BEFORE THE IOWA DEPARTMENT OF REVENUE
HOOVER STATE OFFICE BUILDING
DES MOINES, IOWA

IN THE MATTER OF STEVEN DOWNING 2404 Tamarack Drive Decorah, IA 52101 v. IOWA DEPARTMENT OF REVENUE	CASE NO. 22IDR0003 REV. DOCKET NO. 2019-340-1-0021 **DIRECTOR'S FINAL ORDER ON REVIEW**

PROCEDURAL SUMMARY

On June 27, 2022, an Administrative Law Judge ("ALJ") issued a Proposed Decision in the above-captioned matter. On July 27, 2022, the Iowa Department of Revenue ("Department") appealed the Proposed Decision to the Director of the Department ("Director"). On August 10, 2022, the Director granted the Department's request to present oral arguments and issued a Notice of Hearing and provided the parties the opportunity to file briefs before the hearing. Neither party filed briefs prior to the hearing.

A hearing was held before the Director on October 31, 2022. Assistant Attorney General Paxton Williams[1] appeared on behalf of the Department. Attorney Richard Bartolomei appeared telephonically on behalf of taxpayer Steven Downing, who was also present by telephone. Also present for the hearing were Amy Stohlmeyer and Haley Wurdinger, attorneys for the Director; and Kelsie Royster, Administrative

[1] On November 14, 2022, Paxton Williams withdrew as counsel for the Department on this matter. On November 29, 2022, Assistant Attorney General Andrew N. Jensen filed his appearance as counsel for the Department.

Assistant for Legal Services and Appeals. Other Department staff were also present to observe the proceedings.

In the Proposed Decision, the ALJ agreed with the Department's conclusion that Iowa resident Mr. Downing, rather than Mr. Downing's company Downco, was the true owner and operator of multiple vehicles as Downco was a shell business designed to avoid tax responsibility. Further, because Mr. Downing was the true owner, the vehicles were in Iowa for a qualifying period of time, and the vehicles were not registered in the state, the ALJ affirmed the assessment of tax and interest against Mr. Downing. However, he reversed the assessment of an evasion penalty, concluding that the evasion penalty was a criminal matter which neither the Director nor the ALJ had jurisdiction to impose.

Having reviewed and examined the parties' written briefs, the record made before the ALJ, the ALJ's Proposed Decision, and hearing the parties' arguments, the Director issues this order.

FINDINGS OF FACT

The Director hereby adopts the findings of fact issued by the ALJ.

CONCLUSIONS OF LAW

The Director hereby adopts the conclusions of law issued by the ALJ with respect to the assessment of tax and interest against the Taxpayer and herby AFFIRMS the ALJ's proposed decisions on those matters.

As to the assessment of penalty against the taxpayer, the Director hereby REVERSES the ALJ's proposed decision on that matter for the following reasons.

Iowa Code section 321.105A(7)(b) provides

> *Evasion fee*. An Iowa resident found to be in control of a vehicle which is owned by a shell business and for which the fee for new registration has not been paid, as provided in section 321.55, subsection 2, is guilty of a fraudulent practice. An Iowa resident found to be in control of a vehicle which is owned by a shell business and for which the fee for new registration has not been paid, as provided in section 321.55, subsection 2, shall be assessed a penalty of seventy-five percent of the amount of the fee unpaid and required to be paid on the actual purchase price less trade-in allowance.

The ALJ determined in his Proposed Decision that "the language and context of the penalty reveals it is imposed after a conviction finding an individual committed the crime of fraudulent practice in the form of using a shell company, which requires the State to bear the burden of proof beyond a reasonable doubt." Further, because "the statute does not expressly state who or what is entitled to ma[ke] the finding of an Iowan using a shell company—as articulated in Iowa Code section 321.55(2)—necessary to impose an evasion fee," he decided he was required to go through the process of statutory interpretation in order to conclude whether the evasion penalty could be assessed against Mr. Downing in this matter. He determined there "may be some ambiguity in the term 'found' because, by virtue of being written in the passive voice, the statute does not expressly articulate what entity is capable of making the finding."

The ALJ ultimately concluded that because neither the Department nor the ALJ are authorized to make the findings necessary to impose the penalty without either the Department first securing a criminal conviction or proceeding under one of its other general fraud provisions within the Iowa Code, he reversed the imposition of the evasion penalty.

First, although the ALJ stated "the statute does not expressly articulate what entity is capable of making the finding" under Iowa Code section 321.105A, Iowa Code

section 321.2(4) expressly provides "[t]he director of revenue shall administer and enforce the collection of the fee for new registration as provided in section 321.105A." Iowa Code section 321.105A(4)(a) further provides "the director of revenue in consultation with the department of transportation shall administer and enforce the fee for new registration as nearly as possible in conjunction with the administration and enforcement of the state use tax law, except that portion of the law which implements the streamlined sales and use tax agreement." With these two provisions, the Legislature expressly articulated who has the authority and power to enforce 321.105A, including imposing penalties, as provided in subsection (7), and the necessary findings in order to impose those penalties. Further, the Legislature made it the Director's duty to do just that given the use of the word "shall" in both of these two statutes. Iowa Code § 4.1(30)(a) ("The word 'shall' imposes a duty.").

Secondly, the ALJ also determined that

> guilt is a term associated with the criminal context and because the statute expressly makes this conduct the crime of fraudulent practice, it appears 'found' is related to a criminal context where the State bears the burden of proof beyond a reasonable doubt. Thus, when the term is used in the next sentence, the term would appear[] to require a criminal conviction of fraudulent practice[] in the form of using a shell company as the concept is explained in Iowa Code section 321.55(2).

This determination by the ALJ and presented by the taxpayer in his oral arguments, in addition to his subsequent constitutional claims, that the word "guilty" as used in Iowa Code 321.105A(7)(b) is of a criminal nature is misguided and limited and the context of the word "guilty" is incomplete. "[W]e [must] construe statutory phrases not by assessing solely words and phrases in isolation, but instead by incorporating considerations of the structure and purpose of the statute in its entirety." *Den Hartog v.*

City of Waterloo, 847 N.W.2d 459, 462 (Iowa 2014). We must also consider "the context in which words are used [which] allows us to give them ordinary meanings best achieving the statute's purpose." *Id.* Further, "a statute should not be construed so as to make any part of it superfluous unless no other construction is reasonably possible." *Iowa Auto Dealers Ass'n v. Iowa Dep't of Revenue*, 301 N.W.2d 760, 765 (Iowa 1981).

