

**ST 08-21**

**Tax Type: Sales Tax**

**Issue: Gross Receipts**

**Unreported/Underreported Receipts (Fraud Application)**

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

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<b>THE DEPARTMENT OF REVENUE</b>	)	Docket No.	05-ST-0000
<b>OF THE STATE OF ILLINOIS</b>	)	Reg. No.	0000-0000
	)	NTL No.	00-00000000000000
v.	)		00-00000000000000
	)		00-00000000000000
<b>ABC, INC.,</b>	)	John E. White,	
Taxpayer.	)	Administrative Law Judge	

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**RECOMMENDATION FOR DISPOSITION**

**Appearances:** Timothy Touhy, Touhy & Touhy, Ltd., appeared for ABC, Inc.; John Alshuler, Special Assistant Attorney General, appeared for the Illinois Department of Revenue.

**Synopsis:** This matter arose after ABC, Inc. (ABC or taxpayer) protested Notices of Tax Liability (NTLs) the Illinois Department of Revenue (Department) issued to it. In the aggregate, the NTLs assessed retailers' occupation tax (ROT), use tax (UT), penalties and interest regarding transactions conducted during the months from April 2000 through and including May 2003.

In a pre-hearing order, the parties agreed that the issues to be resolved at hearing were whether the Department correctly calculated ABC's taxable gross receipts, and whether the Department's assessment of a fraud penalty was proper. At hearing, taxpayer introduced into evidence documents including books and records, and the testimony of two witnesses. I have considered the evidence adduced at hearing, and I am

including in this recommendation findings of fact and conclusions of law. I recommend that the Director revise the NTLs to eliminate the projection of taxable gross receipts for 5 months in the audit period, and to eliminate the fraud penalty, and that he finalize them as so revised.

**Findings of Fact:**

1. ABC operates a tavern in Anywhere, Illinois. Department Ex. 1 (copy of NTLs and correction of returns), p. 1 (“Kind of business” description on the Department’s original correction of taxpayer’s returns).
2. The Department conducted an audit of ABC’s business regarding the months of April 1, 2000 through and including May 31, 2003. Department Ex. 1, pp. 4-5.
3. Among other documents, the auditor prepared an Audit History Worksheet and an Auditor Narrative describing this audit of ABC. Department Exs. 2-3 (respectively, copies of Audit History Worksheet and Auditor’s Narrative).
4. The Department auditor delayed the start of the audit because taxpayer and the Department were awaiting an agency decision in a contested case that arose regarding ABC’s protest of assessments arising from a prior audit of taxpayer’s business by the Department. Department Ex. 3.
5. Once the agency’s decision in that prior contested case was issued, the auditor began the audit in this matter, using the same audit methods previously used by the auditor in the prior audit. Department Ex. 3.
6. The Audit History Worksheet consists of the auditor’s chronological entries describing the actions undertaken. Department Ex. 2. Among those entries were the following:

- 7/25/03 Was notified that the prior audit issues had been resolved with this taxpayer and that I could now proceed with this audit.
- Called Mr. John Doe (aka: John Doe) and told him of the current audit results that were based on a projection from the prior audit. He says that he is now reporting his actual sales and that he couldn't possibly owe that much. I told him that fairness was the Department's goal and I asked him for his current suppliers.
- I told him that I would circularize them and recalculate the liability based on his current practices.
- 8/7/03 Received list of current suppliers in the mail. Printed out eda-20's for mailing. Will need to get or find stamps.
- 9/4/03 Mailed out eda-20's today.
- 10/1/03 Have received eda-20's and worked on the audit figures today.
- \*\*\*
- 2/19/04 Verified the taxpayer's business status. Prepared the final spreadsheet and the eda-123.
- Assessed the fraud penalty in accordance with the prior audit cycle.
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Department Ex. 2.

7. The Auditor's Narrative provided, in pertinent part:

General Information

ABC is a tavern located in Anywhere. The taxpayer sold packaged liquor. As of May 31, 2003 the business was sold. The audit was assigned several months before it was started. The taxpayer was in administrative hearings because of his disagreement with the prior audit results. The prior audit ran through March 31, 2000.

Once there was an administrative decision on the prior audit (no change), I was directed to proceed with this audit. The audit was conducted with the taxpayer Mr. John Doe and is based on his purchases of liquor and beer. Since the prior audit procedures were upheld, the same percentages,

and special allowances were applied to circularized purchases.

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## AUDIT PROCEDURES

### Books & Records

The taxpayer did not provide any books and records. The audit was based on purchases reported on eda-20's.

### Sales Reconciliation

A sales reconciliation was prepared. The ROT figure comes from the ST-1 transcripts on the rotpack disk. The B&R figure comes from the marked up purchases. There was no fit because the taxpayer has not filed 1120's. For each period reconciled the disallowed deductions were added to B&R and the unreported receipts were added to ROT 7 FIT.

### Determination of Sales

At the onset of determining sales, 10% of purchases were allowed for spillage/spoilage. The taxpayer was allowed 9% of domestic beer purchases and 8% of hard liquor purchases as "giveaways". The remaining liquor and beer purchases were allocated using categories/percentages of purchases:

#### BEER

Premium	15%	Promotional Sales	1%
Barrels	14%	Beer Giveaways	9%
Pitchers	1%		
Domestic	36%		
Packaged Beers	18%		
Casino & Baseball Trips	1%		
Daily Special	6%		

#### LIQUOR

Premium	18%
Packaged Wine	45%
Casino & Baseball Trips	1%
Regularly Priced Liquor	72%
Liquor Giveaways	8%

Use tax was assessed on giveaways amounting to \$1,827. All other categories were marked up based on prior audit. See projection schedules included in audit for more detail. Also included is a copy of the projection schedule from the prior audit, prepared by Jerry Oblena (J.J.O), which reflects the taxpayer's markups for each category.

The total projected sales per audit amount[ed] to \$885,177.

The taxable reported sales were deducted leaving unreported ROT receipts in the amount of \$462,967. The taxpayer was not allowed a deduction for tax collections, since they were not substantiated or documented. The tax due on the unreported receipts amounts to \$40,510.

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#### AUDIT RESULTS

The taxpayer was assessed a fraud penalty. Based on the Department's under-reporting percentage requirement, the taxpayer has been audited 3 cycles and has been found non-compliant each time.

The audit results were discussed with John Doe, Owner. The results are as follows:

Tax Due on Unreported Sales	\$ 40,500
Use Tax Due on Giveaways	\$ <u>1,827</u>
Total Tax Due Per Audit	\$ 42,337
Late Filing Penalty	\$ 90
Fraud Penalty	\$ 36,210
Interest on Tax	\$ 14,484
Interest on Fraud Penalty	\$ 13,852
Interest on Late Payment Penalty	\$ 2,448
Total Tax Penalty & Interest	\$ <u>980</u>
	<u>\$110,401</u>

Department Ex. 3.

8. Doe faxed a list of his suppliers to the auditor on August 1, 2003 (Department Ex. 4 (copy of fax and attachment from Doe to auditor)), and the Auditor's Narrative and the Audit History Worksheet reflect that the auditor sent out Department forms (i.e., form eda-20's) to ABC's suppliers using the supplier's list that Doe provided to the auditor, after her request. Department Exs. 2-3.
9. As a result of the audit, the Department disregarded the amounts ABC reported as gross receipts on the monthly returns it filed during the audit period. *See* Department Exs. 2-3. The Department also determined that ABC was liable for a fraud penalty. Department Exs. 1-3.
10. Based on the auditor's projection of ABC's underreported receipts for the audit

period, the Department's correction of returns determined that ABC owed ROT in the amount of \$1,066 for each month in the audit period. *See* Department Ex. 1, pp. 4-5 (lines 1 and 6 of form).

