

CT 18-08

Tax Type: Tobacco Products Tax

Tax Issue: Unreported/underreported Receipts (Non-Fraudulent)

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

**DEPARTMENT OF REVENUE
OF THE STATE OF ILLINOIS**

v.

ORLEANS FOOD MART, INC.

Taxpayer

**Docket # XX-ST-XXX
Acct ID: XXXXXXXX
Letter ID: XXXXXXXXXXXXXXXXXXXX**

RECOMMENDATION FOR DISPOSITION

Appearances: Matthew Crain, Special Assistant Attorney General, for the Department of Revenue of the State of Illinois; John R. Simpson of Sorling Northrup for ORLEANS FOOD MART, INC.

Synopsis:

The Department of Revenue (“Department”) conducted an audit of ORLEANS FOOD MART, INC. (“taxpayer”), and as a result of the audit the Department issued a Notice of Tax Liability (“NTL”), which assessed tax in the amount of \$1,644, plus penalties, and interest, pursuant to the Tobacco Products Tax Act (35 ILCS 143/10-1 *et seq.*). The taxpayer timely protested the NTL. The parties filed a Stipulation of Facts with an attached affidavit from the taxpayer’s president. The parties requested that this matter be decided based on the written submissions. The taxpayer filed a brief in support

of its position in which it contends that the Tobacco Products tax does not apply because although the taxpayer had tobacco products in its possession, the products were not sold or disposed of to a retailer or consumer. Most of the products were returned to the supplier; some were destroyed. The Department did not file a brief in response. After reviewing the documents submitted, it is recommended that this matter be resolved in favor of the taxpayer.

FINDINGS OF FACT:

1. In 2012, the taxpayer received certain tobacco products from XYZ ENTERPRISES, INC., which is a supplier based in Indiana. (Stip. #1; Affidavit ¶3)
2. The products were the type of products subject to the Tobacco Products Tax Act. (Stip. #2)
3. The products were received on a verbal “on approval” basis. The taxpayer did not pay XYZ ENTERPRISES, INC. for the products. (Affidavit ¶4, ¶5)
4. The products were delivered to the taxpayer’s location without accompanying documentation. (Affidavit ¶6)
5. Upon examining the products, the taxpayer discovered that most of the products were expired and not of a type that was suitable for marketing. (Affidavit ¶8)
6. After several calls to the supplier, employees of the supplier returned to the taxpayer’s location and picked up almost all of the products. (Affidavit ¶10)
7. The taxpayer destroyed a small amount of the products. (Affidavit ¶11)
8. The taxpayer did not sell any of the products. (Affidavit ¶12)

9. The taxpayer did not pay XYZ ENTERPRISES, INC. for the products. (Affidavit ¶13)
10. XYZ ENTERPRISES, INC. did not provide a receipt or credit document to the taxpayer because the taxpayer did not make a payment for the products. (Affidavit ¶8)
11. In 2015, the Department conducted a tobacco products tax audit of the taxpayer's business. (Affidavit ¶15)
12. In 2015, the taxpayer attempted to contact XYZ ENTERPRISES, INC. and learned that the company is no longer operating. (Affidavit ¶16)

CONCLUSIONS OF LAW:

Section 10-10 of the Tobacco Products Tax Act ("Act") provides, in relevant part, as follows:

Except as otherwise provided in this Section with respect to little cigars, on the first day of the third month after the month in which this Act becomes law, a tax is imposed on any person engaged in business as a distributor of tobacco products, as defined in Section 10-5, at the rate of (i) 18% of the wholesale price of tobacco products *sold or otherwise disposed of to retailers or consumers* located in this State prior to July 1, 2012 and (ii) 36% of the wholesale price of tobacco products *sold or otherwise disposed of to retailers or consumers* located in this State beginning on July 1, 2012; . . . (emphasis added) 35 ILCS 143/10-10.

The taxpayer argues that in order for the tax to be imposed, there must be a sale or disposition to retailers or consumers. The taxpayer cites the Department's regulation that was in effect during the time period in question and provides, in part, as follows:

- a) The Tobacco Products Tax is imposed upon the last distributor, as defined in Section 660.10, who sells tobacco products to a retailer or consumer located in Illinois at the rate of 18% of the wholesale price of tobacco products sold or otherwise disposed of in this State.

...

- c) A retailer is required to register as a distributor, file returns and pay the Tobacco Products Tax imposed by the Act on all sales of tobacco products on which the tax has not been paid unless the sales are exempt under Section 660.30. (See Sections 660.15, 660.20, and 660.30.)

The taxpayer contends that the evidence is uncontroverted that no sale took place. The taxpayer did not pay the supplier, and the products were either returned or destroyed. The taxpayer states that a “Sale” is defined in section 10-5 as “any transfer, exchange, or barter in any manner or by any means whatsoever for a consideration and includes all sales made by persons.” 35 ILCS 143/10-5. The taxpayer argues that such a transfer did not occur in this case, and no sale was made to anyone.

I believe there was no disposition that warrants the tax in this case. A “distributor” includes “any retailer who receives tobacco products on which the tax has not been or will not be paid by another distributor.” 35 ILCS 143/10-5. The tax is imposed on any person engaged in business as a distributor, but the tax is calculated as a percentage of the wholesale price of tobacco products “sold or otherwise disposed of to retailers or consumers.” 35 ILCS 143/10-10. The products in the present case were not sold or otherwise disposed of to retailers or consumers. Some of the products were destroyed and others were returned. The tax should not be imposed on these products.

Recommendation:

For the foregoing reasons, it is recommended that the Notice of Tax Liability be dismissed.

Linda Olivero
Administrative Law Judge

Enter: December 23, 2016