

ST 17-03
Tax Type: Motor Vehicle Use Tax
Tax Issue: Nonresident Exemption

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

THE DEPARTMENT OF REVENUE
OF THE STATE OF ILLINOIS

v.

JANE DOE,
Taxpayer

No. XX-ST-XXX
Account ID XXXXX-XXXXX
Letter ID XXXXXXXXXXXXXXXXXXXX
Period 4/5/12

Ted Sherrod
Administrative Law Judge

RECOMMENDATION FOR DISPOSITION

Appearances: Special Assistant Attorney General Michael Coveny on behalf of the Illinois Department of Revenue; Marlin Johnson, *pro se*.

Synopsis:

This matter comes on for hearing pursuant to a protest filed by JANE DOE (“Taxpayer”) in response to the Department’s Notice of Tax Liability for Form EDA-95, Motor Vehicle Use Tax Report, Letter ID number XXXXXXXXXXXXXXXXXXXX issued by the Illinois Department of Revenue (“Department”) for Motor Vehicle Use Tax on the Taxpayer’s purchase of a 2011 BMW 328i motor vehicle on April 5, 2012. The Taxpayer did not pay any use tax to Illinois on this purchase based upon her position that she was not an Illinois resident when the vehicle was

purchased and, therefore, was exempt from the payment of any such tax. At the hearing in this matter, the Taxpayer testified on her own behalf and both the Department and the Taxpayer submitted documentary evidence. Following the submission of all evidence, and a review of the record, it is recommended that this matter be resolved in favor of the Taxpayer. In support of this recommendation, I make the following findings of fact and conclusions of law.

Findings of Fact:

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, was established by the admission into evidence of the Department's EDA-95 Auditor Prepared Motor Vehicle Use Tax Report showing a tax liability of \$2,973 including penalties. Tr. p. 15; Department Exhibit ("Ex.") 2.
2. In 2011, JANE DOE ("Taxpayer") entered into an agreement to lease a 2011 BMW 328i, VIN number XXXXXXXXXXXXXXXX from BMW Financial Services LLC, a company engaged in the leasing and retail sale of automobiles in Chicago Illinois. Tr. pp. 8, 21. The Taxpayer paid Wisconsin tax on this transaction pursuant to sections W.S.A. 77.52(1) and W.S.A. 77.53(1) of the Wisconsin Statutes¹ and BMW Financial was assessed and paid Illinois tax on this transaction. Tr. pp. 8, 16; Department Ex. 3. At the time the Taxpayer entered into this lease transaction she possessed an unexpired Wisconsin driver's license and was shown on Wisconsin real estate tax records as the owner of a home located at XXXX XXXth Avenue, Burlington, Wisconsin. Taxpayer's Group Ex. 1.²

¹ The Wisconsin use tax is imposed on the use, including storage, in Wisconsin of tangible personal property acquired by sale or lease pursuant to section W.S.A. 77.52(1) and W.S.A. 77.53(1) of the Wisconsin statutes.

² By written agreement of the parties, as authorized by Department regulation 86 Ill. Admin. Code, ch. I, section 200.155, the Taxpayer and the Department were allowed to submit additional documentary evidence for inclusion in the record subsequent to the conclusion of the administrative hearing in this matter. Documentation from both the Taxpayer and the Department was received within 30 days of the date of the hearing. The Department's post

3. On April 5, 2012, the Taxpayer purchased the aforementioned 2011 BMW 328i it had been leasing from BMW Financial for \$33,333.13. Tr. pp. 11, 12; Department Ex. 2, 3. The Taxpayer did not file a RUT-25 reporting any use tax due on this purchase. Tr. pp. 7, 8, 11, 12. Moreover, the record does not indicate that any Form ST-556 Sales Tax Transaction Return was ever filed by BMW Financial covering this transaction as required by 86 Ill. Admin. Code, ch. I, section 130.540.
4. The Taxpayer was issued a Wisconsin driver's license on November 2, 2007 which expired on June 4, 2015. Taxpayer's Group Ex. 1. This driver's license was current and in effect on the date of the purchase of the motor vehicle in controversy from BMW Financial on April 5, 2012. *Id.*
5. The motor vehicle in controversy was insured by State Farm Insurance during 2011 and 2012. *Id.* The aforementioned insurance policy (policy number XXX XXXX-XXX-XXX) issued for this motor vehicle was issued to the Taxpayer and was addressed to her at XXXX XXXth Avenue, Burlington, Wisconsin. *Id.*
6. The record contains receipts for real property taxes paid on the property located at XXXX XXXth Avenue, Burlington, Wisconsin for 2009 through 2014. *Id.* These receipts pertain to real estate taxes paid on this property by the Taxpayer for each of these years. *Id.*
7. During the hearing, the Taxpayer introduced accounting records from a Wisconsin energy provider indicating that the Taxpayer paid monthly charges for gas and electric service provided to the property located at XXXX XXXth Avenue, Burlington, Wisconsin for the