11. ABC kept and maintained books and records during the audit period, and it offered such books and records as evidence at hearing. Taxpayer Ex. 1, 7.
12. ABC hired Mr. Smith (Smith), a certified public accountant, to be a witness at hearing, to testify regarding ABC's challenge to the Department's audit determinations. Hearing Transcript (Tr.), pp. 5-7 (Smith).
13. Taxpayer Exhibit 1 includes a report and schedules Smith prepared that are based on his review of ABC's bank statements, 1099 forms, canceled checks and cash register tapes for the audit period. *Id.* That exhibit also includes copies of ABC's bank statements, 1099 forms, and canceled checks for the audit period. Taxpayer Ex. 1.
14. ABC admitted, as part of Taxpayer Ex. 7, original cash register tapes, commonly known as z-tapes, for the audit period. Taxpayer Ex. 7.
15. Most of ABC's z-tapes have handwritten numbers and words on them that identify separately the amount of gross receipts rung up as having been received from bar sales, i.e., sales of beer or liquor for immediate consumption by patrons at the tavern, and the gross receipts rung up as having been received from sales of packaged goods. Taxpayer Ex. 7.
16. There are pieces of paper included in Taxpayer Ex. 7 which are not cash register tapes, but merely strips of paper on which separate amounts or one single amount is hand written. Taxpayer Ex. 7.
17. There are days for which no z-tapes and/or no handwritten slips are included within

Taxpayer Ex. 7.

18. ABC offered an exhibit that included z-tapes for 2000 through 2002 into evidence at hearing. Taxpayer Ex. 7.
19. The documents admitted at hearing had previously been submitted to the Department's auditor for review, but the contents of those books and records were never scheduled or considered by the auditor. Taxpayer Ex. 1 (tabs 1-2) (copy of 9/25/06 memo from auditor to Department Counsel) (hereinafter, 9/25/06 memo).
20. In addition to making sales of tangible personal property at retail, ABC also received income from video games that are located at its business. Taxpayer Ex. 7 (completed pre-printed forms titled, "Collection Report[s]" (Collection Reports)).
21. ABC had an agreement with XYZ Amusements, the owner of video game machines, to split the amounts that ABC's customers paid to play the games. *See* Taxpayer Ex. 7 (Collection Reports).
22. On completed pre-printed forms titled, "Collection Report[s]" a collector for XYZ Amusements would enter on a weekly Collection Report: the date of the report; the present and previous meter readings of video games at ABC; and the net amount of receipts to be divided equally between XYZ and ABC. Taxpayer Ex. 7 (Collection Reports).
23. A schedule of the z tapes that were included within Taxpayer's Ex. 7 yields the following information:

Date	April-00				May-00			
	Z no.	Bar	Package	Total	Z no.	Bar	Package	Total
1	516	354.75	100.00	454.75	85	186.00	25.00	211.00
2					88	203.25	30.00	233.25
3	522	212.00	42.00	254.00	92	287.00	40.00	327.00
4	526	241.75	30.00	271.75	103	281.75	60.00	341.75
5	530	268.25	15.00	283.25	*			<b>481.00</b>
6	537	298.50	71.00	369.50	109	371.50	90.00	461.50
7	1	374.25	70.00	444.25				
8	4	391.75	125.00	516.75	116	245.75	20.00	265.75
9					119	363.50	40.00	403.50
10	10	261.50	55.00	316.50	123	441.75	80.00	521.75
11	14	347.25	76.00	423.25	130	281.50	41.00	322.50
12	**				*			<b>520.00</b>
13	21	608.50	100.00	708.50	136	323.75	18.00	341.75
14	26	367.50	116.00	483.50				
15	29	394.00	120.00	514.00	144	270.00	70.00	340.00
16					149	379.25	145.00	524.25
17	*	<b>283.00</b>	<b>50.00</b>	<b>333.00</b>	152	499.75	114.00	613.75
18	35	256.75	56.00	312.75	155	354.75	72.00	426.75
19	39	261.25	60.00	321.25	161	404.00	120.00	524.00
20	45	311.50	79.00	390.50	167	401.25	127.00	528.25
21	52	372.50	105.00	477.50				
22	57	323.50	56.00	379.50	*			<b>209.50</b>
23					174	253.75	80.00	333.75
24	60	237.75	25.00	262.75	*			<b>386.00</b>
25	63	303.00	81.00	384.00	179	420.75	129.00	549.75
26	**				184	421.50	212.00	633.50
27	66	232.75	78.00	310.75	189	327.50	100.00	427.50
28	75	351.50	110.00	461.50				
29	79	408.00	110.00	518.00	193	195.00	50.00	245.00
30					196	240.75	62.00	302.75
31					198	263.75	70.00	333.75
<b>Total per Z tapes</b>				<b>5,857.50</b>	<b>Total per Z tapes</b>			<b>10,809.25</b>

Taxpayer Ex. 7. (Note to table(s)). A single asterisk reflects a date for which a z tapes is not included within Taxpayer Ex. 7. The amounts set forth in the tables for dates identified by a single asterisk were obtained from handwritten slips of paper that ABC prepared to record daily receipts. Where separate amounts were included on such handwritten slips for bar and package sales, those separate amounts are included

in the tables. Where separate amounts were not included on such slips, only a total amount is recorded within the tables. A double asterisk reflects a date that ABC was scheduled to open, but for which neither a z tape nor any other data reflects the gross receipts for that date.)

Date	June-00				July-00			
	Z no.	Bar	Package	Total	Z no.	Bar	Package	Total
1	200	288.75	72.00	360.75	316	381.50	134.00	515.50
2	202	357.00	120.00	477.00				
3	206	314.25	75.00	389.25	324	362.75	140.00	502.75
4	**				**			
5					331	262.25	40.00	302.25
6	214	596.50	130.00	726.50	338	332.25	61.00	393.25
7					343	386.75	130.00	516.75
8	220	263.00	72.00	335.00	346	409.75	105.00	514.75
9	226	366.75	100.00	466.75				
10	230	416.00	100.00	516.00	353	224.75	30.00	254.75
11					356	287.50	76.00	363.50
12	236	729.50	130.00	859.50	360	542.75	100.00	642.75
13					367	453.50	87.00	540.50
14	239	280.50	67.00	347.50	372	402.00	95.00	497.00
15	246	659.25	144.00	803.25	375	392.75	110.00	502.75
16	251	396.75	120.00	516.75				
17	255	397.00	105.00	502.00	381	214.50	30.00	244.50
18					384	268.50	41.00	309.50
19	261	186.75	25.00	211.75	388	269.25	40.00	309.25
20	267	303.75	62.00	365.75	392	311.25	51.00	362.25
21	270	410.75	107.00	517.75	397	391.50	125.00	516.50
22	273	477.50	117.00	594.50	400	384.75	100.00	484.75
23	278	401.50	100.00	501.50				
24	281	415.75	105.00	520.75	404	187.00	10.00	197.00
25				0.00	407	292.75	40.00	332.75
26	286	197.25	40.00	237.25	411	382.00	70.00	452.00
27	289	298.25	51.00	349.25	**			
28	293	381.00	60.00	441.00	419	396.50	121.00	517.50
29	308	377.50	60.00	437.50	unk	389.75	120.00	509.75
30	313	388.75	130.00	518.75				
31								
<b>Total per Z tapes</b>				<b>6,865.25</b>	<b>Total per Z tapes</b>			<b>9,782.25</b>

(Note to tables. One z tape included the totals for June 6-7, and another for the totals for June 12-13. Taxpayer Ex. 7 contains some z tapes that were prepared and kept for a date, but the z tape number is not included on the tape itself, as a result of being cut or torn off of the tape. In such instances, I have entered “unk” in the “Z no.” column.

