

ST 11-09

Tax Type: Sales Tax
Issue: Gross Receipts

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

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

v.

**ABC BUSINESS,
Taxpayer**

No.
Account ID
Letter ID
Period
Ted Sherrod
Administrative Law Judge

RECOMMENDATION FOR DISPOSITION

Appearances: Special Assistant Attorney General George Foster on behalf of the Illinois Department of Revenue; Timothy Fitzgerald, Esq. of Fitzgerald & Hursey on behalf of ABC Business

Synopsis:

This matter arose from a protest filed by the taxpayer on November 9, 2009 to a Notice of Tax Liability issued to ABC Business ("taxpayer"), by the Department of Revenue ("Department") on September 8, 2009 for taxes assessed under the Retailers' Occupation Tax Act ("ROTA") 35 ILCS 120/1, *et seq.*, and related taxes. This Notice of Tax Liability was issued at the conclusion of an investigation of the taxpayer's records for the period January 1, 2005 through June 30, 2007. The issue is whether the taxpayer reported the correct amount of gross receipts from its sales and paid the proper amount of tax incurred on these sales.

An evidentiary hearing was held on April 15, 2011 regarding this matter.¹ After reviewing the transcript of the hearing and documents presented at hearing, I recommend that the Notice of Tax Liability be made final.

Findings of Fact:

1. The taxpayer is a corporation doing business in Illinois. Department Exhibit (“Ex.”) 1. The Department conducted an audit of the taxpayer's records for the period January 1, 2005 through June 30, 2007. *Id.*
2. At the conclusion of the audit, the Department prepared a Form SC-10-K Audit Correction and/or Determination of Tax Due (“corrected return”). *Id.*
3. On September 8, 2009, the Department issued a Notice of Tax Liability that was based upon the corrected return, to the taxpayer assessing tax due. *Id.*

¹ A hearing date in this matter was set for March 24, 2011 pursuant to a pre-trial order entered on January 11, 2011. All parties agreed to this order. Subsequently, on March 17, 2011, the taxpayer filed a second motion asking for a continuance for the reason that one of its witnesses was unavailable on the date previously set for hearing. This continuance was granted and all parties agreed to a new hearing date of April 15, 2011. On April 5, 2011, the taxpayer filed a second motion for continuance saying that the same witness was again unavailable due to a scheduling conflict. This motion was denied, and the hearing commenced on April 15, 2011. No witnesses for the taxpayer appeared at that time.

During this hearing, Timothy Fitzgerald, the taxpayer's attorney, made a motion *instanter* to continue the hearing in this matter. Mr. Fitzgerald having cited no emergency basis for this continuance, the taxpayer's motion was untimely pursuant to 86 Ill. Admin. Code, ch. I, section 200.115 and was not granted. Mr. Fitzgerald also contended at the hearing that Melissa Hursey, a name partner in his firm (Fitzgerald & Hursey), and the person that had appeared on behalf of the taxpayer at all prior proceedings in this case had ceased to be a member of this firm in January and that the firm was winding down its practice and seeking to have her disciplined by the ARDC for professional misconduct. However Mr. Fitzgerald presented nothing from the ARDC or any other documentation to support this claim. Moreover, he provided nothing to the Department's Office of Administrative Hearings at any time prior to the date of the hearing advising it that Ms. Hursey was no longer a member of his firm. Accordingly, the taxpayer's claims were deemed to be unsubstantiated and therefore an insufficient basis to terminate the hearing proceedings.

Conclusions of Law:

The ROTA requires every taxpayer to report to the Department the total amount of gross receipts on forms prescribed by the Department. 35 ILCS 120/3. The statute, at 35 ILCS 120/4, also requires the Department to examine these returns and to issue notices of tax liability if it determines additional taxes to be due. Specifically, the latter statute provides as follows:

As soon as practicable after any return is filed, the Department shall examine such return and shall, if necessary, correct such return according to its best judgment and information. ... In the event that the return is corrected for any reason other than a mathematical error, any return so corrected 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 therein. ... In making a correction of transaction by transaction, monthly or quarterly returns covering a period of 6 months or more, it shall be permissible for the Department to show a single corrected return figure for any given 6-month period. ...

If the tax computed upon the basis of gross receipts as fixed by Department is greater than the amount of tax due under the return or returns as filed, the Department shall ... issue the taxpayer a Notice of Tax Liability for the amount of tax claimed by the Department to be due, together with a penalty in an amount determined in accordance with Section 3-3 of the Uniform Penalty and Interest Act. Provided, that if the incorrectness of any return or returns as determined by Department is due to negligence or fraud, said penalty shall be an amount determined in accordance with Section 3-5 or Section 3-6 of the Uniform Penalty and Interest Act, as the case may be.

35 ILCS 120/4.

In the instant case, the Department examined the tax returns filed by the taxpayer for the audit period. At the conclusion of the audit, the Department determined that the gross receipts of the taxpayer's business during the audit period were greater than the amounts reported on the tax returns the taxpayer filed. Accordingly, it prepared a corrected return calculating a deficiency and assessed a late payment penalty. On September 8, 2009, it issued Notice of Tax Liability Letter ID number XXXXXXXX to the taxpayer. Department Ex. No. 1.

It is well established that a corrected return as prepared by the Department is deemed *prima facie* correct. Masini v. Department of Revenue, 60 Ill. App. 3d 11 (1st Dist. 1978). At the hearing in this case, the Department established its *prima facie* case by introducing its Notice of Tax Liability based upon the corrected return into evidence. The burden then shifted to the taxpayer to overcome the Department's *prima facie* case. Anderson v. Department of Finance, 370 Ill. 225 (1938); Masini, *supra* at 15.

“In order to overcome the presumption of validity attached to the Department's corrected returns, [the taxpayer] must produce competent evidence identified with their books and records and showing that the Department's returns are incorrect.” Masini, *supra* at 15. See also Copilevitz v. Department of Revenue, 41 Ill. 2d 154 (1968); DuPage Liquor Store, Inc. v. McKibbin, 383 Ill. 276 (1943); Howard Worthington, Inc. v. Department of Revenue, 96 Ill. App. 3d 1132 (2nd Dist. 1981).

In this case, the Department's *prima facie* case was established when the corrected return was entered into evidence under the certificate of the Director of the Department. The burden then shifted to the taxpayer to overcome the Department's *prima facie* case.

The taxpayer's attorney appeared at the hearing but he did not offer any oral testimony or documentary evidence on behalf of the taxpayer. Accordingly, the taxpayer failed to produce any competent evidence identified with its books and records to overcome the Department's *prima facie* case and the Department's *prima facie* determination of liability must be finalized and affirmed.

WHEREFORE, for the reasons stated above, it is my recommendation that Notice of Tax Liability Letter ID number XXXXXX be finalized as issued.

Ted Sherrod
Administrative Law Judge

Date: April 27, 2011