First, while the term "guilty" is often invoked in relation to a crime or criminal matter, it is not bound to the criminal sphere by definition. In addition to meaning "[h]aving committed a crime," the term also means "[r]esponsible for a civil wrong, such as a tort or breach of contract." *Guilty*, Black's Law Dictionary (11th ed. 2019). Moreover, with the language of the entirety of Iowa Code section 321.105A, the Legislature has set forth provisions and procedures for administering and enforcing the fee for new registration, a civil matter. This includes how to calculate the fee, what information is required of applicants, instances when the fee would not be imposed, as well as the main issue in the present matter, what and when penalties can be imposed if a person fails to register their vehicle when they are obligated to do so. *See* Iowa Code § 321.105A(2), (7). Finally, with the language of Iowa Code sections 321.2(4) and 321.105A(4), the Legislature imposes the duty on and grants the Director the authority to enforce section 321.105A, including the penalty provisions.

If we follow the logic that the penalty provided in Iowa Code section 321.105A(7)(b) is only of a criminal nature which the Director is not authorized to impose because he is unable to make the necessary findings, then subsection (7)(b) becomes essentially superfluous since the Director can neither fully enforce or administer that penalty. When reading the entire statute as a whole, there is nothing in

the language which denotes it as a criminal matter or that the Legislature wanted the issue of penalties to be enforced through the criminal process. Further, it must be presumed that "the legislature does not create useless or superfluous language in its statutes." *Mottet v. Dir. of Revenue*, 635 S.W.3d 862, 865 (Mo. Ct. App. 2021). Utilizing the ALJ's interpretation would provide for a penalty the Director would have no authority to truly administer, however, by placing the evasion penalty language within section 321.105A, a statute the Director has a duty to administer, the Legislature has provided the Director the authority to enforce that penalty.

Accordingly, in the current matter, the Department concluded after an investigation that Mr. Downing was the true owner and in control of the vehicles at issue given that Downco was a shell company and the registration for those vehicles had not been paid. Further, Mr. Downing failed to show that he qualified for the vehicle registration exemption found in Iowa Code section 321.55, so the Department assessed tax and interest against Mr. Downing for the failure to register. The ALJ affirmed this determination. The Director also affirms this determination.

Therefore, under the express terms of Iowa Code section 321.105A(7)(b), because Mr. Downing, an Iowa resident, has been found to be in control of a vehicle owned by a shell business, for which the fee for new registration has not been paid, he "shall be assessed a penalty of seventy-five percent of the amount of the fee unpaid and required to be paid on the actual purchase price less trade-in allowance."

ORDER

IT IS THEREFORE ORDERED that the Administrative Law Judge's Proposed Decision on above-captioned matter is AFFIRMED in part, and REVERSED in part.

Issued at Des Moines, Iowa this 30 day of November, 2022.

IOWA DEPARTMENT OF REVENUE

BY _____
Kraig Paulsen, Director

Iowa Department of Inspections and Appeals
Division of Administrative Hearings
Wallace State Office Building – Third Floor
Des Moines, Iowa 50319

Steven Downing, 2404 Tamarack Drive Decorah, IA 52101, Appellant, v. Iowa Department of Revenue, Respondent.	Case No. 22IDR0003 (Rev. Docket No. 2019-340-1-0021) PROPOSED DECISION

The hearing in this case was concluded on April 4, 2022. Steven Downing ("Downing") appeared and testified; he was represented by Richard Bartolomei. Paxton Williams appeared on behalf of the Iowa Department of Revenue ("IDR"), as did an IDR representative who testified. The entire administrative file, including the submitted exhibits, was admitted into the record, and witness testimony was received. By agreement of the parties, the record was held open until June 15, 2022 for closing briefs, and the matter is now fully submitted.

FINDINGS OF FACT

At all times, Downing was a resident of the State of Iowa. He hired Heggen Law Office to create a Minnesota limited liability company, Downco Leasing, LLC ("Downco"), and on September 27, 2005, the Article of Incorporation was executed for the company. Appellant Ex. 6, at p. 2. The Articles stated the registered office and agent of the company was Jared Heggen, who was part of the firm that established the entity, and it would be a manager managed LLC, with the manager being the law firm. Id., at p. 2. The sole member of Downco has always been Downing, and on September 28, 2005, the Montana Secretary of State accepted the filings for the company. Appellant Ex. 3, at p. 1; Hearing Recording Day 2, at 55:20-:27, 1:55:10-:14. That same day, Downco executed its Operating Agreement, indicating that the principle place of business was the law firm, the manager was again the law firm, and its purpose was any lawful activity. IDR Ex. D, at pp. 3-6.

On September 28, 2005, Downco generated a "minutes of the Meeting of Downco Leasing, LLC[,] A Single Member LLC in Good Standing in the State of Montana, USA." Appellant Ex. 5, at p. 1. In that document, Downing was identified as the sole member, the purchase of a 1999 Prevost Motor Home was authorized, a security agreement would be made for the vehicle, the vehicle would be "assigned to Missoula County, Montana," and the Prevost would be "the sole asset of the company." Id. On the same day, Jared Heggen signed a document, indicating he would "take the responsibility of filing the first security interest in favor of [the lending bank in Iowa] on the [Provost]." Id., at p. 2 (letter of commitment). During this time, Downco applied for an employer identification number, which was approved by the

Internal Revenue Service on October 26, 2005. Id., at p. 15 (EIN approval).

On March 20, 2009, Downco executed another "minutes of special meeting" in which it authorized the purchase of a Harley Davison bike, specifically a 2009 Screaming Eagle Ultra. Appellant Ex. 5, at p. 7. Within the document, the vehicle was again "permanently assigned to Missoula County Montana," with the company "directed to pursue registration of the vehicle in Missoula County Montana." Id. The purchase documents indicate Downco was listed as the owner. IDR Ex. V, at p. 1. On July 18, 2011, Downco executed another "minutes of special meeting"; this time authorizing the purchase of another Harley Davison bike, namely a 2011 Screaming Eagle Ultra," with it again being assigned to Montana and to be registered in the State as well. Appellant Ex. 5, at p. 8. The purchase documents indicate Downco listed as the owner. Ex. W, at p. 1.

