph that specifically allows the exemption for the use solely outside specifies how long that use has to be for?"), 103 (Taxpayer asking Piper, "Can you show me or read to me ... where it gives a precise, specific definition of solely or temporarily in this paragraph (e)?").

Regarding this challenge, and during his closing argument, Taxpayer referred to the case of Coates v. City of Cincinnati, 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971). Tr. pp. 129, 132. That case involved an ordinance which made it a criminal offense for 'three or more persons to assemble *** on any of the sidewalks *** and there conduct themselves in a manner annoying to persons passing by ***.' *Id.* at 611-12, 91 S.Ct. at 1687. In another United States Supreme Court case, Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222 (1972), the Court noted that, "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."

In contrast to the first amendment and liberty interests affected by the criminal

statutes at issue in Coates and Grayned, UTA § 3-55(e) prohibits no conduct whatever; just as UTA § 3's imposition of tax "upon the privilege of using in this State tangible personal property purchased at retail from a retailer ..." does not prohibit any person from purchasing goods at retail for use in Illinois. Nor does UTA § 3-55(e) create any civil penalty. Instead, it sets forth, in plain language, the nature and extent of a particular exemption from Illinois' broad based use tax, for a particular type of storage, in Illinois. 35 ILCS 105/3-55(e).

Taxpayer has cited no case, decided by any court, either federal or state, which has held that a particular exemption provision within a state's non-property tax statute, like UTA § 3-55(e) here, violated the Due Process Clause of the United States Constitution, or of any state constitution, because it was vague. My own search revealed no such authority. Moreover, at least one Illinois court has held that a void for vagueness challenge does not apply to a non-penal statute. Department of Corrections v. Adams, 278 Ill. App. 3d 803, 810, 663 N.E.2d 1145, 1150 (4th Dist. 1996) ("... as we earlier held, section 3-7-6 [of the Unified Code of Corrections (Code) (730 ILCS 5/3-7-6 (West 1992))] is not a penal or criminal statute. Thus, the 'void-for-vagueness' analysis that applies to penal statutes does not apply in this case.").

But if Taxpayer's void for vagueness challenge *is* one that is properly directed to the exemption created by UTA § 3-55(e), the Department first responds, correctly, in my opinion, that if UTA § 3-55(e) were to be found void for some reason, all that would do is eliminate the very exemption Taxpayer claims the benefit of. Tr. pp. 123-24. The legislature made the UTA's provisions severable (35 ILCS 105/18), so were a court to find a particular exemption section void, it would not mean that the UTA, as a whole, is

unconstitutional. Springfield Rare Coin Galleries, Inc. v. Johnson, 115 Ill. 2d 221, 237-38, 503 N.E.2d 300, 307-08 (1986) (part of amendment to ROTA, which excluded from newly added exemption for sales of coins, sales of coins from the Republic of South Africa, was found unconstitutional yet severable from the broader, and otherwise constitutional, exemption for sales of coins for investment or collection). The UTA itself, moreover, has been upheld in the face of vagueness challenges before. Mobil Oil Corp. v. Johnson, 93 Ill. 2d 126, 136, 442 N.E.2d 846, 851 (1982); Turner v. Wright, 11 Ill. 2d 161, 173, 142 N.E.2d 84, 91 (1957).

And while I could not find any federal or Illinois decision involving a vagueness challenge to a state tax exemption provision, I note that the Illinois Supreme Court has addressed a vagueness challenge to an Illinois non-criminal statute, in Bartlow v. Costigan, 2014 IL 115152, 13 N.E.3d 1216 (2014). That case involved a challenge to an exemption section of the Employee Classification Act (EAC), 820 ILCS 185/1 *et seq.* (2010). The EAC is directed at the classification of employees in Illinois's construction industry, and the Illinois Department of Labor (IDOL) is responsible for enforcing its provisions. Costigan, 2014 IL 115152 at ¶¶ 1, 3; 13 N.E.3d at 1218. Regarding the vagueness challenge, the Court wrote:

¶ 40 A vagueness challenge arises from the notice requirement of the due process clause. [all citations omitted] As this court recognizes, “[a] statute can be impermissibly vague for either of two independent reasons: (1) if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits, or (2) if it authorizes or even encourages arbitrary and discriminatory enforcement.”

¶ 41 Although vagueness claims that implicate the First Amendment require a greater degree of specificity, “ ‘perfect clarity and precise guidance have never been required’ ” of statutes challenged as unconstitutionally vague. (Internal quotation marks

omitted.) The test for determining vagueness varies with the nature and context of the legislative enactment, but the Constitution requires more specificity in statutes with criminal penalties, particularly statutes that lack a *scienter* requirement. In contrast, statutes with civil penalties that regulate economic matters are subject to a “less strict” vagueness test because they typically involve more narrow subject matter, and business interests are better placed to address, and possibly shape, regulations that will impact them.

