

UT 08-7

Tax Type: Use Tax

Issue: Rolling Stock (Purchase/Sale Claimed To Be Exempt)

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

THE DEPARTMENT OF REVENUE
OF THE STATE OF ILLINOIS

v.

ABC LEASING, INC.,
Taxpayer

No. 06-ST-0000
IBT# 0000-0000
NTL# 00 00000000000000

Ted Sherrod
Administrative Law Judge

RECOMMENDATION FOR DISPOSITION

Appearances: Special Assistant Attorney General George Foster on behalf of the Illinois Department of Revenue; Stephen Lewis of Cooke & Lewis, Ltd. and Jamie L. Ross of Kalcheim Haber, LLP on behalf of ABC Leasing, Inc.¹

Synopsis:

This matter has arisen by way of a request for an initial review pursuant to 86 Ill. Admin. Code, ch. I, section 200.175 of the Department of Revenue’s Notice of Tax Liability (“NTL”) number 00 00000000000000 issued by the Illinois Department of Revenue (“Department”) for use tax due on trucks and trailers purchased during 1999. The issue presented in this case, as agreed to by the parties, is: “whether the Department

¹ Jamie L. Ross appeared at the hearing but did not file a power of attorney. Since a representative of the taxpayer was also present at the hearing, his appearance is deemed to be with the concurrence of the taxpayer.

properly determined that ABC Leasing Inc. owed Use Tax in the amount of \$127,986 plus statutory interest with respect to the purchase of certain trucks ... or alternatively whether the purchase of those vehicles was exempt from taxation pursuant to the rolling stock exemption.” Pre-Trial Order dated October 2, 2007. A hearing to adjudicate this issue was held on March 14, 2008 at which time testimony on behalf of the taxpayer was received from XXXXX and XXXXX, representatives of companies doing business with a lessee of the taxpayer, XYZ Trucking, Inc. (“XYZ Trucking”), from John Doe, the taxpayer’s vice president of leasing and acquisition and from Jim Doe, operations manager for XYZ Trucking. Michael Juricek, the Department’s auditor, testified on behalf of the Department in this matter. Following the submission of testimony and documentary evidence, and a review of the record in this case, it is recommended that this matter be resolved in favor of the Department. In support of this recommendation, I make the following findings of fact and conclusions of law.

Findings of Fact:

1. The Department audited the books and records of the taxpayer for the period beginning January 1999 through June 2001 and issued, on February 14, 2006, Notice of Tax Liability (“NTL”) number 00 00000000000000 showing Illinois Use Tax, penalty and interest due of \$234,213.52. Department Group Exhibit (“Ex.”) 1.
2. The Department’s *prima facie* case, including all jurisdictional elements, was established by the admission into evidence of the Department’s SC-10-K Audit Correction and/or Determination of Tax Due, and of NTL number 00 00000000000000

showing additional tax due for the audit period.² Tr. p. 12; Department Group Ex. No. 1.

3. ABC Leasing, Inc. (“ABC Leasing” or “taxpayer”), a for-profit corporation commercially domiciled in Illinois, is engaged in the business of acquiring vehicles for lease and leasing vehicles to trucking carriers engaged in intrastate and interstate commerce. Tr. pp. 43 – 47; Taxpayer’s Ex. 1, 3, 4; Department Ex. 1 (Auditor’s Comments).
4. XYZ Trucking, a for-profit corporation commercially domiciled in Illinois which was incorporated in 1976, is engaged in business as an intrastate and interstate carrier for hire. Tr. pp. 57, 58; Taxpayer’s Ex. 1, 3, 4; Department Ex. 1. Its business includes the transport of recoverable and recyclable debris from demolition sites for building demolition companies. Tr. pp. 21, 57.
5. ABC Leasing and XYZ Trucking, although part of the same family business, are separate legal entities. Tr. p. 48; Department Ex. 1 (Auditor’s Comments).
6. XYZ Trucking has been authorized by an agency of the Federal government to act as a common and contract carrier and to transport property between all points within the contiguous 48 states of the United States since January 11, 1994. Tr. pp. 47, 58, 59; Taxpayer’s Ex. 3.
7. On January 1, 1995, the Illinois Commerce Commission issued certificate number 79921MC to XYZ Trucking authorizing it to transport any and all commodities except household goods between all points within the state of Illinois. Taxpayer’s Ex. 4.