hearing submission is marked as Department Ex. 5, and the Taxpayer's post hearing submission is marked as Taxpayer's Group Ex. 1.

entire calendar year 2012. *Id.* These records indicate that the Taxpayer has been paying utility bills for utility services provided to this property since 2010. *Id.*

8. The Taxpayer is employed by ABC COMPANY located in Wooddale, Illinois. Tr. p. 25. The Taxpayer testified that she commutes from Wisconsin to her job in Wooddale, Illinois and that she has been doing so since 2004. *Id.*
9. The Taxpayer filed Illinois income tax returns for 2011, 2012 and 2013. Tr. p. 16; Department Ex. 5. The Taxpayer's IL-1040 income tax returns for these years identify the Taxpayer as a resident of Illinois. *Id.* The Taxpayer testified during the hearing that she filed Illinois returns on which she identified herself as an Illinois resident based upon advice from her employer that this was required because she worked in Illinois. Tr. p. 33.
10. Wisconsin license plates were affixed to the motor vehicle in controversy at the time it was purchased by the Taxpayer on April 5, 2012. Tr. p. 41.

Conclusions of Law:

In this case, JANE DOE (“Taxpayer”) contests the Department’s imposition of a use tax on her purchase of a 2011 BMW 328i motor vehicle, VIN number XXXXXXXXXXXXXXXXXXXX from BMW Financial Services LLC (“BMW Financial”) an automobile lessor and retailer doing business in Illinois. The Taxpayer purchased this vehicle on April 5, 2012 after having previously entered into a lease agreement to lease this vehicle from BMW Financial. Department Exhibit (“Ex.”) 3.

Under the Use Tax Act (“UTA”), 35 ILCS 105/1 *et seq.*, Illinois imposes a tax on the privilege of using in Illinois tangible personal property purchased at retail from a retailer. 35 ILCS 105/3. The use tax is a corollary to the State’s sales tax which is normally collected by automobile dealers and other retailers engaged in the business of selling tangible personal

property in Illinois. Boye Needle Co. v. Department of Revenue, 45 Ill. 2d 484 (1970). If sales tax is collected on a purchase of a vehicle or other tangible personal property, the purchaser is not required to pay use tax to the state. 86 Ill. Admin. Code, ch. I, § 150.130. However, a retailer's failure to collect sales tax from the purchaser when it is legally due does not prevent the Department from collecting tax directly from the purchaser. *Id.* (“If the user purchases the tangible personal property from a retailer, but does not pay use tax to such retailer, the purchaser shall pay use tax directly to the Department.”).

The facts at issue indicate that no Illinois Retailers' Occupation Tax (“sales tax”) was collected from the Taxpayer when she purchased the motor vehicle at issue. On April 5, 2012, the Taxpayer purchased the vehicle from BMW Financial. Department Ex. 3. The record contains no evidence that a form ST-556 was ever completed by the seller and filed with the Department to report this sale as required by Department regulation 86 Ill. Admin. Code, ch. I, section 130.540. Based on the absence of this evidence from the record, I conclude that the Taxpayer did not pay Illinois Retailers' Occupation Tax to the dealer on this purchase.

An analysis of the facts and law in this matter is governed by well-settled legal premises. In Illinois, tax exemption provisions are strictly construed against the taxpayer and in favor of the taxing body (Telco Leasing, Inc. v. Allphin, 63 Ill. 2d 305 (1976)) with the exemption claimant having to clearly and conclusively prove entitlement to the exemption (*id.* at 310) and with doubts being resolved in favor of taxation. Follett's Illinois Book Supply Store, Inc. v. Isaacs, 27 Ill. 2d 600 (1963).