Date	August-00				September-00			
	Z no.	Bar	Package	Total	Z no.	Bar	Package	Total
1	429	302.75	50.00	352.75	530	401.00	121.00	522.00
2	433	237.00	55.00	292.00	537	358.75	195.00	553.75
3	438	689.75	134.00	823.75				
4	441	402.75	101.00	503.75	**			
5	*			<b>480.00</b>	548	234.75	55.00	289.75
6					552	234.75	25.00	259.75
7	453	268.00	35.00	303.00	558	212.25	20.00	232.25
8	456	299.75	41.00	340.75	560	377.00	100.00	477.00
9	459	279.00	30.00	309.00	570	387.00	96.00	483.00
10	464	464.25	65.00	529.25				
11	*			<b>490.00</b>	573	267.75	30.00	297.75
12	470	416.75	95.00	511.75	576	340.75	60.00	400.75
13					580	674.00	100.00	774.00
14	476	197.00	10.00	207.00	585	684.25	96.00	780.25
15	479	210.25	31.00	241.25	587	399.00	121.00	520.00
16	483	277.25	40.00	317.25	593	404.75	110.00	514.75
17	488	502.75	86.00	588.75				
18	492	418.50	98.00	516.50	603	201.75	40.00	241.75
19	495	412.25	90.00	502.25	606	183.25	56.00	239.25
20					615	357.00	90.00	447.00
21	500	182.75	20.00	202.75	620	499.75	104.00	603.75
22	503	212.00	61.00	273.00	624	388.50	134.00	522.50
23	**				630	403.75	85.00	488.75
24	508	269.00	86.00	355.00				
25	512	397.50	92.00	489.50	637	251.00	20.00	271.00
26	517	383.00	105.00	488.00	640	238.50	46.00	284.50
27					644	312.50	70.00	382.50
28	**				649	352.00	55.00	407.00
29	524	229.75	56.00	285.75	652	377.25	134.00	511.25
30	*			<b>419.00</b>	661	379.75	107.00	486.75
31								
<b>Total per Z tapes</b>				<b>9,822.00</b>	<b>Total per Z tapes</b>			<b>10,991.00</b>

Date	October-00				November-00			
	Z no.	Bar	Package	Total	Z no.	Bar	Package	Total
1					787	357.25	55.00	412.25
2	666	223.50	60.00	283.50	793	452.75	135.00	587.75
3	*				796	384.75	110.00	494.75
4	672	547.25	155.00	702.25	803	385.75	120.00	505.75
5	676	634.25	119.00	753.25				
6	*				808	228.75	20.00	248.75
7	687	374.25	130.00	504.25	813	253.75	55.00	308.75
8					816	288.25	70.00	358.25
9	**				*			
10	695	225.75	67.00	292.75	823	415.25	107.00	522.25
11	700	268.25	55.00	323.25	831	410.25	125.00	535.25
12	705	317.50	24.00	341.50				
13	708	384.25	139.00	523.25	837	352.75	45.00	397.75
14	715	409.75	105.00	514.75	841	230.75	40.00	270.75
15					844	357.50	60.00	417.50
16	*			<b>392.00</b>	849	367.50	60.00	427.50
17	724	205.00	10.00	215.00	852	452.25	125.00	577.25
18	729	453.75	190.00	643.75	860	424.00	120.00	544.00
19	734	307.00	55.00	362.00				
20	738	411.50	125.00	536.50	**			
21	743	411.50	105.00	516.50	869	256.25	91.00	347.25
22					876	997.50	272.00	1,269.50
23	750	230.75	50.00	280.75				
24	755	234.75	22.00	256.75	879	407.25	124.00	531.25
25	759	338.75	110.00	448.75	885	401.75	110.00	511.75
26	764	476.25	100.00	576.25				
27	766	376.50	138.00	514.50	890	230.00	40.00	270.00
28	772	420.50	125.00	545.50	894	231.25	40.00	271.25
29					897	367.50	55.00	422.50
30	779	277.00	45.00	322.00	**			
31	783	250.50	31.00	281.50				
<b>Total per Z tapes</b>				<b>10,130.50</b>	<b>Total per Z tapes</b>			<b>9,819.75</b>

(Notes to table. The handwritten slips prepared and kept for October 3 and 6, and for November 9 include no daily sales total.)

Date	December-00				January-01			
	Z no.	Bar	Package	Total	Z no.	Bar	Package	Total
1	903	408.75	139.00	547.75				
2	912	418.75	100.00	518.75				
3					*			<b>324.00</b>
4	**				1040	374.00	60.00	434.00
5	920	319.25	50.00	369.25	1046	601.75	130.00	731.75
6	923	411.75	60.00	471.75	1050	563.25	125.00	688.25
7	**							
8	929	409.50	153.00	562.50	1057	181.75	20.00	201.75
9	938	419.25	155.00	574.25	*			<b>345.00</b>
10					1064	309.00	90.00	399.00
11	944	184.50	72.00	256.50	1070	349.50	50.00	399.50
12	952	246.50	45.00	291.50	1075	527.50	117.00	644.50
13	*	<b>293.50</b>	<b>40.00</b>	<b>333.50</b>	1079	488.25	100.00	588.25
14	959	218.25	40.00	258.25				
15	962	412.50	160.00	572.50	1087	250.75	45.00	295.75
16	968	566.00	152.00	718.00	1092	195.00	32.00	227.00
17					1097	266.75	30.00	296.75
18	977	180.75	20.00	200.75	1103	350.25	60.00	410.25
19	981	281.75	92.00	373.75	1108	454.75	100.00	554.75
20	*	<b>311.75</b>	<b>60.00</b>	<b>371.75</b>	1112	484.75	127.00	611.75
21	*	<b>277.00</b>	<b>60.00</b>	<b>337.00</b>				
22	989	590.50	224.00	814.50	1118	201.00	5.00	206.00
23	*			<b>789.00</b>	1123	296.75	42.00	338.75
24					1127	424.25	60.00	484.25
25					1132	662.75	70.00	732.75
26	1003	207.25	52.00	259.25	*			<b>650.00</b>
27	1008	342.50	150.00	492.50	1141	354.00	90.00	444.00
28	1014	322.75	80.00	402.75				
29	*			<b>803.00</b>	1150	239.75	40.00	279.75
30	1021	527.50	222.00	749.50	1155	205.25	37.00	242.25
31					1160	229.00	20.00	249.00
<b>Total per Z tapes</b>				<b>10,520.50</b>	<b>Total per Z tapes</b>			<b>10,779.00</b>

Date	February-01				March-01			
	Z no.	Bar	Package	Total	Z no.	Bar	Package	Total
1	1165	343.25	40.00	383.25				
2	1171	511.25	110.00	621.25	1299	398.25	117.00	515.25
3	1175	489.50	133.00	622.50	1303	402.75	90.00	492.75
4					**			
5	1183	268.00	25.00	293.00	1309	233.75	20.00	253.75
6	**				1315	308.75	25.00	333.75
7	1191	273.50	40.00	313.50	1321	413.25	45.00	458.25
8	1197	277.25	45.00	322.25				
9	1202	406.75	105.00	511.75	*	<b>472.00</b>	<b>110.00</b>	<b>582.00</b>
10	1210	479.25	110.00	589.25	1340	470.75	148.00	618.75
11								
12	1213	429.75	54.00	483.75	*			<b>280.00</b>
13	1219	248.75	50.00	298.75	*			<b>245.00</b>
14	1224	237.25	10.00	247.25	*			<b>393.00</b>
15	1229	237.50	25.00	262.50	*			<b>420.00</b>
16	1234	387.25	144.00	531.25	1356	411.00	125.00	536.00
17	1238	407.00	95.00	502.00	1360	479.50	182.00	661.50
18								
19	**				1367	486.00	88.00	574.00
20	1248	242.00	10.00	252.00	1372	452.75	70.00	522.75
21	1253	401.00	55.00	456.00	1376	767.25	100.00	867.25
22	1259	282.75	35.00	317.75	1384	573.25	68.00	641.25
23	**				1390	436.75	125.00	561.75
24	1269	421.75	120.00	541.75	1394	472.00	144.00	616.00
25								
26	1277	332.25	45.45	377.70	1400	258.75	40.00	298.75
27	1282	371.00	60.00	431.00	1405	228.00	20.00	248.00
28	1288	450.75	40.00	490.75	1409	358.75	70.00	428.75
29					1416	515.75	74.00	589.75
30					*			<b>550.00</b>
31					1423	493.25	125.00	618.25
<b>Total per Z tapes</b>				<b>8,849.20</b>	<b>Total per Z tapes</b>			<b>12,306.50</b>