² Unless otherwise noted, findings of fact apply to the audit period.

8. The taxpayer purchased the vehicles identified in the NTL at issue in 1999 and leased these vehicles to XYZ Trucking pursuant to a lease of more than one year executed in 1996 and in effect at the time the aforementioned trucks were purchased. Tr. pp. 44, 45, 53, 54; Department Ex. 1 (Auditor's Comments); Taxpayer's Ex. 1.
9. XYZ Trucking uses trucks leased from the taxpayer to pick up scrap iron, concrete and other demolition debris and bring these materials to an Illinois location operated by MMM Industries Inc. ("MMM") and other locations where construction debris is accumulated, pursuant to contracts and agreements with WWW Construction/LLL Construction Joint Venture ("WWW"), DDD Demolition Corporation ("DDD") and other construction demolition companies that retain XYZ Trucking to perform transportation services.³ Tr. pp. 20, 21, 29, 30; Taxpayer's Ex. 5, 6, 7 (A-K), 9 - 14. None of the items transported were the property of XYZ Trucking or the taxpayer, and neither XYZ Trucking nor the taxpayer took title to any items transported by XYZ Trucking before, during or after transport of these materials from the site where materials were picked up to the site where they were delivered. Tr. pp. 15, 25, 26, 33, 59, 60; Taxpayer's Ex. 7(A-K). The property transported was picked up and delivered pursuant to instructions given the taxpayer by WWW, DDD and other construction and demolition contractors with which the taxpayer did business. Tr. pp. 15, 18, 25, 64; Taxpayer's Ex. 7(A - K).

³ The legal title of the entity referred to as WWW Construction in the transcript of the hearing in this case is identified in Taxpayer's Ex. 6. The legal title of the entity referred to as DDD Construction in the transcript is identified in Taxpayer's Ex. 5 and Ex. 9.

- 10.** Taxpayer's contracts with WWW and DDD during the tax period in controversy state that the taxpayer is retained only to provide transportation services to these companies. Tr. pp. 15, 24, 25; Taxpayer's Ex. 5, 6.
- 11.** A majority of the trips identified in the record involving trucks covered by the NTL at issue in this case during the period at issue were for the purpose of transporting construction debris between demolition sites and MMM. Taxpayer's Ex. 9 - 14. MMM's facility to which debris was transported is located in Anywhere, Illinois. Tr. p. 30. MMM is engaged in the business of salvaging steel debris from construction demolitions and selling this salvaged steel to steel mills. Tr. pp. 36, 37; Taxpayer's Ex. 7 (D).
- 12.** Steel scraps and other debris brought to MMM's Anywhere site are purchased by MMM from construction and demolition companies retaining XYZ Trucking to transport these materials. Tr. pp. 33 - 35. After MMM's acquisition of title to these materials, they are used in a manner solely determined by MMM. Tr. pp. 34, 35. Neither the taxpayer, XYZ Trucking nor any XYZ Trucking customer has any authority over the use of steel debris transferred to MMM after delivery has been completed. Tr. pp. 38 - 40.
- 13.** All of the truck purchases assessed pursuant to the NTL at issue in this case were leased to XYZ Trucking by the taxpayer pursuant to leases of one year or more in duration. Tr. pp. 44 - 46; Taxpayer's Ex. 1. None of the trucks at issue in this case were used to haul materials delivered by MMM to its out of state customers. Tr. pp. 80 - 82; Taxpayer's Ex. 9 - 14.