Thereafter, Downco Leasing sold the 1999 Provost as part of a purchase of a 2004 Provost Motor Home ("Provost"). IDR Ex. S, at p. 8. Of note, there does not appear to be any corporate minutes associated with the purchase of the Provost, but the purchase documents indicate the purchase occurred on April 4, 2016 in Stuart, Florida with the named purchaser being "Downco Leasing, LLC" and financed by a bank that has branches in Iowa. Id., at pp. 2, 7. There is a disbursement request and authorization as well as related financing documents in the record. See generally, Appellant Ex. 5. Each vehicle was registered in the State of Montana in Downco's name. See, e.g., IDR Exs. S-W. Of note, Downing registered other vehicles in his own name in Iowa. See generally, IDR Ex. R.

Thereafter, a member of the public contacted IDR about the motorhome being in Iowa but not registered as such, and IDR initiated an investigation into this matter. The investigation revealed, among other things, a 2017 insurance claim for the Provost where the vehicle hit an animal in Kentucky and where Downing was listed as the insured driver. IDR Ex. T. The investigation further learned, at least indirectly, Downco had no separate financial documents apart from Downing's tax returns (as it was a pass through entity), there was no separate bank account for the entity, and additional corporate documents like other minutes were either not generated or at least not presented. See generally, Ex. E; see also Hearing Recording Day 2, at 1:07:40-:55; 1:45:00-:15. At some point, IDR concluded Downco was a shell company Downing utilized to avoid paying Iowa registration tax on the vehicles, and it issued a Notice of Assessment against Downing on November 21, 2018, assessing tax, penalty, and interest for failing to register the 2004 Provost, 2009 Harley Davison, and 2011 Harley Davison in Iowa. IDR Exs. A, B. The tax years at issue were 2009, 2011, and 2016. Id.

Downing timely appealed. At the hearing, Downing testified Downco took delivery of the 2004 Provost in Florida and neither motorcycle was delivered in Iowa. Hearing Recording Day 2, at 56:13-:27; 1:13:00-:12. While he specifically testified that the Provost and motorcycles at issue were not in Iowa for more than 90 days, he ultimately equivocated, stating at one point on cross-examination: "I got so many vehicles I did not know where they are." Hearing Recording Day 2, at 1:47:19-:22. He went on to say he could not be certain of the number of days the Provost or motorcycles were in Iowa due to the lack of records and the passage of time. See, e.g., Hearing Recording Day 2, at 1:48:45-1:49:13, 2:11:20-:30, 2:12:50-2:13:11. In fact, with respect to the Provost that generally towed a trailer containing the motorcycles at issue, the following exchange was had with the Tribunal:

Q. Why are you certain the vehicle, the motorhome, has not been in Iowa for 90 days or more during any calendar year?
A. Can't be certain because I don't have a record of that.

Hearing Recording Day 2, at 2:11:14-:31; see also id., at 1:53:15-:25 (indicating the location of the motorcycles in the trailer for the Provost).

As to use of the Provost and motorcycles, Downing persuasively indicated he was typically the only driver, many of the trips were personal in nature although there were some business trips for marketing with clients of his other businesses, and no trip logs were kept detailing the nature and extent of each trip. See, e.g., Hearing Recording Day 2, at 1:06:30-:55, 1:58:00-2:00:00, 2:08:00-2:09:00. The Motorhome also had a cement pad in Florida owned by another company of his, namely Downing Rentals, LLC ("Downing Rentals"), which is an Iowa company that has its own bank account and financial statements but is still a disregarded entity and which pays not only for the utilities at the site but also the loan payments and insurance on at least the Provost. Hearing Recording Day 2, at 1:02:00-:25, 1:04:30-:35, 1:10:15-:25, 1:36:40-:53, 1:55:50-1:56:20, 2:06:30-:50. In addition, neither Downing nor Downing Rentals had any agreement with Downco for the use of any of the vehicles, with no monetary compensation being provided to Downco for the use of the vehicles. Hearing Recording Day 2, at 1:14:40-1:15:06, 2:00:30-2:01:10, 2:02:00-2:03:07, 2:05:40-:51, 2:08:00-:20, 2:18:00-:20. Downing further does not pay himself a salary for Downco, and the company has never issued any 1099 or W2 or the like. Hearing Recording Day 2, at 1:23:49-:59.

Downing also proved he had other trucks and other vehicles registered in Iowa in both his name and in another limited liability company he owns, and the only vehicles Downco has ever owned are the two Provosts and two motorcycles detailed above. Hearing Recording Day 2, at 59:00-1:01:00, 2:05:08-:21. In addition, when directly question as to the purpose of Downco given the broad authorization of its activities in its governing documents, Downing initially stated that it had no business purpose, only to qualify the answer with company's purpose being a liability shield. Hearing Recording Day 2, at 1:51:50-1:52:30.

After the hearing, Downing argued the assessment should be set aside because he has demonstrated that the vehicles at issue were not in Iowa for a sufficient period of time to require registration and because, even if any taxes were due, it would be owed by Downco and not him given Downco is not a shell company or otherwise subject to veil piercing with this record. In particular, Downing argues IDR has no evidence to contradict his initial claims that the vehicles were not in Iowa 90 days, which is corroborated in part by the vehicle's proverbial home base being in Florida and by Downing registering other vehicles in Iowa (which suggests he would have registered the ones at issue if they were present). In addition, Downing argues the Tribunal must utilize Montana's corporate veil piercing rules given the full faith and credit clause of the United States Constitution since the company was organized there and, under Montana corporate law, the veil should not be pierced. Downing argues there is a special test for LLCs, as opposed to corporations that are required to adhere to more formalities, and this test indicates the veil should not be pierced since Downco was treated separately on the purchase and financing documents—even if Downing was a personal guarantee as the documents do indicate—and since liability protection and tax advantages are legitimate and common purposes for organizing the company. He raises

additional constitutional arguments, and he notes the veil should also not be pierced under any test. In response, IDR essentially asserts Downing has not met his burden of proof because, by his own admission, he cannot prove the vehicles at issue were *not* in Iowa for a qualifying period of time and because the record essentially shows that Downco is a sham business to be disregarded under any veil piercing test. IDR further asserts that the "fraud penalty" is appropriate.