Moreover, the EDA-95, Auditor-Prepared Motor Vehicle Use Tax Report showing the liability assessed in the Notice of Tax Liability issued in this cause is *prima facie* evidence of the correctness of the liability shown to be due. 35 ILCS 105/12 (incorporating 35 ILCS 120/4,

120/5); Masini v. Department of Revenue, 60 Ill. App. 3d 11 (1st Dist. 1978). After the Department establishes its *prima facie* case, the burden shifts to the taxpayer to overcome it (*id.* at 15) and the taxpayer must carry its burden with competent evidence, identified with its books and records. *Id.*; Copilevitz v. Department of Revenue, 41 Ill. 2nd 154 (1968).

On the merits, the Taxpayer defends against the assessment of tax on the motor vehicle at issue averring that at the time of her purchase of the motor vehicle in controversy she was a resident of Wisconsin. Tr. pp. 21, 22, 45, 46. She contends that she purchased the motor vehicle for use in Wisconsin where the vehicle was stored when not being driven. *Id.* The Department argues that the Taxpayer was a resident of Illinois at the time of the purchase as evidenced by the Taxpayer's 2012 IL-1040 on which she identified herself as a resident of Illinois during that year. Tr. p. 16; Department Ex. 5.

The issue whether the Taxpayer was a resident of Illinois or Wisconsin at the time of the purchase of the motor vehicle in controversy is important because the legal basis for the Taxpayer's claim of exemption from tax is section 3-55(h) of the UTA, 35 ILCS 105/3-55(h), which provides:

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:

h) Except as provided in subsection (h-1), the use, in this State, of a motor vehicle that was sold in this State to a nonresident, even though the motor vehicle is delivered to the nonresident in this State, if the motor vehicle is not to be titled in this State, and if a drive-away permit is issued to the motor vehicle as provided by Section 3-603 of the Illinois Vehicle Code or if the nonresident purchaser has vehicle registration plates to transfer to the motor vehicle upon returning to his or her home state. The issuance of the drive-away permit or having the out-of-state registration plates to be transferred shall be *prima facie* evidence that the motor vehicle will not be titled in this State.
35 ILCS 105/3-55(h)

If the Taxpayer was a nonresident in 2012 when she purchased the vehicle in controversy and otherwise satisfied the conditions for exemption prescribed by section 3-55(h) at that time, no tax is due from her on the purchase of this motor vehicle.

It is first observed that the Illinois Vehicle Code (“Code”) defines “resident”, in pertinent part, as follows: “Every natural person who resides in this state shall be deemed a resident of this State.” 625 ILCS 5/1-173. The UTA does not define “resident.” The appellate court, in the case of Hatcher v. Anders, 117 Ill. App. 3d 236 (2d District 1983), discussed the meaning of the term “resident” for purposes of the Code. The court determined that the term “resident” is synonymous with “domicile.” *Id.* at 239. Further, the court provided that:

[A] person can have only one domicile or permanent residence and once it is established it is retained until a new domicile is acquired. (citations omitted). Affirmative acts must be proved to sustain the abandonment of an Illinois residence and a temporary absence from the state, no matter how protracted, does not equate with abandonment. (citations omitted). To establish a new domicile, a person must physically go to a new home and live there with the intention of making it his permanent home. (citations omitted). Only when abandonment has been proven is residency lost. (citations omitted).

Id.

Intent is a critical question in determining residency. Connelly by Connelly v. Gibbs, 112 Ill. App. 3d 257 (1st Dist.1983).

While the Taxpayer contends that she was a resident of Wisconsin in 2012, there is no question that for the year 2012, the Taxpayer filed an Illinois income tax return on which she affirmatively represented that she was an Illinois resident. Department Ex. 5.³ While the Taxpayer was given the option on her 2012 IL-1040 return of indicating her status as a “Non Resident” or as a “Part Year Resident” she chose not to do so. *Id.*

³ In addition to proof of the Taxpayer’s Illinois income tax return filings, the Department also introduced into the record evidence of a firearm training certificate issued to the Taxpayer by the Illinois Department of Professional Regulation in 1999 showing an Illinois address for the Taxpayer. Department Ex. 4. As indicated in the record, this evidence was determined to document the Taxpayer’s residency status during periods prior to 2012, the year in which the Taxpayer purchased the vehicle in controversy. Tr. pp. 37-40. Consequently, this evidence has been accorded no weight in arriving at a decision in this case.