Date	April-01				May-01			
	Z no.	Bar	Package	Total	Z no.	Bar	Package	Total
1					1563	329.00	45.00	374.00
2	1431	220.75	30.00	250.75	1568	306.25	20.00	326.25
3	1435	258.25	30.00	288.25	1573	671.50	55.00	726.50
4	1440	385.25	60.00	445.25	*			<b>500.00</b>
5	1445	457.00	70.00	527.00	1582	412.75	110.00	522.75
6	1451	439.50	138.00	577.50				
7	1455	506.00	100.00	606.00	1590	250.00	10.00	260.00
8					1595	211.25	30.00	241.25
9	1461	342.75	40.00	382.75	1600	390.25	40.00	430.25
10	1467	322.00	55.00	377.00	*			<b>493.00</b>
11	1472	882.25	87.00	969.25	1610	481.75	130.00	611.75
12	1479	664.25	103.00	767.25	1616	472.25	158.00	630.25
13	1485	515.75	105.00	620.75				
14	*			<b>544.00</b>	1623	229.00	10.00	239.00
15					1627	295.75	55.00	350.75
16	1494	270.50	20.00	290.50	1632	476.25	20.00	496.25
17	1498	385.75	74.00	459.75	1636	398.25	47.00	445.25
18	1503	789.00	80.00	869.00	1642	487.50	100.00	587.50
19	1510	371.25	45.00	416.25	1646	496.75	110.00	606.75
20	1517	445.00	125.00	570.00				
21	1521	455.25	127.00	582.25	1652	277.25	30.00	307.25
22					1656	369.00	47.00	416.00
23	**				1660	560.75	60.00	620.75
24	1530	232.75	10.00	242.75	1666	688.50	94.00	782.50
25	1534	395.00	40.00	435.00	1669	472.50	153.00	625.50
26	1539	421.75	55.00	476.75	1673	494.25	140.00	634.25
27	*			<b>499.00</b>				
28	1549	423.75	110.00	533.75	1681	181.25	5.00	186.25
29					1685	363.50	40.00	403.50
30	**				1689	565.75	80.00	645.75
31					1697	321.25	10.00	331.25
<b>Total per Z tapes</b>				<b>11,730.75</b>	<b>Total per Z tapes</b>			<b>12,794.50</b>

Date	June-01				July-01			
	Z no.	Bar	Package	Total	Z no.	Bar	Package	Total
1	1702	517.50	160.00	677.50				
2	1706	518.75	134.00	652.75	1837	291.75	20.00	311.75
3					1841	369.25	60.00	429.25
4	1716	252.00	20.00	272.00	1845	259.00	50.00	<b>309.00</b>
5	1719	228.75	30.00	258.75	1851	406.50	45.00	451.50
6	1725	702.75	110.00	812.75	1858	424.75	120.00	544.75
7	1733	448.50	60.00	508.50	1862	401.25	120.00	521.25
8	1736	543.50	175.00	718.50				
9	1741	649.25	154.00	803.25	1870	201.00	10.00	211.00
10					**			
11	**				1877	321.75	40.00	361.75
12	1749	388.25	45.00	433.25	1882	426.75	4.50	431.25
13	1753	427.50	30.00	457.50	1888	441.75	140.00	581.75
14	1758	394.75	60.00	<b>454.75</b>	1892	412.00	110.00	522.00
15	1763	510.50	132.00	642.50				
16	1767	404.75	140.00	544.75	1898	298.75	20.00	318.75
17					1902	265.75		265.75
18	1774	260.00	40.00	300.00	1906	342.25	35.00	377.25
19	1778	380.75	30.00	410.75	1912	394.25	40.00	434.25
20	1785	538.75	50.00	588.75	*			<b>235.00</b>
21	1792	363.25	30.00	393.25	1920	545.00	110.00	655.00
22	1797	394.00	120.00	514.00				
23	1801	566.25	120.00	686.25	*			<b>226.00</b>
24					1933	427.50	25.00	452.50
25	1808	215.00	10.00	225.00	*			<b>621.00</b>
26	1812	231.25	30.00	261.25	1942	533.75	70.00	603.75
27	1817	340.75	4.50	<b>345.25</b>	**			
28	1822	309.25	40.00	349.25	1948	441.00	125.00	566.00
29	1826	429.75	120.00	549.75				
30	*			<b>473.00</b>	1955	261.00	25.00	286.00
31					1959	240.50	30.00	270.50
<b>Total per Z tapes</b>				<b>12,333.25</b>	<b>Total per Z tapes</b>			<b>9,987.00</b>

Date	August-01				September-01			
	Z no.	Bar	Package	Total	Z no.	Bar	Package	Total
1	*	351.25	45.00	396.25	19	456.00	125.00	581.00
2	1965	503.25	70.00	573.25				
3	1971	406.00	110.00	516.00	**			
4	1975	394.75	125.00	519.75	31	258.00	40.00	298.00
5					35	360.00	20.00	380.00
6	1985	255.25	15.00	270.25	40	386.75	0.00	386.75
7					*			550.00
8					49	454.75	110.00	564.75
9								
10					56	225.00	15.00	240.00
11					61	206.75	45.00	251.75
12					65	339.50	40.00	379.50
13					71	383.00	65.00	448.00
14					74	475.50	125.00	600.50
15					78	511.50	130.00	641.50
16								
17					85	219.75	20.00	239.75
18					89	230.00	20.00	250.00
19					93	323.50	30.00	353.50
20					98	349.75	75.00	424.75
21					101	521.75	140.00	661.75
22					108	704.25	180.00	884.25
23								
24					114	230.00	10.00	240.00
25					118	232.50	20.00	252.50
26					122	301.75	50.00	351.75
27					128	276.25	20.00	296.25
28	4	353.25	65.00	418.25	*			
29	*			418.00	132	392.00	130.00	522.00
30	12	369.5	40	409.50				
31	15	464.75	100.00	564.75				
<b>Total per Z tapes</b>				<b>4,086.00</b>	<b>Total per Z tapes</b>			<b>9,798.25</b>

(Notes to Table. A slip within Taxpayer Ex. 7 contained a handwritten entry stating, “Closed Aug 6<sup>th</sup>-28<sup>th</sup>”).

Date	October-01				December-01			
	Z no.	Bar	Package	Total	Z no.	Bar	Package	Total
1	138	261.00	40.00	301.00	100	380.00	130.00	510.00
2	142	284.25	30.00	314.25				
3	146	450.50	60.00	510.50	unk	305.00	35.00	340.00
4	151	319.5	75.00	394.50	107	308.50	40.00	348.50
5	*			<b>664.00</b>	114	564.75	90.00	654.75
6	157	455.00	130.00	585.00	119	513.00	77.00	590.00
7					124	424.75	110.00	534.75
8	*			<b>228.00</b>	130	472.50	144.00	616.50
9	165	186.25	10.00	196.25				
10	2	257.00	20.00	277.00	137	248.25	40.00	288.25
11	7	308.25	40.00	348.25	141	255.00	10.00	265.00
12	11	522.75	125.00	647.75	144	313.75	35.00	348.75
13	16	586.50	140.00	726.50	150	401.50	35.00	436.50
14					154	488.75	124.00	612.75
15	23	223.75	30.00	253.75	161	488.75	100.00	588.75
16	28	287.00	150.00	437.00				
17	33	331.75	40.00	371.75	168	251.50	20.00	271.50
18	37	312.50	20.00	332.50	173	228.00	10.00	238.00
19	43	512.00	135.00	647.00	**			
20	49	574.75	140.00	714.75	181	445.75	45.00	490.75
21					186	672.50	158.00	830.50
22	55	225.00	25.00	250.00	*			<b>492.50</b>
23	59	216.25	24.00	240.25				
24	*	<b>332.75</b>	<b>45.00</b>	<b>377.75</b>	204	266.50	110.00	376.50
25	65	394.75	40.00	434.75	**			
26	70	543.50	168.00	711.50	208	360.00	90.00	450.00
27	76	502.00	120.00	622.00	214	305.75	30.00	335.75
28					*			<b>640.00</b>
29	83	235.50	30.00	265.50	223	609.25	158.00	767.25
30	87	247.50	30.00	277.50				
31	91	489.00	67.00	556.00	233	418.25	130.00	548.25
<b>Total per Z tapes</b>				<b>11,685.00</b>	<b>Total per Z tapes</b>			<b>11,575.50</b>

(Notes to table). Two handwritten slips in Taxpayer Ex. 7 contain entries stating “November closed suspension.”)