For clarify, and as discussed more fully below, the balance of the record indicates Downing did not prove the Provost and motorcycles were *not* in Iowa for a qualifying period of time because he kept no logs as to the vehicles usage, he understandably cannot remember their locations due to the passage of time, and there is evidence they were present in Iowa given the admission the Provost at issue was and the Provost often towed the motorcycles in a trailer behind. It is true Downing's counsel attempt to recraft Downing's frank admission on redirect, but the efforts were not persuasive nor was his initial testimony about the vehicles not being in Iowa. Further, Downing has not shown Downco is *not* a sham company because, among other things, he used all of its assets for protracted periods of time without compensation and such uncompensated appropriation of company property indicates the entity is little more than an illegitimate sham and alter-ego. This is true even though Downco was represented to third parties, including on the purchase documents and secretary of state filings, as a proper LLC and Downing Rentals paid at least some of Downco's expenses.

CONCLUSIONS OF LAW

A.

As a general matter, "[e]very motor vehicle, trailer, and semitrailer when driven or moved upon a highway shall be subject to . . . registration[.]" Iowa Code Ann. § 321.18. There are exceptions to the general rule, and with respect to nonresident owners of vehicles driven by a resident, the law prior to July 1, 2013 stated:

> A nonresident owner of a motor vehicle operated within the state by a resident of the state shall register the vehicle and shall maintain financial liability coverage as required under section 321.20B for the vehicle. The nonresident owner shall pay the same fees for registration as are paid for like vehicles owned by residents of this state. However, registration under this paragraph is not required for vehicles being operated by residents temporarily, not exceeding ninety days.

Iowa Code § 321.55(2)(2012). On July 1, 2013, this provision of law was amended to read:

> a. A nonresident owner of a motor vehicle operated within this state by a resident of this state shall register the vehicle and shall maintain financial liability coverage as required under section 321.20B for the vehicle. The nonresident owner shall pay the same fees for registration as are paid for like vehicles owned by residents of this state. However, registration under this paragraph is not required for vehicles being operated by residents temporarily for not more than ninety days. For purposes of this paragraph, a vehicle is not operated in the state temporarily, and is therefore subject to registration and the owner is

required to pay the applicable fees, if the vehicle is located in Iowa for more than ninety consecutive or nonconsecutive days and is operated on an Iowa highway by an Iowa resident during that time.

b. On or after July 1, 2013, if the department, in consultation with the department of revenue, determines that the nonresident owner of a vehicle is a partnership, limited liability company, or corporation that is a shell business, it shall be rebuttably presumed that the Iowa resident in control of the vehicle is the actual owner of the vehicle, that the vehicle is subject to registration in this state, and that payment of the fee for new registration for the vehicle is owed by the Iowa resident.

(1) Factors which indicate that a partnership, limited liability company, or corporation is a shell business include but are not limited to the following:
(a) The partnership, limited liability company, or corporation lacks a specific business activity or purpose.
(b) The partnership, limited liability company, or corporation fails to maintain a physical location in the foreign state.
(c) The partnership, limited liability company, or corporation fails to employ individual persons and provide those persons with internal revenue service form W-2 wage and tax statements.
(d) The partnership, limited liability company, or corporation fails to file federal tax returns, or fails to file a required state tax return in the foreign state.

(2) Factors which indicate that a person is in control of a vehicle include but are not limited to the following:
(a) The person was the initial purchaser of the vehicle.
(b) The person operated or stored the vehicle in Iowa for any period of time.
(c) The person is a partner, member, or shareholder of the nonresident partnership, limited liability company, or corporation that purports to be the owner of the vehicle.
(d) The person is insured to drive the vehicle.

Iowa Code §321.55(2)(2013). The burden of proof is generally on a taxpayer challenging the denial of a refund absent inapplicable exceptions. Iowa Code § 421.60(6)(c).

B.

In this case, IDR's action is proper because Downing has not carried his burden of proof to show the vehicles subject to assessment were *not* in Iowa for a qualifying period of time and because he has not shown Downco to be a separate legal entity from himself. Both prove fatal to avoiding liability, although the evasion fee is not warranted at this time because, as discussed below, the language of the governing statute suggests there must be a criminal conviction which does not exist to date.

As an initial matter, Downing has not proven with the record made the vehicles were not in Iowa for a qualifying period of time because the record indicates the vehicles were present at least at some point

given the 2004 Provost that towed the motorcycles was here and because the passage of time and lack of trip logs reveals he cannot show the location of the vehicles outside of the State for the necessary period of time. While Downing did testify initially and on redirect (when his counsel attempted to move his testimony back to its original position) that the vehicles were not in the State for the requisite 90 days, this is not found to be persuasive. The hesitation Downing expressed on cross-examination and when the Tribunal inquired reveal the more accurate answer is that the vehicles were here in Iowa for some unknown amount of time, even if their proverbial home base was in Florida. Because it is Downing's burden of proof, this proves fatal to avoiding any registration requirement for the vehicles under the theory a non-resident owner owned them and the vehicles were operated by a resident in Iowa for an insufficient period of time. Had the burden of proof been on IDR, the finding would have been the opposite.

The closer issue in this case is whether Downco should be disregarded under a veil piercing theory and/or as a sham under Revenue law and liability attached directly to Downing. Indeed, in both version of Iowa Code section 321.55 at issue, a "nonresident owner of a motor vehicle" must first exist before the registration exemption can be claimed for vehicles driven by residents in the state on a limited basis. Iowa Code § 321.55. By statute, owner "means a person who holds the legal title of a vehicle." Iowa Code § 321.1(49). Person "means every natural person, firm, partnership, association, or corporation," and where the term person is used in connection with the registration of a motor vehicle, it includes "any corporation, association, partnership, company, firm, or other aggregation of individuals which owns or controls such motor vehicle as actual owner[.]" Id. § 321.1(52).