14. There are 52 trucks at issue pursuant to the NTL giving rise to this case. Tr. p. 99; Department Ex. 3. The auditor looked at 27 of these to determine whether they were exempt as rolling stock and determined that 22 of those reviewed were taxable. Tr. p. 102. The auditor determined that 91% of the aggregate purchase price of the 27 vehicles examined was attributable to the 22 vehicles determined to be taxable. Tr. pp. 108, 109; Department Ex. 3. Based on this determination, the auditor applied an error ratio percentage of 91 percent to the 52 vehicles at issue in arriving at the assessment amount shown on the NTL. Tr. pp. 108, 109.

Conclusions of Law:

The Department prepared a corrected return which was admitted into evidence as part of Department Group Ex. number 1 for Use Tax liabilities of ABC Leasing, Inc. pursuant to section 5 of the Retailers' Occupation Tax Act, ("ROTA") 35 ILCS 120/5. Said section is incorporated into the Use Tax Act ("UTA") by section 12 of the UTA (35 ILCS 105/12). Section 5 of the ROTA provides in pertinent part as follows:

In case any person engaged in the business of selling tangible personal property at retail fails to file a return, the Department shall determine the amount of tax due from him according to its best judgment and information, which amount so fixed by the Department shall be prima facie correct and shall be prima facie evidence of the correctness of the amount of tax due, as shown in such determination ... Proof of such determination by the Department may be made at any hearing before the Department or in any legal proceeding by a reproduced copy or computer print-out of the Department's record relating thereto in the name of the Department under the certificate of the Director of Revenue ... such certified reproduced copy or certified computer print-out shall, without further proof, be admitted into evidence before the Department or in any legal proceeding and shall be prima facie proof of the correctness of the amount of tax due, as shown therein.
35 ILCS 120/5

In this case, the taxpayer challenges the assessment by the Department of Use Tax, penalty and interest on the purchase of various trucks and truck trailers for those vehicles. The taxpayer asserts that these purchases were exempt from Use Tax based upon the “rolling stock” exemption as set forth in section 3-55 and 3-60 of the UTA (35 **ILCS** 105/3-55 and 35 **ILCS** 105/3-60). Those statutory provisions state 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:

....

- (b) the use, in this State, of tangible personal property by an interstate carrier for hire as rolling stock moving in interstate commerce or by lessors under a lease of one year or longer executed or in effect at the time of purchase of tangible personal property by interstate carriers for hire for use as rolling stock moving in interstate commerce as long as so used by the interstate carriers for-hire ...
[.]

35 **ILCS** 105/3-55

...

Sec. 3-60. Rolling stock exemption. The rolling stock exemption applies to rolling stock used by an interstate carrier for hire, even just between points in Illinois, if the rolling stock transports, for hire, persons whose journeys or property whose shipments originate or terminate outside of Illinois.

35 **ILCS** 105/3-60

In order to qualify for exemption from Use Tax or Retailers’ Occupation Tax, case law is clear that the burden is always on the taxpayer to show that it is entitled to the exemption. Wyndemere Retirement Community v. Department of Revenue, 274 Ill. App. 3d 455 (2nd Dist. 1995). Statutes that exempt property, a transaction, or an entity from taxation must be strictly construed in favor of taxation and against exemption. *Id.*