The Taxpayer testified that her identification of herself as an Illinois resident on her return was erroneous. Tr. p. 33. In explaining this error, she testified that she was told by her employer that she was required to file returns in Illinois because she worked in Illinois. Tr. pp. 33, 34. In light of voluminous evidence that the Taxpayer was not an Illinois resident in 2012, which is summarized below, I find her claim that she erroneously identified herself as an Illinois resident on her Illinois return completely credible.

The record in this case indicates that the Taxpayer held a Wisconsin driver's license at the time of the purchase of the vehicle at issue in this case. Taxpayer Group Ex. 1. Rules promulgated by the Department deem this to be clear evidence that the Taxpayer was a nonresident at the time of this purchase in 2012. Specifically, regulation 86 Ill. Admin. Code, ch. I, section 130.605(b)(1)(A) states in part as follows:

(A) Documentation of nonresidency. The exemption under subsection (b)(1) is available only to nonresidents. A vehicle purchased by an Illinois resident is not eligible for exemption (even if the purchaser is only a part-time Illinois resident or has dual residency in Illinois and another state, and, in the case of more than one purchaser, even if only one of the purchasers is an Illinois resident) ... i) When the purchaser is a natural person, the best evidence of nonresidence is a non-Illinois driver's license. (Emphasis added)

Moreover, the Taxpayer has offered voluminous additional documentary evidence to support her position that she was a Wisconsin resident during 2012. The motor vehicle in controversy was insured by State Farm Insurance during 2011 and 2012. *Id.* The aforementioned insurance policy (policy number XXX XXXX-XXX-XXX) issued for this motor vehicle was issued to the Taxpayer and was addressed to her at XXXX XXXth Avenue, Burlington, Wisconsin. *Id.* The record also contains receipts for real property taxes paid on the property located at XXXX XXXth Avenue, Burlington, Wisconsin for 2009 through 2014. *Id.* These receipts pertain to real estate taxes paid on this property by the Taxpayer for each of these

years. *Id.* Moreover, during the hearing, the Taxpayer introduced accounting records from a Wisconsin energy provider indicating that the Taxpayer paid monthly charges for gas and electric service provided to the property located at XXXX XXXth Avenue, Burlington, Wisconsin for the entire calendar year 2012. *Id.* These records indicate that the Taxpayer has been paying utility bills for utility service provided to this property since 2010. *Id.*

In fact, the Department's own evidence, consisting of its Notice of Tax Liability issued May 29, 2015 (Department Ex. 1) and the Department's EDA-95, Auditor Prepared Motor Vehicle Use Tax Report (Department Ex. 2) contained in the record both show the Taxpayer's address to be in Burlington, Wisconsin. I find all of the aforementioned evidence sufficient to rebut the Department's finding that the Taxpayer was an Illinois resident in 2012 because the evidence contained in the record overwhelmingly supports the conclusion that she was a resident of Wisconsin.

Aside from establishing that the Taxpayer was a nonresident of Illinois when she purchased the motor vehicle at issue, another requirement of the exemption statute prescribed at section 3-55 of the UTA must be satisfied in order for the nonresident exemption set forth in this measure to apply. Section 3-55 of the UTA exempts from tax a motor vehicle sold to a nonresident but delivered to him or her in Illinois only "if a drive-away permit is issued to the motor vehicle as provided in Section 3-603 of the Illinois Vehicle Code or if the nonresident purchaser has vehicle registration plates to transfer to the motor vehicle upon returning to his or her home state[.] The issuance of the drive-away permit or having the out-of-state registration plates to be transferred shall be prima facie evidence that the motor vehicle will not be titled in this State." 35 ILCS 105/3-55(h).