Date	January-02				February-02			
	Z no.	Bar	Package	Total	Z no.	Bar	Package	Total
1					372	617.25	161.00	778.25
2	240	261.75	30.00	291.75	377	641.25	130.00	771.25
3	246	394.50	60.00	454.50				
4	250	497.25	134.00	631.25	384	240.75	15.00	255.75
5	257	512.50	110.00	622.50	390	241.75	20.00	261.75
6					394	401.75	40.00	441.75
7	262	237.75	10.00	247.75	399	355.00	45.00	400.00
8	270	221.00	20.00	241.00	403	584.50	134.00	718.50
9	274	234.50	20.00	254.50	407	512.75	90.00	602.75
10	279	407.25	55.00	462.25				
11	284	492.50	148.00	640.50	412	223.00	10.00	233.00
12	290	577.25	130.00	707.25	**			
13					418	378.50	55.00	433.50
14	295	218.00	15.00	233.00	424	334.25	25.00	359.25
15	301	220.75	10.00	230.75	428	629.50	130.00	759.50
16	305	356.75	45.00	401.75	433	598.75	124.00	722.75
17	310	348.75	60.00	408.75				
18	316	558.75	144.00	702.75	439	301.50	5.00	306.50
19	321	599.25	148.00	747.25	444	197.75	0.00	197.75
20					448	247.50	20.00	267.50
21	327	160.00	0.00	160.00	453	439.50	55.00	494.50
22	332	255.50	40.00	295.50	457	611.00	130.00	741.00
23	336	407.50	70.00	477.50	462	571.75	148.00	719.75
24	unk	378.50	35.00	413.50				
25	344	609.75	158.00	767.75	467	210.00	20.00	230.00
26	349	640.00	140.00	780.00	unk	381.25	35.00	416.25
27					476	360.00	45.00	405.00
28	354	175.00	5.00	180.00	481	399.25	40.00	439.25
29	358	207.20	15.00	222.20				
30	361	351.25	30.00	381.25				
31	367	470.25	45.00	515.25				
<b>Total per Z tapes</b>				<b>11,470.45</b>	<b>Total per Z tapes</b>			<b>10,955.50</b>

Date	March-02				April-02			
	Z no.	Bar	Package	Total	Z no.	Bar	Package	Total
1	485	533.25	135.00	668.25	594	126.00	0.00	126.00
2	491	517.25	127.00	644.25	601	296.00	40.00	336.00
3					605	371.25	55.00	426.25
4	*			125.00	610	471.00	60.00	531.00
5	*			305.50	615	624.75	158.00	782.75
6	*			446.00	619	485.25	130.00	615.25
7	505	518.50	45.00	563.50				
8	507	577.25	130.00	707.25	**			
9	511	634.25	134.00	768.25	628	326.50	80.00	406.50
10					632	239.00	0.00	239.00
11	517	220.00	35.00	255.00	636	393.75	55.00	448.75
12	522	237.75	11.00	248.75	642	509.00	105.00	614.00
13	526	371.50	60.00	431.50	646	545.25	115.00	660.25
14	530	435.75	98.00	533.75				
15	**				651	181.00	15.00	196.00
16	537	474.25	130.00	604.25	655	202.50	15.00	217.50
17					659	252.75	45.00	297.75
18	545	245.00	0.00	245.00	663	349.25	60.00	409.25
19	547	210.75	10.00	220.75	*			<b>620.00</b>
20	550	302.75	40.00	342.75	670	585.75	124.00	709.75
21	*	<b>493.00</b>	<b>70.00</b>	<b>563.00</b>				
22	557	575.25	137.00	712.25	674	243.50	20.00	263.50
23	563	552.75	90.00	642.75	678	242.50	40.00	282.50
24					682	334.00	47.00	381.00
25	566	234.75	15.00	249.75	686	543.75	60.00	603.75
26	571	269.25	35.00	304.25	692	486.00	132.00	618.00
27	575	306.00	40.00	346.00	**			
28	579	325.25	35.00	360.25				
29	583	608.75	110.00	718.75	698	258.25	25.00	283.25
30	588	344.75	110.00	454.75	703	450.50	35.00	485.50
31								
<b>Total per Z tapes</b>				<b>11,461.50</b>	<b>Total per Z tapes</b>			<b>10,553.50</b>

(Notes to table. A single, handwritten slip was included within Taxpayer Ex. 7 for March 4th through 7th. The handwritten entry for March 7 reflected total gross receipts of \$443.50. There was also a z-tape prepared for March 7, with different total gross receipts for that same day. The table above includes the gross receipts set forth on the z-tape prepared for March 7.)

Date	May-02				June-02			
	Z no.	Bar	Package	Total	Z no.	Bar	Package	Total
1					*			<b>610.00</b>
2								
3					790	267.00	20.00	287.00
4					794	256.75	40.00	296.75
5					797	240.50	10.00	250.50
6					802	512.50	77.00	589.50
7					808	534.25	110.00	644.25
8					812	501.00	105.00	606.00
9								
10					818	256.75	40.00	296.75
11					823	333.75	45.00	378.75
12					827	382.25	30.00	412.25
13	716	290.75	45.00	335.75	832	502.75	60.00	562.75
14	721	130.00	0.00	130.00	836	516.75	100.00	616.75
15	725	227.50	25.00	252.50	840	513.00	115.00	628.00
16	728	473.00	50.00	523.00				
17	**				846	305.25	30.00	335.25
18	734	356.75	90.00	446.75	850	204.00	10.00	214.00
19					854	351.00	40.00	391.00
20	**				858	305.00	47.00	352.00
21	745	322.75	30.00	352.75	862	512.50	124.00	636.50
22	747	397.25	40.00	437.25	866	588.26	100.00	688.26
23	751	360.00	40.00	400.00				
24	755	476.50	140.00	616.50	872	254.25	40.00	294.25
25	759	490.75	150.00	640.75	876	315.50	45.00	360.50
26					880	389.00	30.00	419.00
27	765	146.00	10.00	156.00	882	779.75	114.00	893.75
28	769	224.75	10.00	234.75	888	504.75	125.00	629.75
29	773	506.25	57.00	563.25	892	511.00	105.00	616.00
30	777	351.50	45.00	396.50				
31	782	504.75	110.00	614.75				
<b>Total per Z tapes</b>				<b>6,100.50</b>	<b>Total per Z tapes</b>			<b>12,009.51</b>

(Notes to table. Taxpayer Ex. 7 includes a slip of paper with the following handwritten statement, “May 2002[,] Closed May 1<sup>st</sup> until May 13<sup>th</sup>[,] State did not issue liquor license[.]”)

Date	July-02				August-02			
	Z no.	Bar	Package	Total	Z no.	Bar	Package	Total
1	*			<b>268.50</b>	unk	861.75	28.25	890.00
2	902	254.00	45.00	299.00	992	758.50	31.00	789.50
3	909	580.50	178.00	758.50	994	685.25	28.75	714.00
4								
5	913	520.00	110.00	630.00	1004	478.75	6.25	485.00
6	917	447.50	95.00	542.50	1006	361.50	13.50	375.00
7					1009	390.25	22.25	412.50
8	925	205.25	15.00	220.25	unk	698.00	16.00	714.00
9	929	250.75	20.00	270.75	1014	642.00	15.50	657.50
10	933	294.00	20.00	314.00	1016	571.50	18.25	589.75
11	unk	932.00	32.25	964.25				
12	937	491.00	14.50	505.50	1021	483.25	15.50	498.75
13	939	759.00	11.25	770.25	1023	271.75	8.50	280.25
14					1028	403.00	10.00	413.00
15	944	412.75	30.25	443.00	**			
16	unk	264.25	21.50	285.75	1033	573.25	25.75	599.00
17	952	830.00	12.50	842.50	1036	548.50	25.00	573.50
18	unk	695.75	16.25	712.00				
19	956	553.75	29.50	583.25	1040	319.25	23.50	342.75
20	958	625.25	16.00	641.25	1042	431.25	9.00	440.25
21					1046	490.00	25.00	515.00
22	963	246.25	45.00	291.25	unk	817.75	14.75	832.50
23	968	430.25	9.75	440.00	1051	799.50	18.50	818.00
24	969	354.00	20.00	374.00	1054	580.00	20.00	600.00
25	unk	568.30	78.70	647.00				
26	975	770.50	34.00	804.50	1060	566.75	23.25	590.00
27	978	629.50	22.00	651.50	1062	248.00	8.50	256.50
28					397	394.50	13.00	407.50
29	983	641.35	21.75	663.10	1067	746.00	45.25	791.25
30	985	493.25	30.25	523.50	1071	642.50	23.50	666.00
31	989	451.25	37.75	489.00	1073	469.75	20.75	490.50
<b>Total per Z tapes</b>				<b>13,935.10</b>	<b>Total per Z tapes</b>			<b>14,742.00</b>