In order to qualify for the “rolling stock” exemption, the claimant or lessee leasing transportation vehicles from the claimant must fulfill three distinct requirements. First, to be considered an interstate carrier for hire, the claimant or its lessee must possess an Interstate Commerce Commission Certificate of Authority, an Illinois Commerce Commission registration number indicating that it is recognized by the Illinois Commerce Commission as an interstate carrier for hire, or “[I]f the carrier is a type which is subject to regulation by some Federal Government regulatory agency other than the Interstate Commerce Commission”, a registration number from such other Federal Government regulatory agency. 86 Ill. Admin. Code, ch. I, section 130.340(f). See also Instructions to Illinois Department of Revenue Form RUT-7 “Rolling Stock Certification.” ABC Leasing produced an official government document containing a registration number obtained by XYZ Trucking from the Federal Motor Carrier Safety Administration to show that this requirement was fulfilled, and XYZ Trucking’s status as an authorized interstate carrier has not been challenged by the Department. Tr. pp. 47, 58, 59; Taxpayer’s Ex. 3. All XYZ Trucking movements are conducted pursuant to its interstate authority (Taxpayer’s Ex. 3), or its authority to transport goods in intrastate commerce in Illinois granted by the Illinois Commerce Commission (Taxpayer’s Ex. 4).

The second requirement needed to qualify for exemption is that the interstate carrier must be “for hire” when providing transportation services. As detailed in administrative rules, “[t]he term ‘rolling stock’ includes the transportation vehicles of any kind of interstate transportation company for hire but not vehicles which are being used by a person to transport its officers, employees, customers or others for hire (even if they cross State lines) or to transport property which such person owns or is selling and

delivering to customers (even if such transportation crosses State lines).” 86 Ill. Admin. Code, ch. I, section 130.340(b). In order to meet this requirement, the taxpayer must establish that it transports, or leases vehicles to appropriate lessees to transport, materials for other customers and that the taxpayer or its lessee has no ownership interest in or control over the property being transported. *Id.*

The Department’s auditor initially determined that XYZ Trucking, the taxpayer’s lessee purportedly using the trucks at issue in this case to engage in interstate commerce, was retained to act primarily as a garbage hauler and that, therefore, it did not qualify as a carrier for hire because it took ownership of, and exercised control over the refuse debris it collected and transported. Department Ex. 1 (Auditor’s Comments) (citing X-L Disposal v Zehnder, 304 Ill. App. 3d 202 (4th Dist. 1999); Admiral Disposal Co. v. Department of Revenue, 302 Ill. App. 3d 256 (2nd Dist. 1999)).

Subsequently, during a reaudit of the taxpayer, the taxpayer produced documentation indicating that customers of the taxpayer’s lessee, XYZ Trucking, placed orders with the lessee to transport debris from construction demolition sites to locations specified by the customer. Department Ex. 1 (Auditor’s Comments). This documentation indicated that the customer always retained ownership of and control over the property being transferred by the taxpayer’s lessees in the trucks at issue in this case. *Id.* Moreover, contracts between XYZ Trucking and DDD, and between XYZ Trucking and WWW indicate that XYZ Trucking customers were billed at an hourly rate or per load rate agreed to by the parties based upon the number of loads or the amount of time required to transport the debris between the locations the customer specified. Taxpayer’s Ex. 5, 6. Pursuant to these contracts, the taxpayer’s customers were billed based upon

the number of loads carried or the aggregate hours required to gather, transport and deliver the customer's property. *Id.* Based upon the foregoing evidence, the Department conceded that all of the vehicles at issue in this case were used by XYZ Trucking for the purpose of conducting transportation of construction debris for hire, and that the "for hire" prerequisite to obtaining exemption from tax as rolling stock noted above was satisfied by XYZ Trucking, the taxpayer's lessee. Tr. p. 121.

In order for the rolling stock exemption to apply, the third requirement states that the taxpayer must prove by documentary evidence that it or its lessee transports persons or property for hire that moves in interstate commerce. Prior to August 14, 1999, the required use of rolling stock in interstate commerce was enumerated as follows: "The rolling stock exemption applies to rolling stock used by an interstate carrier for hire, even just between points in Illinois, if the rolling stock transports, for hire, persons whose journeys or property whose shipments originate or terminate outside Illinois." 35 ILCS 105/3-60. The "use of rolling stock" qualifying for exemption was more precisely enumerated when the UTA was amended by Public Act 91-587 adding section 3-61, which became effective on August 14, 1999. The additional language clarifying the required use of rolling stock in interstate commerce in order to qualify for exemption states as follows:

Use as rolling stock definition. "Use as rolling stock moving in interstate commerce" in subsections (b) and (c) of Section 3-55 means for motor vehicles, ... and trailers, ... when on 15 or more occasions in a 12-month period the motor vehicle and trailer has carried persons or property for hire in interstate commerce, even just between points in Illinois, if the motor vehicle and trailer transports persons whose journeys or property whose shipments originate or terminate outside Illinois. This definition applies to all property purchased for the

purpose of being attached to those motor vehicles or trailers as a part thereof.

35 ILCS 105/3-61

86 Ill. Admin. Code, ch. I, section 130.340 was amended to conform to this statutory change. Subsection (e) was re-lettered and new language was added on July 7, 2000, which states:

e) ... [P]ursuant to Public Act 91-0587, motor vehicles ... and all property purchased for the purpose of being attached to those motor vehicles ... will qualify as rolling stock under this Section if they carry persons or property for hire in interstate commerce on 15 or more occasions in a 12-month period. [35 ILCS 120/2-51] The first 12-month qualifying period for the use of a vehicle or trailer begins on the date of registration or titling with an agency of this State, whichever occurs later. ... The vehicle or trailer must continue to be used in a qualifying manner for each consecutive 12-month period. The Department will apply the provisions of this subsection in determining whether such items qualify for exempt status under this Section for all periods in which liability has not become final or for which the statute of limitations for filing a claim has not expired. A liability does not become final until the liability is no longer open to protest, hearing, judicial review, or any other proceeding or action, either before the Department or in any court of this State.

1) If a vehicle or trailer carries persons or property for hire in interstate commerce on 15 or more occasions in the first 12-month period or in a subsequent 12-month period, but then does not carry persons or property for hire in interstate commerce on 15 or more occasions in a subsequent 12-month period, the vehicle, ... will be subject to tax based upon its original purchase price even if it was then used in a qualifying manner in the third 12-month period.

86 Ill. Admin. Code, ch. I, section 130.340(e)

In order to qualify for the “rolling stock” exemption, the requirement that rolling stock be used in interstate commerce must be proven by documentary evidence. Specifically, the taxpayer must prove by documentary evidence that it transports persons or property for hire moving in interstate commerce. In the case of First National Leasing & Financial Corporation v. Zagel, 80 Ill. App. 3d 358 (4th Dist. 1980) the court said that

oral testimony concerning the taxpayer's interstate activities was not sufficient to prove its claim to the "rolling stock" exemption.

During the hearing in this case, the taxpayer introduced into the record voluminous trip tickets and other documentation showing the manner in which most of the vehicles at issue in this case were used within one year from the date of purchase, the tax period in controversy. Taxpayer's Ex. 9 – 14. These records purport to establish that 19 out of the 27 vehicles that were sampled by the auditor to arrive at an error ratio (which was based upon the cost of vehicles for which the "rolling stock" exemption was claimed that were not used in interstate commerce) in fact transported property in interstate commerce 15 or more times in a 12 month period commencing with their date of registration. Taxpayer's Ex. 9 – 14. A review of this documentation indicates that it clearly shows the movement of debris from construction demolition sites in Illinois to MMM's location in Anywhere, Illinois and other debris collection sites in this state. *Id.* Accordingly these documents establish the transit of property on journeys that begin and terminate in Illinois. *Id.* Moreover these records show that each vehicle at issue identified in the taxpayer's documentary evidence journeyed at least 15 separate times between demolition sites in Illinois and MMM and other debris collection sites in Illinois during the relevant period for each such vehicle. *Id.*

The taxpayer seeks to rely upon the aforementioned evidence it has presented to show that, during a twelve month period commencing from the date the vehicles at issue in this case were acquired, XYZ Trucking vehicles transported debris at least 15 separate times in interstate commerce. Taxpayer's Ex. 9 – 11. While the evidence the taxpayer produced only shows that debris was transported between locations in Illinois, the

taxpayer contends that this evidence is sufficient to establish interstate transport pursuant to 35 ILCS 105/60 and 35 ILCS 105/61 (providing that rolling stock used by an interstate carrier for hire, “even just between points in Illinois” qualifies for the rolling stock exemption if the rolling stock transports for hire, “persons whose journeys or property whose shipments originate or terminate outside of Illinois.”).