Here, the record ultimately indicates Downing, an Iowa resident ineligible for the registration exemption under Iowa Code section 321.55, was the true owner of the vehicles at issue because Downco was a sham company and should be disregarded. In the rare situation a corporation or limited liability company is a sham and the proverbial veil is pierced, the business entity should be "treated as the individuals who own it," with the Iowa Supreme Court finding that both the assets and liabilities of the entitiy are those of its owners. Benson v. Richardson, 537 N.W.2d 748, 761 (Iowa 1995). While there is no definitive Iowa case on point, a federal district court persuasively explained the law of the state in which a business entity is formed controls when the corporate veil should be pierced for a business entitiy. See Tyson Fresh Meats, Inc. v. Lauer Ltd., L.L.C., 918 F. Supp. 2d 835, 850 (N.D. Iowa 2013) ("While neither the Iowa Courts nor the Eighth Circuit has determined which states' law applies to questions of piercing the corporate veil or alter ego theories in cases involving an Iowa plaintiff and out-of-state entity defendant, this Court, after reviewing relevant case law, is persuaded that because Lauer Limited is a Nebraska entity, Nebraska law applies."). The Tribunal can find no authority to indicate the deference to the originating state's business entity law would change the statutory burden of proof assigned to the taxpayer in this proceeding, thereby leaving the burden on the taxpayer, and on the issue of veil piercing, the Montana Supreme Court has stated:

> We have defined a two-prong test for piercing the corporate veil. First, the trier of fact must find that the defendant was either the alter ego, instrumentality, or agent of the corporation. Second, the trier of fact must find evidence that the corporate entity was used as a subterfuge to defeat public convenience, justify wrong, or perpetrate fraud.

Drilcon, Inc. v. Roil Energy Corp., 749 P.2d 1058, 1064 (1988). While this two prong theory has

historically been applied to Montana LLCs, a more recent decision by the Montana Supreme Court has called this into question, primarily because a key factor in veil piercing is corporate formalities and because LLCs in Montana are not required to follow many traditional corporate formalities. Weaver v. Tri-Cnty. Implement, Inc., 311 P.3d 808, 812 (2013).

The following analysis by the bankruptcy court in In Re Atlantis Water Solutions, LLC details the evolution of this issue, stating in relevant part:

> As a general rule, members of a limited liability company ("LLC") are not subject to personal liability for obligations of the company. Mont. Code Ann. ("MCA") § 35-8-304(1). Despite the plain language of this statute, common law principles associated with piercing the corporate veil, and disregarding the corporate form, have been applied to LLCs. This Court engaged in this analysis, and provided a thorough discussion of the applicable cases in Businger v. Storer (In re Storer), 380 B.R. 223, 233-34 (Bankr. D. Mont. 2007).
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> Baldwins' urge this Court to follow the analysis outlined In re Storer, and apply the traditional two-prong test to determine whether the corporate veil can be pierced. The test requires, first, that the defendant must be shown to be an alter ego, instrumentality, or agent of the corporation. See Peschel Family Trust v. Colonna, 75 P.3d 793, 796–97 (Mont. 2003) (abrogated on other grounds by Boyne USA, Inc. v. Lone Moose Meadows, LLC, 235 P.3d 1269, 1273 (Mont. 2010)). Second, substantial evidence must exist that the corporate entity was used as a "subterfuge to defeat public convenience, justify wrong or perpetrate fraud." Id. at 799. Baldwins urge this Court to apply this two-prong test to Atlantis. See ECF No. 18, p. 13.
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> Atlantis and Iofina counter that the Montana Supreme Court's holding in Weaver v. Tri-County Implement, Inc., 311 P.3d 808, sets forth the applicable standard when a party seeks to "pierce the veil" of an LLC and reach its members. With regard to LLCs, the Montana Supreme Court has held that piercing the veil may be appropriate if a member "operates an LLC as an empty shell to perpetuate fraud and avoid personal responsibility." Weaver, supra, 2013 MT at ¶ 18 Weaver, supra, 2013 MT at ¶ 18. Atlantis and Iofina argue that this Court must determine: (i) whether Atlantis and its sole member, Iofina, complied with the formalities required of LLCs under Montana law; and, (ii) whether Iofina used Atlantis as a subterfuge to perpetuate fraud and avoid personal liability.
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> In urging the Court to rely on Weaver, not Peschel in its analysis, Atlantis and Iofina persuasively argue that the established law in Montana for piercing the veil of corporations, and in particular, the first prong of the test involving the alter ego or agent analysis and the 14 factors set forth in Peschel, supra, are not appropriate for LLCs. Atlantis and Iofina highlight the distinctions between corporations and LLC's to support this argument. For example, Atlantis and Iofina note that, while corporations are generally required to observe a variety of formalities in their governance and operations, LLCs are not. An LLC may consist of a single member. MCA § 35-8-201(1). An LLC can be managed directly by its members instead of managers or officers and directors. MCA § 35-8-202(e)(ii). In a

> member-managed LLC, a member is an agent of the LLC for the purposes of its business or affairs. MCA § 35-8-301(1). LLCs are not required to have an operating agreement. MCA § 35-8-109(1). Finally, and importantly, "the failure of a limited liability company to observe usual company formalities or requirements relating to the exercise of its company powers or management of its business is not a ground for imposing personal liability on the members or managers of the limited liability company." MCA § 35-8-304(2).

In re Atlantis Water Sols., LLC, 2018 WL 6199127, at *5–6 (Bankr. D. Mont. Nov. 5, 2018). The court concluded the result in the case would be the same under either test, and this was affirmed on appeal. In re Atlantis Water Sols., LLC, 2019 WL 4874764, at *8 (B.A.P. 9th Cir. Oct. 1, 2019) ("The Baldwins failed to produce evidence that Iofina used Atlantis as a subterfuge to defeat public convenience, commit crime, justify wrong, perpetuate fraud or avoid personal responsibility and, ultimately, that the LLC veil should be pierced."). As such, support exists that the veil piercing test for LLC should modified from the traditional corporate approach to consider, in the words of the Montana Supreme Court, whether "a member or manager operates an LLC as an empty shell to perpetuate fraud and avoid personal responsibility[.]" Weaver, 311 P.3d at 812.