Date	September-02				October-02			
	Z no.	Bar	Package	Total	Z no.	Bar	Package	Total
1					1161	341.00	22.25	363.25
2					1163	448.00	20.75	468.75
3	1080	229.25	23.50	252.75	1	622.00	22.75	644.75
4	1082	576.00	13.50	589.50	5	1,166.50	6.50	1,173.00
5	1084	1,002.25	36.00	1,038.25	7	847.25	11.50	858.75
6	1089	525.00	28.50	553.50				
7	1093	664.75	16.50	681.25	11	603.50	3.00	606.50
8					13	442.75	9.50	452.25
9	1099	457.00	24.75	481.75	15	355.50	23.25	378.75
10	1101	670.00	21.50	691.50	17	676.25	9.75	686.00
11	1103	577.00	28.50	605.50	20	669.50	17.50	687.00
12	1105	821.00	50.00	871.00	22	1,103.50	1.00	1,104.50
13	1109	685.75	11.5	697.25				
14	1111	814.50	9.25	823.75	28	320.50	5.00	325.50
15					30	558.75	16.50	575.25
16	1118	306.00	19.25	325.25	33	352.50	12.50	365.00
17	1120	517.00	18.50	535.50	35	787.00	12.75	799.75
18	1122	469.25	17.00	486.25	38	821.75	25.00	846.75
19	1124	674.50	17.50	692.00	41	438.75	4.50	443.25
20	1128	603.25	16.50	619.75				
21	1130	764.75	13.00	777.75	48	332.25	3.50	335.75
22					50	359.50	9.50	369.00
23	1137	258.50	18.00	276.50	52	500.25	11.50	511.75
24	1139	396.50	24.50	421.00	54	557.00	9.50	566.50
25	1141	593.50	23.75	617.25	57	727.01	7.00	734.01
26	1143	931.50	36.50	968.00	60	696.25	32.00	728.25
27	1147	638.26	9.50	647.76				
28	1151	728.60	24.25	752.85	69	431.50	6.25	437.75
29					71	477.25	11.00	488.25
30	1159	435.00	44.50	479.50	74	533.25	25.00	558.25
31					76	718.00	14.50	732.50
<b>Total per Z tapes</b>				<b>14,885.36</b>	<b>Total per Z tapes</b>			<b>16,241.01</b>

Date	November-02				December-02			
	Z no.	Bar	Package	Total	Z no.	Bar	Package	Total
1	80	607.50	18.00	625.50				
2	82	535.51	32.50	568.01	30	280.25	2.50	282.75
3					32	468.00	4.50	472.50
4	89	566.00	10.25	576.25	35	374.00	19.25	393.25
5	91	128.00	0.00	128.00	37	813.00	45.75	858.75
6	93	336.50	10.00	346.50	39	977.75	42.75	1,020.50
7	95	645.25	19.50	664.75	41	740.75	23.00	763.75
8	98	667.75	15.00	682.75				
9	100	695.50	16.00	711.50	46	558.25	5.00	563.25
10					48	446.75	7.50	454.25
11	104	442.25	15.00	457.25	51	360.25	5.25	365.50
12	108	379.00	1.00	380.00	53	585.25	20.00	605.25
13	110	410.50	18.25	428.75	55	641.76	6.50	648.26
14	112	746.00	31.00	777.00	57	800.25	13.25	813.50
15	114	695.82	8.00	703.82				
16	116	721.75	3.50	725.25	64	526.00	34.25	560.25
17					66	497.75	23.00	520.75
18	120	454.50	5.25	459.75	1	419.75	16.50	436.25
19	122	682.00	17.50	699.50	3	764.00	31.00	795.00
20	125	325.00	11.75	336.75	5	593.00	23.50	616.50
21	1	746.75	12.75	759.50	7	435.00	13.00	448.00
22	3	605.75	16.75	622.50				
23	5	497.25	20.00	517.25	13	826.75	34.00	860.75
24					15	714.75	4.50	719.25
25	11	700.75	27.00	727.75				
26	13	635.25	15.50	650.75	20	796.25	9.75	806.00
27	16	520.25	21.25	541.50	22	531.50	16.75	548.25
28	19	670.25	29.00	699.25	24	685.25	16.25	701.50
29	22	804.25	32.00	836.25				
30	24	559.25	7.50	566.75	29	549.75	28.00	577.75
31					31	990.75	13.00	1,003.75
<b>Total per Z tapes</b>				<b>15,192.83</b>	<b>Total per Z tapes</b>			<b>15,835.51</b>

Taxpayer Ex. 7.

24. The total receipts reflected on the Z tapes and handwritten slips that are included within Taxpayer Ex. 7 are as follows:

<b>Month/Year</b>	<b>Totals per Z tape</b>
Apr-00	5,857.50
May-00	10,809.25
Jun-00	6,865.25
Jul-00	9,782.25
Aug-00	9,822.00
Sep-00	10,991.00
Oct-00	10,130.50
Nov-00	9,819.75
Dec-00	10,520.50
Jan-01	10,779.00
Feb-01	8,849.20
Mar-01	12,306.50
Apr-01	11,730.75
May-01	12,794.50
Jun-01	12,333.25
Jul-01	9,987.00
Aug-01	4,086.00
Sep-01	9,798.25
Oct-01	11,685.00
Nov-01	
Dec-01	11,575.50
Jan-02	11,470.45
Feb-02	10,955.50
Mar-02	11,461.50
Apr-02	10,553.50
May-02	6,100.50
Jun-02	12,009.51
Jul-02	13,935.10
Aug-02	14,742.00
Sep-02	14,885.36
Oct-02	16,241.01
Nov-02	15,192.83
Dec-02	15,835.51
<b>TOTAL per Z TAPES</b>	<b>\$353,905.72</b>

Taxpayer Ex. 7.

25. In a memo to Department counsel, the auditor explained why she would not consider the z-tapes and other books and records, to wit: “bank statements, ... 1099’s, excel

spreadsheets with monthly purchases” that ABC submitted to the Department as evidence why the audit was incorrect. Taxpayer Ex. 1 (tabs 1-2) (copy of 9/25/06 memo from auditor to Department Counsel). In that memo, the auditor wrote, in part:

The register tapes are Z rings. In order for Z ring register tapes to be used to support control over sales, each tape[‘s “z” number must be sequentially numbered in relation to the other z tapes. This is because each time the register is “z-ed” out the sales count begins anew. Therefore, in order to get an accurate total of all the sales rang at the register; all z-tape totals must be tallied. The tapes provided by the taxpayer do not have sequential “z” numbers therefore they do not represent all of the sales rang up at the register. The register was “z-ed” out but the tapes are missing. Additionally, even in instances where the z tapes are sequentially numbered further comparisons are made to ensure that all sales are included on the z tapes.

Taxpayer Ex. 1 (tab titled, “9-25-06 Memo D.O.R.”).

26. In anticipation of hearing, Smith scheduled, among other things, the monthly amounts of ABC’s gross sales from selling property at retail, plus the income it realized from video games. Taxpayer Ex. 1 (tables titled: “Gross sales and income – 2000”; “Gross sales and income – 2001”; and “Gross sales and income – 2002”, which are separately included within tabs for each year under the general tab titled, “Alcohol Purchases”).
27. Taxpayer Ex. 1 also includes a copy of ABC’s bank statements for each month from January 2000 through December 2002. The amounts of ABC’s monthly deposits to its bank account are closely consistent with the entries Smith scheduled as ABC’s monthly “Gross sales and income ...” totals for 2000 through 2002. *Compare* Taxpayer Ex. 1 (tables titled: “Gross sales and income – 2000”; “Gross sales and income – 2001”; and “Gross sales and income – 2002” *with* Taxpayer Ex. 1 (tab

titled, "Bank Statements").