Section 3-603 of the Illinois Vehicle Code specifically provides for the issuance of a drive-away permit when a dealer sells a motor vehicle to a nonresident who does not, at the time the motor vehicle is delivered have out-of-state registration plates to transfer to it. The purpose of this specific permit is to allow for the “operation of such vehicle without registration from the place of sale to the place of destination outside of the State of Illinois...[.]” 625 ILCS 5/3-603(a). Further, “[A]ny vehicle being operated pursuant to a driveaway decal permit may not be used for any other purpose and such permits shall be effective only for a period of 30 days from the date of sale.” *Id.*

During her testimony, the Taxpayer testified that the motor vehicle in controversy had Wisconsin license plates throughout the Taxpayer’s custody of this vehicle as lessee and owner. Tr. p. 41. In light of documentary evidence that the Taxpayer had a Wisconsin driver’s license and that the Taxpayer owned a Wisconsin home and paid Wisconsin property taxes and utility bills, and my finding, based upon this evidence, that the Taxpayer was a Wisconsin resident during the tax period in controversy, I find this testimony completely credible.

As noted above, section 3-55 of the UTA requires a drive-away permit to be issued for this exemption provision to apply only if a nonresident does not have out of state license plates to transfer to the vehicle when it is acquired. Although pictures of the license plates on the vehicle at the time it was purchased in 2012 could not be produced by the Taxpayer, I nevertheless find sufficient evidence in the record to corroborate the Taxpayer’s testimony that the motor vehicle in controversy had Wisconsin license plates when she purchased it.

As previously noted, the record contains voluminous evidence that the Taxpayer was as Wisconsin resident including evidence that the Taxpayer had an unexpired Wisconsin driver’s license when she acquired the vehicle in controversy. Moreover, the record indicates that she

paid Wisconsin use tax on the vehicle when she acquired it under lease in 2011. Tr. pp. 8, 16; Department Ex. 3. I find it improbable that a Wisconsin resident having a Wisconsin driver's license would not have Wisconsin license plates. Moreover, I further find it doubtful that the Taxpayer would have paid Wisconsin use tax on the storage and use of the motor vehicle in Wisconsin when she first acquired it had she not been a Wisconsin resident and intended to register the vehicle in Wisconsin at that time. For the foregoing reasons, in the instant case, I find that the Taxpayer did have out of state vehicle registration plates at the time of her purchase of the motor vehicle in controversy and, therefore that BMW Financial was not required to issue her a drive-away permit for the nonresident exemption statute prescribed at section 3-55 of the UTA to apply to her purchase.

In sum, regulation 86 Ill. Admin. Code, ch. I, section 130.605(b), a regulation promulgated by the Department to govern the applicability of the exemption for nonresident purchases that is also provided for in section 3-55 of the UTA, states as follows:

- (1) ... [T]he tax is not imposed upon the sale of a motor vehicle in this State even though the motor vehicle is delivered in this State, if all of the following conditions are met: the motor vehicle is sold to a nonresident; the motor vehicle is not to be titled in this State; and either a drive-away permit for purposes of transporting the motor vehicle to a destination outside of Illinois is issued to the motor vehicle as provided by section 3-603 of the Illinois Vehicle Code [625 ILCS 5/3-605], or the nonresident purchaser has non-Illinois vehicle registration plates to transfer to the motor vehicle upon transporting the vehicle outside of Illinois. The issuance of the drive-away permit or having the out-of-state registration plates to be transferred is prima facie evidence that the motor vehicle will not be titled in this State. 86 Ill. Admin. Code, ch. I, section 130.605(b)

Based upon the evidence contained in the record, I find that the transaction in controversy has satisfied all of the requirements enumerated in regulation 130.605(b) which are identical to the requirements enumerated in section 3-55 of the UTA. The exemption provision prescribed by

section 3-55 being applicable in the instant case, I find that the evidence provided by the Taxpayer that she is a nonresident to whom the exemption contained in section 3-55 of the UTA is applicable sufficient to rebut the *prima facie* correctness of the Department's determination of liability.

Wherefore, for the reasons stated above, it is recommended that Notice of Tax Liability Letter ID number XXXXXXXXXXXXXXXXXXXX be cancelled.

A handwritten signature in black ink that reads "Ted Sherrod". The signature is written in a cursive style and is positioned above a horizontal line.

Ted Sherrod
Administrative Law Judge

Date: December 28, 2016