Much like the situation in Atlantis, the record here indicates the result would be the same whether the traditional veil piercing test is employed or the newer formulation that looks past corporate formalities. Starting with the newer approach suggested after Weaver, Downing has *not* proven Downco was anything but "an empty shell to perpetuate fraud and avoid personal responsibility[.]" Weaver, 311 P.3d at 812. This is because Downing caused Downco, a properly constituted Montana LLC, to purchase the three vehicles at issue, in an obvious effort to limit his tax liability, and then caused the company to allow him to essentially appropriate the vehicles without compensation in the form of his unlimited personal usage without any lease, monetary remuneration, or other material consideration. As evidenced by the lack of any agreement, rental payments, or even accounting of usage, Downing effectively treated the vehicles as his own personal property, and in so doing, he materially diminished the value of the company's sole assets. When pressed, Downing did discuss how the vehicles had occasionally been used for marketing purposes for his other ventures, but the lack of detail and structure to these transactions only confirm he treated the property as his own and did not regard Downco as a separate entity controlling the vehicles. In sum, this appropriation of all of Downco's assets for uncompensated personal use demonstrates the company was an empty shell designed to avoid personal responsibility by means of essentially tax scheme. A such, this case goes from the "use of particular business entities to avoid taxes and other liabilities[, which] is a common and legal practice," Thomas v. Bridges, 144 So. 3d 1001, 1008 (2014), to a situation where the business entity was used to improperly avoid taxes, which justifies piercing the veil in accord with the Montana Supreme Court's interpretation of the law. See, e.g., Brady Irr. Co. v. Teton Cty., 85 P.2d 350, 352 (1938) ("While the general rule is that courts will not ordinarily look behind the veil of the corporate entity, it at times becomes material to consider what is this thing which is described as a corporation. The Supreme Court of the United States has not hesitated, when the facts warranted it, in looking behind the veil of the corporate entity in tax cases[.]" (internal citation and quotation marks omitted)). To hold to the contrary would be to effectively state a business entity can be used to solely purchase property and then essentially donate the property's use to an owner to avoid the taxes the owner would otherwise have to pay he had bought the property outright to use. Without some statute specifically authorizing such, this cannot be the state of the law.

A similar result is reached under the more traditional Montana test. As the bankruptcy court in Atlantis found, the second prong of the traditional test, namely whether "the corporate entity was used as a subterfuge to defeat public convenience, justify wrong, or perpetrate fraud" is in practice a very similar inquiry to the newer suggested test for LLCs, and for the foregoing reasons, this requirement is met. Drilcon, 749 P.2d at 1064. Consequently, the issue is whether Downco was also an "alter ego, instrumentality, or agent of the corporation." Id. This is determined by a totality of the circumstances, with no one factor or even set of factors necessarily having controlling weight. Peschel, 317 Mont. at 134. In commenting on the intentional fluidity of the test, the Montana Supreme Court has stated: "Piercing the corporate veil is an equitable remedy used to curb injustices resulting from the improper use of a corporate entity. Because the remedy is equitable, no concrete formula exists under which a court will disregard the separate identity of the corporate entity. Use of this remedy depends entirely upon the circumstances of each case." Hando v. PPG Indus., Inc., 771 P.2d 956, 960 (1989). Some of the factors the Montana Supreme Court has considered are:

1. Whether the shareholder owns all or most of the corporation's stock.
2. Whether the shareholder is a director and/or president of the corporation.
3. Whether the shareholder makes all the corporate decisions without consulting the other directors or officers.
4. Whether the shareholder, officers and/or directors fail to comply with the statutory requirements regarding operation of the corporation.
5. Whether the shareholder's personal funds are commingled with the corporation's funds.
6. Whether the shareholder's personal credit and corporation's credit are used interchangeably to obtain personal and corporate loans.
7. Whether the shareholder's personal business records are not kept separate from the corporation's business records.
8. Whether the shareholder and corporation engage in the same type of business.
9. Whether the shareholder and corporation have the same address which is the address of shareholder's personal residence.
10. Whether the shareholder admits to third parties that the shareholder and the corporation are one in the same.
11. Whether the corporation's profits and earnings are distributed through means other than dividends.
12. Whether the corporation is undercapitalized.
13. Whether the parent and subsidiary have the same name.
14. Whether the parent and subsidiary have the same directors and officers.

Meridian Mins. Co. v. Nicor Mins., Inc., 742 P.2d 456, 462 (1987). At other times, the non-exclusive factors have been formulated by the Montana Supreme Court and other courts following Montana law as follows:

1. Whether the individual is in a position of control or authority over the entity;
2. Whether the individual controls the entity's actions without need to consult others;
3. Whether the individual uses the entity to shield himself from personal liability;

4. Whether the individual uses the business entity for his or her own financial benefit;
5. Whether the individual mingles his own affairs in the affairs of the business entity;
6. Whether the individual uses the business entity to assume his own debts, or the debts of another, or whether the individual uses his own funds to pay the business entity's debts.

In re Storer, 380 B.R. 223, 233–34 (Bankr. D. Mont. 2007) (citing Hando, 771 P.2d 956, 960 (1989)).

On balance, Downing has *not* proven Downco is anything but an alter-ego of himself. As an initial matter, Downing is the sole owner of the company, and he is the only individual that has substantively made decisions for the company. In addition, he has directed the company to purchase the vehicles at issue, which effectively comprised the company's only assets during the relevant time periods, and then used such vehicles without agreement or compensation for his own financial benefit. The use was so pervasive there is no ability to materially determine when the company's sole assets were not being used for Downing's personal benefit. Despite some equivocation at the hearing, the record demonstrates the purpose of using a Montana entity was to avoid certain vehicle tax Downing would otherwise have to pay if he bought the vehicles outright for his own benefit. Against this strong evidence of the company being an alter ego, there is a general lack of material corporate formalities, such as having a separate bank account, financial statements or similar corporate documents. While such may not be required by law and while the governing Montana statute states such cannot be used to pierce the veil, its lack prevents it from being used diminish other evidence supporting piercing the veil. See generally, M.C.A. § 35-8-304(2) ("The failure of a limited liability company to observe the usual company formalities or requirements relating to the exercise of its company powers or management of its business is not a ground for imposing personal liability on the members or managers of the limited liability company."). Further, while Downing was careful to have Downco listed as purchaser of the vehicles and on certain other documents to third parties, to have its bills paid by another third party, and to have the Secretary of State filings made, the weight this evidence has is not strong enough to offset the other evidence. This is because it is not enough to have the business entity be represented to third parties as separate entity; it must also be treated as such by the owner, which it was not here for the foregoing reasons. The address of record in Montana also does not change much because there were no employees or the like in that location, and even the vehicles that were generally "assigned" to Montana did not appear to be stationed there. In short, the factor is met, and as such, the veil is pierced.