28. ABC did not offer into evidence the actual receipts it received from vendors when making purchases of property for resale. *See* Taxpayer Ex. 1, *passim*. However, Smith did create schedules that he prepared after reviewing such receipts, and those schedules are included in this record. Taxpayer Ex. 1 (various tables included within the tab titled, "Alcohol Purchases").
29. ABC included Smith's schedules of ABC's purchases within the books and records it tendered to the Department for review. In the memo the auditor wrote to Department counsel following that tender, the auditor wrote, in part:

The taxpayer provided this schedule to represent monthly purchases. It should be noted that the purchases were slightly higher than the purchases obtained, by the auditor, from circularizing the suppliers. The difference could likely result from the timing of the payments to the suppliers or the differences in the basis of accounting between the taxpayer and his suppliers. The purchases were not adjusted since the[y] were obtained directly from the suppliers.

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Taxpayer Ex. 1 (9/25/06 Memo).

30. The final entry in the auditor's 9/25/06 memo is as follows:

The acid-test, so to speak, of controlling sales is to use actual purchases and the taxpayer's actual mark-ups to determine sales. In this audit the taxpayers' purchases were obtained directly from the taxpayers suppliers. The purchases were then allocated to the various sales categories as established by XXXX and the taxpayer during the audit cycle prior to this one. These categories included sales for special events, special promotions, giveaways, etc. The markups for each category were also taken from the prior audit. The markups and category breakdowns are considered valid because the prior audit was also disputed by the taxpayer and was upheld by the Department. It is for these reasons that I did not adjust the liability based on

the records provided.

Taxpayer Ex. 1 (9/25/06 Memo).

**Conclusions of Law:**

**Issue 1: Whether the Department Correctly Calculated ABC's Taxable Gross Receipts**

The Department introduced a copy of the NTL it issued to ABC into evidence under the certificate of the Director. Department Ex. 1. Pursuant to § 4 of the Retailers' Occupation Tax Act (ROTA), that NTL constitutes the Department's prima facie case in this matter. 35 ILCS 120/4, 7. The Department's prima facie case is a rebuttable presumption. 35 ILCS 120/7; Copilevitz v. Department of Revenue, 41 Ill. 2d 154, 157, 242 N.E.2d 205, 207 (1968); DuPage Liquor Store, Inc. v. McKibbin, 383 Ill. 276, 279, 48 N.E.2d 926, 927 (1943). The statutory presumption extends to all elements necessary for a determination that the tax and penalties assessed are due as determined by the Department. *E.g.* Branson v. Department of Revenue, 68 Ill. 2d 247, 258, 659 N.E.2d 961, 966-67 (1995) ("nothing more [than the certified copy of the NPL] is needed to prove the Department's claim for a tax penalty against the corporate officer or employee."). That is to say, the presumption extends to the agency's determination that ABC is engaged in retailing (Soho Club, Inc. v. Department of Revenue, 269 Ill. App. 3d 220, 232, 645 N.E.2d 1060, 1068 (1<sup>st</sup> Dist. 1995)), and that the transactions at issue here were subject to ROT. 35 ILCS 120/7.

A taxpayer cannot overcome the statutory presumption merely by denying the accuracy of the Department's assessment. A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3d 826, 833, 527 N.E.2d 1048, 1053 (1st Dist. 1988). Instead, a taxpayer

has the burden to present evidence that is consistent, probable and closely identified with its books and records, to show that the assessment is not correct. Fillichio v. Department of Revenue, 15 Ill. 2d 327, 333, 155 N.E.2d 3, 7 (1958); A.R. Barnes & Co., 173 Ill. App. 3d at 833-34, 527 N.E.2d at 1053.

Here, the Department determined that ABC did not accurately report the true amount of its taxable gross receipts on the monthly returns filed during the audit period. *See* Department Ex. 2. Thereafter, the auditor estimated taxable gross receipts by reviewing ABC's purchases for resale during a given period, and by projecting an estimate of ABC's sales for the audit period. *See id.* The issues presented by the parties' pre-hearing order included whether the Department properly calculated and projected taxpayer's gross receipts, and whether the fraud penalty should have been assessed.

The auditor's narrative reflects that ABC provided no books and records for review at audit. Department Ex. 3. At hearing, however, ABC introduced documentary evidence into the record, including books and records such as original z tapes for most but not every day in the audit period, copies of bank statements showing deposits into and withdrawals from the corporate account, and copies of schedules of its purchases. Taxpayer Exs. 1, 7. The auditor was not called as a witness by either party, so I do not know why she wrote that documents like those presented at hearing were not provided at the time the audit was initiated. In any event, the conclusions set forth in this recommendation are based on the evidence which is part of this record, including the books and records offered by ABC.

After considering the contents of every single z tape and other document included in Taxpayer Ex. 7, I conclude that they are, at best, insufficient to show what ABC's

actual gross receipts were for the entire audit period. On this point, I refer to the regulation the Department has promulgated to set forth the minimum records that a retailer must make, keep, and present, when asked, for review by the Department. 86 Ill. Admin. Code § 130.805. That applicable regulation describes three types of records, the first of which is “[c]ash register tapes and other data which will provide a daily record of the gross amount of sales.” 86 Ill. Admin. Code § 130.805(a)(1).

A careful review of the z tapes and other documents within Taxpayer Ex. 7 shows that ABC much too frequently failed to make and/or keep a cash register tape for each day it was open. For example, for April 2000, ABC had no cash register tapes for the 12<sup>th</sup>, the 17<sup>th</sup>, and for the 26<sup>th</sup>, even though the tavern was supposed to be open those days. Thus, of the 25 days that ABC was open that month, it failed to make and/or keep a cash register tape for 3 of those days, for a failure rate of 12%. Taxpayer Ex. 7 (scheduled *supra*, p. 8) ( $3 \div 25 = 0.12$  or 12%). For May, ABC had four days without a register tape being made and/or kept for the 27 days it was open, for a failure rate of over 14%. *Id.* ( $4 \div 27 \approx 0.1481$  or 14.8%). Further, while the audit period extended through May 2003, there were no cash register tapes included within Taxpayer Ex. 7 for any month after December 2002. Taxpayer Ex. 7. Even if I were to accept as true that ABC was actually closed during the periods for which handwritten slips of paper reflect that ABC was closed for given period of time (*see supra*, pp. 16-17, 20), ABC’s failure to offer into evidence cash register tapes showing a daily record of its sales for the audit period precludes me from concluding that the auditor’s projection of taxable gross receipts using a formula was unreasonable.

That said, there were months during the audit period for which ABC did make and keep an actual cash register receipt for every day that it was open that month. Taxpayer Ex. 7 (*see supra*, pp. 18, 22-23). Those actual receipts were admitted at hearing, and are being considered by this fact finder as records that meet the criteria set forth in the Department's regulation regarding the minimum records required to be kept by a retailer 86 Ill. Admin. Code § 150.805(a)(1).

As to the auditor's outright refusal to review ABC's cash register receipts because they were not consecutively numbered (*see* Department Ex. 3), there is no such requirement expressly articulated within the applicable regulation. 86 Ill. Admin. Code § 150.805(a)(1). Further, I do not consider Doe's testimony as to why the receipts were not consecutively numbered to be so incredible as to be beyond belief. Tr. pp. 71-73, 81-82 (Doe). If anything, Doe's testimony that he regularly used his register as an adding machine and would discard the totals produced after each such use confirms the conclusion reasonably drawn from a fair review of the rest of his cash register receipts — that he was a very inept record keeper. But at least for the months of January 2002, and for September through December 2002, Doe made, kept, and produced for review ABC's cash register tapes which provide a daily record of the gross amount of sales for those months. 86 Ill. Admin. Code § 130.805(a)(1).