The taxpayer’s claim is premised upon its assertion that some of the debris (steel scraps) delivered to MMM was subsequently re-delivered by MMM to locations in Indiana and other states. Tr. pp. 76 – 78, 80 – 82. While the taxpayer has clearly demonstrated that some of the debris it collected in Illinois was delivered to MMM in Illinois, its argument requires further proof that the goods it delivered on each of the trips documented in the records the taxpayer has provided were actually transported at the behest of MMM or some other company outside of the state of Illinois. Pursuant to the Appellate Court’s ruling in First National Leasing & Financial, the analysis required is a specific one, testing the movement of each particular piece of equipment to determine if it provides a basis for exemption. First National Leasing & Financial, *supra* at 995, 996 (affirming the Department’s denial of the “rolling stock” exemption where “the taxpayer had no records showing that each vehicle had been used as an interstate carrier for hire.”). Moreover, interstate movement must be established by documentary evidence rather than testimony. *Id.* Accordingly the taxpayer’s claim of interstate transit must be substantiated with respect to each trip identified in the taxpayer’s records of trips between points in Illinois.

The taxpayer seeks to meet its burden of relating the intrastate trips it has identified to interstate commerce by establishing that all of the property the taxpayer’s

lessee delivers to MMM was subsequently transported outside of Illinois. Tr. pp. 76 – 78. To corroborate this claim, the taxpayer sought to introduce a letter purporting to be executed by a representative of MMM which appears on MMM’s letterhead, stating as follows: “To whom it may concern: All the steel that is brought by your customers to this distribution center is eventually shipped to either Indiana, Iowa.” Tr. p. 77. This evidence propounded by the taxpayer is potentially dispositive in this case since proof that all steel scraps delivered to MMM during the tax period in controversy was subsequently shipped to another state would be sufficient to establish that the intrastate trips the taxpayer identified constituted part of a journey that terminated in another state. Such evidence would bring these trips within the plain language of 35 ILCS 105/3-60 and 35 ILCS 105/3-61 which clearly indicates that intrastate trips that are part of an interstate journey can be counted in determining if interstate transit has occurred.

However, the evidence upon which the taxpayer seeks to rely was objected to as hearsay by the Department and was not admitted into the record. Tr. pp. 77 – 80.⁴ An examination of the declarant of the information contained in the letter purported to be from MMM was imperative in this case because the assertions contained in the letter are contradicted by other evidence in the record indicating that steel scraps delivered to MMM were not always sent to other states. Department Ex. 1 (Auditor’s Comments). The record contains no other evidence other than testimony concerning what happened to the debris (steel scraps) the taxpayer collected and delivered to MMM after completion of the intrastate trips identified in the taxpayer’s exhibits using trucks at issue in this case.

⁴ The evidentiary ruling barring the admission of the letter purported to be from MMM as hearsay pertains to the copy of this letter contained in the record as part of Taxpayer’s group Ex. 9, as well as to Taxpayer’s Ex. 16, the exhibit expressly rejected in response to the Department’s objection.