¶ 42 When reviewing a statute for vagueness, we apply familiar rules of statutory construction to examine the plain statutory language in light of its common understanding and practice. If the plain language of the statute sets forth clearly perceived boundaries, the vagueness challenge fails, and our inquiry ends.

Costigan, 2014 IL 115152, at ¶¶ 40-42, 13 N.E.3d at 1224-25.

When considering Taxpayer’s facial challenge to UTA § 3-55(e) here, I find nothing vague about the legislature’s repeated use of the phrase “used solely outside this State” in UTA § 3-55(e). As an adverb, solely means:

1. as the only one or ones: *solely responsible*.
2. exclusively or only: *plants found solely in the tropics*.
3. merely: *She wanted solely to get out of the house for a while*.

Dictionary.com Unabridged Based on the Random House Dictionary, © Random House, Inc. 2017.

When asked at hearing, both Piper and Koss each testified that he understood the phrase to mean used only, or permanently, outside Illinois after the period of temporary storage (Tr. pp. 75-80 (Koss)), or never to be returned to Illinois by the owner. Tr. p. 104 (Piper). Their commonsense understanding of the plain words used in § 3-55(e) correspond nicely with the second definition quoted above. The words have a commonly understood meaning, which is capable of objective understanding by persons affected by the statute. Additionally, and for decades, different Illinois courts have addressed the plain text of the exemption currently codified at UTA § 3-55(e), without ever perceiving

vagueness in the challenged phrase. United Air Lines, Inc., 49 Ill. 2d at 55-56, 273 N.E.2d at 590; Nutrition Headquarters Inc. v. Department of Revenue, 123 Ill. App. 3d 997, 463 N.E.2d 926 (5th Dist. 1984); Time Inc. v. Department of Revenue, 11 Ill. App. 3d 282, 284, 295 N.E.2d 529, 531 (1st Dist. 1973).

The plain text of the UTA sets forth boundaries which may be perceived by an objective reader who is making a good faith attempt to comply with the UTA's provisions. 35 ILCS 105/3-55(e); Costigan, 2014 IL 115152, at ¶¶ 40-42, 13 N.E.3d at 1225. Taxpayer, moreover, has never articulated any reason why I, or the Director, should consider his repeated exercise of rights and powers over the Painting, in Illinois, incident to his ownership of it, to be activities which the Due Process Clauses of the 5th or 14th amendments prohibit Illinois from taxing. *See* United Air Lines, Inc., 49 Ill. 2d at 55-56, 273 N.E.2d at 590; *id.*, 410 U.S. at 626, 629, 93 S.Ct. at 1189-90, 35 L.Ed.2d 545; Kromeich v. City of Chicago, 258 Ill. App. 3d 606, 609, 630 N.E.2d 913, 915 (1st Dist. 1994) ("A law is not vague if it does not reach constitutionally protected conduct and is reasonably clear in its application to the complainant."). Given the Illinois and United States Supreme Courts' decisions in United Air Lines, Taxpayer cannot reasonably claim that, for Due Process purposes, he and other affected persons have been given no notice that a purchaser/owner's storage, in Illinois, of goods purchased at retail outside Illinois, was subject to Illinois use tax. 35 ILCS 105/2; United Air Lines, Inc., 49 Ill. 2d at 55-56, 273 N.E.2d at 590; *id.*, 410 U.S. at 626, 629, 93 S.Ct. at 1189-90, 35 L.Ed.2d 545.

Finally, one who challenges a statute for vagueness has the burden to show that the statute is impermissibly vague in all of its applications. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494-95 & nn.5-7, 102 S.Ct. 1186, 1191-92

& nn.5-7, 71 L.Ed.2d 362 (1982) (“A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. [footnote omitted] A court should therefore examine the complainant’s conduct before analyzing other hypothetical applications of the law.”); In re R.C., 195 Ill. 2d at 297, 745 N.E.2d at 1238 (“A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.”) (internal quotations marks omitted).

The evidence here clearly and convincingly shows that, after Taxpayer arranged to have the Painting stored at CCC during parts of August and September 2011, he did not use the Painting solely outside Illinois. Department Ex. 2, pp. 3-4. Instead, after a period of use in STATE 1, Taxpayer arranged to have the Painting returned to Illinois, and arranged to have CCC again store and safely keep the Painting for him, in Illinois, for an additional fourteen months. *Id.*, pp. 3-4, 19, 21. So, while it is possible to imagine situations in which goods previously stored temporarily by an owner in Illinois are subsequently returned to, or physically brought into Illinois, without any direction by the owner, that did not occur here. Department Ex. 2, pp. 3-4, 19, 21; Flipside, Hoffman Estates, Inc., 455 U.S. at 495 n.7, 102 S.Ct. at 1191 n.7, 71 L.Ed.2d 362 (“One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.”).

Conclusion:

I recommend that the Director finalize the Department’s determination of tax and penalties due, with interest to accrue pursuant to statute.

A handwritten signature in black ink, appearing to read "John E. White". The signature is written in a cursive style with a large initial "J" and "W".

July 11, 2017
Date

John E. White, Administrative Law Judge