Even under Iowa's substantively similar veil piercing analysis, the result would be identical for similar reasons. See generally, Keith Smith Co. v. Bushman, 873 N.W.2d 776 (Iowa Ct. App. 2015). In fact, even considering the non-exclusive, but arguably more narrow factors in Iowa Code section 321.55(2)(b) on shell businesses, the result would be the same for similar reasons. Again, the core issue is that Downco only had a nominal existence with Downing representing it as existing to third parties such as on purchase documents, but this is not enough when he treated the company as his own and not a separate legal entity with the unfettered and uncompensated personal use of all of the company's assets to the determinant of those assets. This is particularly true since there is nothing to indicate Downco treated the uncompensated use as a gift—much as a non-profit might be in the business of providing gifts—that was memorialized and/or appropriate tax paid.

C.

Finding Downing has not carried his burden of proof to avoid the veil being pierced and to avoid finding he was the true owner, he is liable and unable to claim any refuge in Iowa Code section 321.55. While this justifies the tax and interest alleged by IDR, it does not justify the evasion fee or "fraud penalty" IDR is claiming under Iowa Code section 321.105A(7)(b). That statute states:

> b. Evasion fee. An Iowa resident found to be in control of a vehicle which is owned by a shell business and for which the fee for new registration has not been paid, as provided in section 321.55, subsection 2, is guilty of a fraudulent practice. An Iowa resident found to be in control of a vehicle which is owned by a shell business and for which the fee for new registration has not been paid, as provided in section 321.55, subsection 2, shall be assessed a penalty of seventy-five percent of the amount of the fee unpaid and required to be paid on the actual purchase price less trade-in allowance.

Iowa Code § 321.105A(7)(b). The difficulty with applying this penalty provision is that the language and context of the penalty reveals it is to be imposed after a conviction finding an individual committed the crime of fraudulent practice in the form of using a shell company, which requires the State to bear the burden of proof beyond a reasonable doubt. This is not the same as a finding by an administrative Tribunal, where the taxpayer bears the burden of proof by a preponderance of the evidence.

Indeed, because the statute does not expressly state who or what is entitled to making the finding of an Iowan using a shell company—as articulated in Iowa Code section 321.55(2)—necessary to impose an evasion fee, the Tribunal must turn to the principals of statutory interpretation. "Ordinarily, the interpretation of a statute is a pure question of law," and the Iowa Supreme court has articulated a very specific methodology for interpreting statutes. Andover Volunteer Fire Dep't v. Grinnell Mut. Reinsurance Co., 787 N.W.2d 75, 79 (Iowa 2010) (internal quotation marks omitted). The overarching purpose behind any statutory interpretation is to effectuate the legislature's intent, and the "first step when interpreting a statute is to determine whether it is ambiguous." State v. Iowa Dist. Court for Scott Cty., 889 N.W.2d 467, 471 (Iowa 2017). "A statute is ambiguous if reasonable minds could differ or be uncertain as to the meaning of the statute." The Sherwin-Williams Co. v. Iowa Dep't of Revenue, 789 N.W.2d 417, 424 (Iowa 2010) (internal quotation marks omitted). "Ambiguity arises in two ways—either from the meaning of specific words or from the general scope and meaning of the statute when all of its provisions are examined." State v. McCullah, 787 N.W.2d 90, 94 (Iowa 2010) (internal quotation marks omitted). A term or phrase is given its "common and ordinary meaning" often from a common usage dictionary, unless the legislature chose to define it or it had "a well-settled legal meaning" at the time the legislature passed the law. Miller v. Marshall Cty., 641 N.W.2d 742, 748 (Iowa 2002).

"If no ambiguity exists, [a] statute is rationally applied as written." Andover Volunteer Fire Dep't, 787 N.W.2d at 81. This is true absent the most exceptional circumstances where confidence exists that "the legislature did not intend the result required by literal application of the statutory terms." Brakke v. Iowa Dep't of Nat. Res., 897 N.W.2d 522, 541 (Iowa 2017). "[T]he task is to interpret the statute, not improve it," and statutory interpretation cannot be used a guise for redrafting a statute, even one that is at best a "half measure" on an important issue. Id. Finally, when dealing with tax exemption statutes, they are "strictly construed with any doubt resolved in favor of taxation and against exemption." Parshall Christian Order v. Bd. of Review, Marion Cty., 315 N.W.2d 798, 801 (Iowa 1982).

In this case, there may be some ambiguity in the term "found" because, by virtue of being written in the passive voice, the statute does not expressly articulate what entity is capable of making the finding. This stands in stark contrast to Iowa Code section 321.55(b)'s provisions on shell companies, where the Department of Transportation—and not the IDR (although IDR may "consult")—is specifically identified as making findings.[1] This also stands in stark contrast to other situations where the legislature expressly stated a criminal conviction is not a prerequisite to a civil penalty. See, e.g., Jim O. Inc. v. City of Cedar Rapids, 587 N.W.2d 476, 479 (Iowa 1998) ("Reinforcing that authority, subsection (c) of the same statute declares '[a] criminal conviction is not a prerequisite to suspension, revocation, or imposition of a civil penalty pursuant to this section.' Iowa Code § 123.39(1)(c)."). The context of the term, though, either outright dispels any ambiguity or promptly resolves it. The term "found" is used twice is the same subsection, which generally indicates they should be defined in the same manner as there is no special definition attached to one. See, e.g., State v. Richardson, 890 N.W.2d 609, 619 (Iowa 2017) ("When the same term appears multiple times in the same statute, it should have the same meaning each time." (internal quotation marks and citation omitted). The first use of the term is the opening sentence of the statute, which again states: "An Iowa resident found to be in control of a vehicle which is owned by a shell business and for which the fee for new registration has not been paid, as provided in section 321.55, subsection 2, is guilty of a fraudulent practice." Iowa Code § 321.105A(7)(a). Because guilt is a term associated with the criminal context and because the statute expressly makes this conduct the crime of fraudulent practice, it appears "found" is related to a criminal context where the State bears the burden of proof beyond a reasonable doubt. Thus, when the term is used in the next sentence, the term would appears to require a criminal conviction of fraudulent practices in the form of using a shell company as the concept is explained in Iowa Code section 321.55(2). Nothing about assessing a significant evasion fee after a conviction is so unusual as to indicate the typical rules of interpretation should be annulled to avoid an absurd result. This conclusions holds particularly since IDR did not cite any other provision of law enabling it to make this finding or raise any separate argument to this effect in its brief. IDR Br.,at pp. 15-16. With this interpretation, then, this administrative proceeding where the taxpayer bears the burden of proof is incapable of making such a finding. Thus, the evasion fee must be set aside unless and until the State secures a criminal conviction or IDR finds a way to proceed under one of its general fraud provisions, where it will typically carry the burden of proof by clear and convincing evidence. See, e.g., Iowa Code §§ 421.27, .60 ("With respect to the issue of fraud with intent to evade tax, the burden of proof is upon the department. The burden of proof must be carried by clear and convincing evidence.").