The taxpayer also introduced evidence showing that one of the trucks leased to XYZ Trucking did indeed transport steel scraps from MMM to Indiana. Tr. pp. 80 – 82. However, while this transport was properly documented, it did not concern a truck that is the subject of the NTL at issue. *Id.*

In sum, while the taxpayer has shown that the trucks at issue in this case were used to transport debris from pick-up locations in Illinois to delivery locations in Illinois, it has provided no documents showing that the debris so delivered in Illinois was transported outside of this state. In order to qualify for exemption, the taxpayer must identify the subject of its purchases and show that there was a specific qualifying use for each specific purchase. The taxpayer has not done this. The trucks and trailers at issue have been shown to transport goods in intrastate commerce, but it has not been shown that the goods they transported in each instance claimed to be interstate commerce terminated their journey outside of Illinois. Specifically, the taxpayer has provided no books, records or other admissible documentary evidence to show that the trucks at issue in this case in fact qualified for the “rolling stock” exemption under the 15-trip in interstate commerce per 12-month standard prescribed at 35 **ILCS** 105/3-61. The taxpayer’s failure of proof arises from its inability to document that the property it delivered in Illinois during trips identified from its books and records terminated its journey outside of this state.

The taxpayer also argues that the Department applied the statutorily prescribed standard for determining “use in interstate commerce” at 35 **ILCS** 105/3-61 prior to the adoption of the 15 trip per 12 month period criteria effective August 14, 1999 by using the 15 trip per 12 month period test to determine whether vehicles purchased prior to

August 14, 1999 were excluded from tax pursuant to the “rolling stock” exemption. Tr. p. 10. As noted in the Auditor’s Comments, the Department applied the 15 trip per 12 month criteria to vehicles purchased before August 14, 1999 pursuant to the Department’s policy which is reflected in 86 Ill. Admin. Code, ch. I, sec. 130.340(e).

This provision states the following:

The Department will apply [35 ILCS 105/3-61] in determining whether such items qualify for exempt status under this Section for all periods in which liability has not become final or for which the statute of limitations for filing a claim has not expired. A liability does not become final until the liability is no longer open to protest, hearing, judicial review, or any other proceeding or action, either before the Department or in any court of this State.

86 Ill. Admin. Code, ch. I, sec. 130.340(e)

Prior to August 14, 1999, the taxpayer was only required to show that its trucks moved in interstate commerce on a “regular and frequent” basis in order to qualify for exemption. See Department of Revenue Information Bulletin No. FY 2000-4, issued 10/1/99. The terms “regular and frequent” were not defined by the number of trips within a twelve month period prior to August 14, 1999. Prior to this date, there was no set standard for the number of trips necessary to qualify equipment for the rolling stock exemption.

However, even prior to August 14, 1999, the taxpayer was required to show that its use of rolling stock in interstate commerce was at a minimum, at least, more than incidental. National School Bus Service, Inc. v. Department of Revenue, 302 Ill. App. 3d 820 (1st Dist. 1998). In this case, the Appellate Court held that a bus company that failed to show that its use of rolling stock in interstate commerce was more than incidental was not entitled to the rolling stock exemption. In upholding the Department’s interpretation

regarding the use of the “regular and frequent” standard requiring a showing of more than incidental use, the Court stated:

“National claims that the Use Tax Act should be interpreted to permit taxation only if rolling stock is used exclusively in intrastate commerce, and any use in interstate commerce qualifies for exemption. The Act does not say this, as it sets no explicit level of use required for exemption. But even if the Act expressly required use exclusively in intrastate commerce, the statute, under the reasoning of McKenzie and Gas Research, would mean that the Department could tax the use as long as any use in interstate commerce was merely incidental or secondary to use in intrastate commerce. Just as incidental use of property for noncharitable purposes does not destroy the exemption under the Retailers’ Occupation Tax Act, an incidental use of rolling stock in interstate commerce will not destroy its taxability under the Use Tax Act.” National School Bus Service Inc., *supra* at 826.