I conclude, therefore, that ABC has rebutted the Department's determination that, for those particular months, ABC's taxable gross receipts could only be determined by the formula it used to measure gross receipts for the remainder of the audit period. ABC has rebutted that determination with documentary evidence, and with testimony that is corroborated by and closely associated with its books and records. The evidence,

however, does not rebut the Department's prima facie correct determination to reject the receipts reported on ABC's filed returns for the other months in the audit period, and to estimate such receipts using the best information available. To effect this conclusion, I recommend that the Director revise the NTLs to eliminate the additional tax assessed for the five months for which ABC presented books and records that showed its daily gross receipts. That is, \$5,332 (Department Ex. 1, pp. 4-5; *supra*, p. 5, finding of fact number 10 ( $5 \times 1,066 = 5,332$ )), should be subtracted from the tax assessed in the NTLs, leaving a total tax due of \$37,005 ( $42,337 - 5,332 = 37,005$ ).

## **Issue 2: Was the Imposition of a Fraud Penalty Appropriate**

The second issue is whether the fraud penalty was properly imposed. The Department assessed a 50% fraud penalty against ABC. Department Exs. 1, 3. Section 3-6 of the Uniform Penalty and Interest Act (UPIA) provides, in part:

Penalty for fraud.

(a) If any return or amended return is filed with intent to defraud, in addition to any penalty imposed under Section 3-3 of this Act, a penalty shall be imposed in an amount equal to 50% of any resulting deficiency.

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35 ILCS 735/3-6 (1994).

The standard for determining whether a fraud penalty is appropriate is clear and convincing evidence. Puleo v. Department of Revenue, 117 Ill. App. 3d 260, 268, 453 N.E.2d 48, 53 (4<sup>th</sup> Dist. 1983). Clear and convincing evidence of an intent to defraud can be circumstantial in nature. *E.g.*, Vitale v. Department of Revenue, 118 Ill. App. 3d 210, 213, 454 N.E.2d 799, 802 (3d Dist. 1983). Here, the auditor cited three bases for the fraud penalty assessment: (1) the auditor that performed the prior audit of ABC assessed one; (2) that prior fraud penalty assessment was upheld following hearing; and (3) ABC

had been audited twice before and was non-compliant in those other audits. Department Ex. 3.

As to the first two bases, I am the ALJ that considered the evidence adduced at the hearing in the prior matter, and the evidence presented there is not like the evidence that was presented in this case. I take notice that my recommendation that the Director uphold the fraud penalty assessed in that prior matter was based on Doe's own testimony admitting that he knew that all of ABC's receipts were not being reported on the returns he caused to have filed for ABC during that prior audit period. That testimony constituted direct evidence that ABC was knowingly filing false returns, warranting the imposition of a fraud penalty. Puleo, 117 Ill. App. 3d at 268, 453 N.E.2d at 53. In this case, in contrast, no such direct evidence was offered at hearing. In fact, the Department's own exhibit includes the auditor's restatement of Doe's initial reaction to the assessment amount as being, "he says that he is now reporting his actual sales and that he couldn't possibly owe that much." Department Ex. 2, p. 1.

Additionally, I find no circumstantial evidence that ABC was filing returns with an intent to defraud during this audit period. On this point, Vitale is helpful. In that case, the court upheld the assessment of a fraud penalty because, among other things, the business' bank deposits exceeded its reported gross receipts by \$25,000 a year, because the business' purchases exceeded his sales by 46%, and because the business wholly failed to maintain business records. Vitale, 118 Ill. App. 3d at 213, 454 N.E.2d at 802.

But unlike the facts in Vitale, the documentary evidence in this record shows that ABC's bank deposits did not exceed the sum of ABC's reported gross receipts plus its receipts from video games. *Compare* Taxpayer Ex. 1 (tables titled: "Gross sales and

income – 2000”; “Gross sales and income – 2001”; and “Gross sales and income – 2002” with Taxpayer Ex. 1 (tab titled, “Bank Statements”); Taxpayer Ex. 7 (Collection Reports). Nor did ABC’s purchases ever exceed its reported sales. Department Ex. 2-3; Taxpayer Ex. 1 (schedules within the general tab titled, “Alcohol Purchases”). The record further reflects that, during the period at issue, Doe had begun to regularly, but inconsistently, make and/or keep the type of records that constitute the minimum records required to be kept by a retailer in Illinois. ABC had not done so for most of the prior audit period, and, again, the facts showed that ABC was not reporting all of its receipts during that prior audit period. Despite the difference in how ABC conducted business during the prior period versus the way it conducted business during this period, the fraud assessment here was clearly premised on the presumption that ABC was continuing to act as it had during prior audit periods. Department Ex. 3.

This presumption is further illustrated by the third basis cited to support the imposition of the fraud penalty, which is that ABC had been audited twice before and was non-compliant in those other audits. Department Ex. 3. Taken together, all three of the cited bases may be loosely summarized as, “taxpayer was assessed a fraud penalty before, that penalty was upheld, therefore a fraud penalty is appropriate now.” The best evidence why that syllogism should be rejected is reflected in a letter that ABC admitted at hearing, and which it received from the Department after the Department’s audit of ABC for the period following the audit period at issue, which began on June 1, 2003. That letter provided, in part,

Dear Taxpayer:

We are writing to inform you that we have completed your audit for the audit period listed above. After reviewing your tax returns and corresponding records, we found your

returns to be in order. No adjustments will be made to the tax returns that were reviewed at this time. Thank you for your cooperation in the audit period.

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Taxpayer Ex. 1 (tab titled, “6-1-03 — 12-31-05 Audit Letter”).

Whether a penalty was properly imposed requires a review of the facts of the taxpayer’s actions for the period under review. *See* Brown Specialty Co. v. Allphin, 75 Ill. App. 3d 845, 850-51, 394 N.E.2d 659, 663 (3<sup>rd</sup> Dist. 1979); Peterson v. Yacktmann, 25 Ill. App. 2d 208, 214, 166 N.E.2d 452, 455 (1<sup>st</sup> Dist. 1960) (“There is no general rule for determining what facts will constitute fraud; whether or not it is found depends upon the special facts of each particular case.”). The burden lies with the Department to prove fraud by clear and convincing evidence. Brown Specialty Co., 75 Ill. App. 3d at 853, 394 N.E.2d at 665. The standard of proof alone cautions against presuming fraudulent intent. Racine Fuel Co. v. Rawlins, 377 Ill. 375, 380, 36 N.E.2d 710, 713 (1941) (“Fraud is not presumed but must be proved like any other fact by clear and convincing evidence.”).

Viewed together, the evidence introduced at hearing reflects that there was a continuum during which Doe obtained notice of the costs associated with the tax collector’s determination that his business was filing tax returns that did not include all of its taxable receipts, as well as the costs of bad recordkeeping. During the same continuum, however, the evidence also shows that Doe began to change his actions, by attempting to come into compliance with Illinois’ tax laws.

When rejecting the Department’s stated bases for assessing the fraud penalty here, I do not mean to imply that the fact that the Department’s may have previously imposed a similar penalty against a taxpayer is wholly irrelevant to whether a similar penalty should be assessed for a subsequent audit period. Again, the Department’s enforcement actions

often provide notice to a taxpayer of some particular error(s) in reporting. Had the evidence shown that Doe and/or ABC had continued to act, during this audit period, as it had previously acted during the prior audit period, and after being notified that such actions constituted fraud, then the fact that ABC continued to act in the same manner could hardly be deemed innocent. But on the other hand, a taxpayer may also stop filing returns that do not report all of its taxable receipts. That's what Doe testified occurred here, and the documentary evidence supports that testimony. *See* Taxpayer Ex. 1 (tab titled, "6-1-03 — 12-31-05 Audit Letter").

I conclude that ABC admitted documentary evidence at hearing that rebuts the Department's determination that a fraud penalty should be assessed. I recommend therefore, that the Director revise the NTLs to eliminate the fraud penalty.

**Conclusion:**

ABC has rebutted the prima facie correctness of the Department's calculation of ABC's taxable gross receipts for January 2002, and for September through December 2002. ABC has not rebutted the Department's prima facie correct determination to estimate ABC's taxable gross receipts regarding the remaining months in the audit period. ABC has also rebutted the Department's determination that it filed returns during the audit period with an intent to defraud. I recommend that the Director revise the NTLs as described herein, and finalize them as so revised, with interest to accrue pursuant to statute.

February 8, 2008  
Date

John E. White, Administrative Law Judge