D.

1 Of note, any attempt to simply look through the passive voice use of the term "found" in Iowa Code section 321.55 to Iowa Code section 321.55(b) to discern who makes the shell business finding still runs into the proverbial wall of the plain language of Iowa Code section 321.55(b) stating DOT makes the finding. Iowa Code § 321.55(1)(b) ("On or after July 1, 2013, if the department, in consultation with the department of revenue, determines that the nonresident owner of a vehicle is a partnership, limited liability company, or corporation that is a shell business . . .]"). This reading would still deprive the Tribunal of jurisdiction because this case was certified to it by IDR and not DOT, even though the Tribunal routinely hears both types of cases given it is a central panel serving dozens of agencies and other government entities. In fact, it is unclear the extent to which this Tribunal with the issue certified and the agency certifying it can fully delve into the statutory, shell business analysis. Transmittal Form, at p. 1. This is true despite the fact that Exhibit A purports to indicate DOT made the requisite finding in a joint investigation, and one reason such considerations are important is to determine which agency has reviewing authority over the Tribunal's decision. Ex. A, at p. 1.

While having substance, Downing's arguments to the contrary cannot ultimately change this outcome. With respect to the amount of time the vehicles spent in Iowa, Downing argues IDR has no proof that the vehicles were in Iowa for a qualifying period of time given it at most only has proof the Provost was here in the State occasionally and the vehicles were based in Florida, unlike Downing's other vehicles which were in Iowa and properly registered. While this argument does have some persuasive appeal, the law assigns the burden of proof to Downing, and he does not remember how often the vehicles were in Iowa. This is fatal because, even if they were based in Florida, this does not mean they were in Iowa for an insufficient period of time to qualify for registration.

Likewise, while agreeing Montana's more lax business entity law should apply, Downing argues the veil should not be pierced under any test because a LLC is not required to have any more formalities than Downco had and because Downco can be used for any lawful purpose, which would include buying vehicles under a tax advantage status and allowing its owner to use them, even if the compensation was limited to management, business trips, and the like. Again, while some of this claim has force, the core difficulty is the materially uncompensated use of the vehicles. The claim as to management and business trips being some form of compensation is of no avail since it was not structured as such with a discernable agreement. Such was a *post hoc* justification of the use, and in effect, the record shows Downing used Downco's only assets as his own without thought of compensation until the present proceedings. This is the problem because the essence of nearly all veil piercing tests turn on whether the business entity was treated as a separate legal entity it purports to be. Such uncompensated, pervasive use of all the assets, particularly when the use reduced the value of the assets is the definition of being a shell, alter-ego company with no truly separate existence. The fact Downing Rentals paid certain expenses for Downco does not change the analysis because, again, there was no agreement structuring the payments as compensation. If anything, the payments call into question Downco Rentals.

Further, throughout the appeal process, including during questioning at the hearing, Downing kept making the point of the economic inefficiency and absurdity of making agreements, payments, and/or other arrangements with Downco for the use of the vehicles given he was the sole member of Downco. This line of questioning misses the point, and in fact, it all but requires veil piercing because the only reason such agreements and the like would not be necessary is if the company were not truly treated as a separate legal entity. The fact the entity is a pass through company on certain tax returns does not justify treating it as a sham. While the Tribunal searched for a means of disallowing IDR's action, none exists. The fact Downco did represent itself as a separate legal entity to third parties, such as in the purchase agreements, is not enough because, again, a business entity still must be treated by its owner as separate.

The remainder of Downing's arguments are also unpersuasive, at least at this time. Much discussion exists about the statutory changes to Iowa Code section 321.55(2). However, the Tribunal's resolution that the veil should be pierced and the evasion fee should not apply appear to render many of the constitutional and statutory issues raised about the statute immaterial. Likewise, the discussion concerning the objections to the discovery requests, upon which a motion to compel was never filed, is equally immaterial, particularly given it is Downing's burden of proof to show liability does not apply to him. Any remaining constitutional arguments do not appear to be "as applied" enough to allow the Tribunal to comment, and they are preserved to the extent raised in the briefs. See, e.g., Shell Oil Co. v.

Bair, 417 N.W.2d 425, 429 (Iowa 1987) ("A fundamental distinction must be recognized between constitutional applicability of legislation to particular facts and constitutionality of the legislation. When a tribunal passes upon constitutional applicability, it is carrying out the legislative intent, either express or implied or presumed. When a tribunal passes upon constitutionality of the legislation, the question is whether it shall take action which runs counter to the legislative intent. We commit to administrative agencies the power to determine constitutional applicability, but we do not commit to administrative agencies the power to determine constitutionality of legislation."). Finally, the passing reference to the statute of limitations is of no avail since there does not appear to be any action capable of triggering the period to start running. See generally, Iowa Code § 423.37. Accordingly, IDR's action is AFFIRMED in part finding Downing is liable for the registration but REVERSED in part as the Tribunal is not capable of making the finding necessary to support the evasion fee or "fraud penalty" as IDR calls it in its brief.

ORDER

IDR's action in this matter is AFFIRMED on all issued except for being REVERSED on the issue of the evasion fee, which cannot be imposed at this time. IDR shall take any action necessary to implement and enforce this decision.

IT IS SO ORDERED.

Dated this the 27th day of June, 2022.

Jonathan M. Gallagher
Administrative Law Judge

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Paxton Williams, Assistant Attorney General (By AEDMS)
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NOTICE

Any aggrieved party has 30 days, including Saturdays, Sundays and legal holidays, of the date of this Proposed Decision to file an appeal to the Director of the Department of Revenue. 701 I.A.C. § 7.17(8)(d). The appeal must be made in writing. The appeal shall be directed to:

Office of the Director
Iowa Department of Revenue
Hoover State Office Building
Des Moines, Iowa 50319

Case Title: STEVEN DOWNING V. IOWA DEPARTMENT OF REVENUE

Case Number: 22IDR0003

Type: Proposed Decision

IT IS SO ORDERED.

Jonathan Gallagher, Administrative Law Judge