In light of the court’s ruling in National School Bus Service, the taxpayer presumably is arguing that, irrespective of whether it met the 15 trips per 12 month test effective August 14, 1999, its vehicles purchased prior to August 14, 1999 were used in interstate commerce because their use in this manner was more than merely incidental. However, this argument fails for the same reason that the taxpayer’s argument that it qualifies for exemption under the 15 trips per 12 month period test adopted in August 1999 fails. Both arguments fail because the taxpayer has not presented documentary evidence sufficient to rebut the Department’s prima facie case that the debris it picked up and delivered in Illinois on occasions identified in the taxpayer’s exhibits was subsequently reshipped outside of this state. The absence of documentary or any other evidence other than testimony that the journey of any debris (steel scraps) the taxpayer picked up in Illinois on trips and in trucks identified in the taxpayer’s records that are in

evidence ended up outside of Illinois is fatal to the taxpayer's claim. First National Leasing & Financial, *supra*.

The taxpayer also contests the auditor's use of the purchase price of the vehicles at issue rather than their fair market value as the basis for his assessment in this case. Tr. pp. 49, 50, 109, 135, 155. The taxpayer contends that the purchase price should have been reduced by the amount of depreciation as shown on the taxpayer's federal income tax returns occurring between the dates on which trucks were purchased and the date on which the 12 month period used to determine whether sufficient interstate activity to qualify for exemption took place expired. Tr. pp. 109, 135. The taxpayer's argument that the assessment was erroneous must be rejected because it ignores the plain language of the Use Tax Act. Specifically, 35 **ILCS** 105/3-10 provides as follows:

Rate of tax. Unless otherwise provided in this Section, the tax imposed by this Act is at the rate of 6.25% of either the selling price or the fair market value, if any, of the tangible personal property. In all cases where property functionally used or consumed is the same as the property that was purchased at retail, then the tax is imposed on the selling price of the property. In all cases where the property functionally used or consumed is a by-product or waste product that has been refined, manufactured, or produced from property purchased at retail, then the tax is imposed on the lower of the fair market value, if any, of the specific property so used in this State or on the selling price of the property purchased at retail.

35 **ILCS** 105/3-10

Pursuant to this provision, fair market value may be used as the basis for determining the amount of use tax due only where the item being assessed is a byproduct or waste product that was refined, manufactured, or produced from property purchased at retail. *Id.* However, where, as in the instant case, the property that is assessed is the same when

functionally used as it is when it was purchased, section 3-10 of the UTA noted above requires that the tax be imposed based upon the “selling price” of the property. *Id.*

The term “selling price” is defined at section 2 of the UTA, 35 ILCS 105/2 as follows:

“Selling price” means the consideration for a sale valued in money whether received in money or otherwise ... and shall be determined without any deduction on account of the cost of the property sold, the cost of materials used, labor or service cost or any other expense whatsoever ... [.]
35 ILCS 105/2

Pursuant to the foregoing, no deduction for depreciation or any other expense is allowable in arriving at the tax base for the imposition of the use tax based upon the cost of the property being assessed. Since the amount assessed by the auditor based upon the purchase price of vehicles was undertaken in full compliance with the aforementioned statutory provisions, I find that the taxpayer is not entitled to a reduction of the tax base to reflect the fair market value of the property that has been assessed in the manner the taxpayer proposes.⁵

⁵ Department regulation 86 Ill. Admin. Code, ch. I, sec. 150.310 also provides for the use of fair market value to value rolling stock at the time use of the rolling stock reverts to the lessor from a lessee, stating as follows: “When tangible personal property is purchased by a lessor, under a lease of one year or longer, executed or in effect at the time of purchase to an interstate carrier for hire, who did not pay Use Tax to the retailer, such lessor (by the last day of the month following the calendar month in which such property reverts to the use of such lessor) shall file a return with the Department and pay the tax upon the fair market value of such property on the date of such reversion.” The circumstances warranting use of “fair market value” to arrive at an assessed value of rolling stock described above are not present in the instant case.

WHEREFORE, for the reasons stated above, it is my recommendation that NTL number 00 0000000000000 be affirmed in its entirety.

Ted Sherrod
Administrative Law Judge

Date: May 12, 2008