

ST 09-10

Tax Type: Sales Tax

Issue: Excess Tax Collections & Building Materials Taxation

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

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|----------------------------------|---|--------------------------|-------------|
| THE DEPARTMENT OF REVENUE |) | Docket No. | 08-ST-0000 |
| OF THE STATE OF ILLINOIS |) | IBT No. | 0000-0000 |
| |) | Tax Periods | 1/03 — 6/05 |
| |) | NTL Nos. | |
| |) | | |
| v. |) | | |
| |) | | |
| ABC, LLC, |) | John E. White, | |
| Taxpayer |) | Administrative Law Judge | |

**RECOMMENDATION FOR DECISION REGARDING
THE PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT**

Appearances: Steve Brooks, appeared for ABC, LLC;
Gary Stutland, Special Assistant Attorney General,
appeared for the Illinois Department of Revenue.

Synopsis: This matter involves ABC, LLC's (Taxpayer) protest of three Notices of Tax Liability (NTLs) the Illinois Department of Revenue (Department) issued to it to assess tax regarding the period from January 2003 through June 2005. The amount of tax in dispute is \$35,777, which the Department determined some of Taxpayer's stores over-collected from customers during some months in the audit period, and where Taxpayer had not refunded such amounts to such customers.

Prior to hearing, Taxpayer filed a Motion for Summary Judgment (Taxpayer's Motion), to which the Department responded with its own Cross-Motion for Summary

Judgment (Department's Motion). After considering the parties' motions and the evidence of record, I am including in this recommendation a statement of facts not in dispute, and conclusions of law. I recommend that the Director deny Taxpayer's Motion, grant the Department's Motion, and finalize the NTLs as issued.

Statements of Fact Not In Dispute:

1. The Department audited Taxpayer's business for the months of January 2003 through and including June 2005. Taxpayer's Motion, ¶ 2; Department's Motion, Affidavit of Scott Cochrane (Cochrane Aff.); Department's Motion, Ex. A (copies of auditor's workpapers detailing results of his review of Taxpayer's records regarding different stores in Illinois). During this period, Taxpayer conducted business at 28 locations within Illinois. Taxpayer's Motion, ¶ 2; Department's Motion, Ex. A.
2. During the months at issue, Taxpayer filed monthly consolidated Illinois Sales and Use Tax returns to report its Illinois tax liability for all of its Illinois locations, as per 86 Ill. Admin. Code § 130.530. Taxpayer's Motion, ¶ 3; Department's Motion, ¶ 9.
3. For the audit period, Taxpayer reported total taxable receipts in the amount of \$79,403,585 and a total tax due of \$4,696,726. Taxpayer's Motion, ¶ 4; Department's Motion, Cochrane Aff., ¶ 8.
4. Taxpayer paid \$4,696,726 to the Department regarding the taxable receipts reported during the audit period. Taxpayer's Motion, ¶ 5; Department's Motion, Cochrane Aff., ¶ 8.
5. During the audit, the Department requested that Taxpayer submit for review its books and records. Department's Motion, ¶ 10; Reply to Department's Response to the

Taxpayer's Motion for Summary Judgment and Taxpayer's Response to the Department's Motion for Summary Judgment (Taxpayer's Response/Reply), ¶¶ 4-6.

6. After reviewing Taxpayer's books and records, the auditor, and subsequently, the Department, determined that Taxpayer had more taxable gross receipts than were reported on its monthly returns. Department Motion, Ex. B, pp. 4-6 (line 11 of each Audit Report); Taxpayer's Motion, p. 2 n.1 ("ABC admits that the auditor determined that there was an additional \$14,124 in unreported sales income under the [ROTA] during the audit period. ABC has paid any and all sales taxes and interest due for this unreported amount.").
7. As part of his audit, the Department's auditor reviewed the amounts of sales tax collected at each of Taxpayer's Illinois stores, on a monthly basis. Taxpayer's Motion, ¶ 8; Department's Motion, Cochrane Aff., ¶¶ 4-5. He then compared those figures with Taxpayer's financial books and records, and noted and scheduled instances where the amount of tax reported as having been collected from customers at a particular store was greater than the tax due on the taxable receipts at that particular store, for particular months. Department's Motion, Ex. A; Taxpayer's Motion, ¶ 8.
8. As a result of the audit, the Department determined that some of Taxpayer's Illinois stores charged and collected from customers amounts, designated as tax, that were in excess of the amounts of tax actually due on the gross receipts realized from sales made to such customers, and that Taxpayer had not refunded such excess amounts of tax back to the customers from whom Taxpayer collected them. Taxpayer's Motion,

¶¶ 8-9 & Saporta Aff., ¶¶ 4, 6e; Department's Motion, ¶ 2 & Ex. B; Department's Motion, Cochrane Aff., ¶¶ 7, 10.

9. Taxpayer collected from all customers, from all locations, less than the total amount of retailers' occupation tax (ROT) that was due on the taxable receipts it received from making sales of tangible personal property at retail. Taxpayer's Motion, ¶ 6 & Saporta Aff., ¶¶ 4, 6e; Department's Motion, Cochrane Aff., ¶¶ 8-10. Specifically, Taxpayer collected from all customers, from all locations, \$4,688,208, whereas the amount of ROT due on the taxable receipts from Taxpayer's sales, at all locations, was \$4,696,726. Taxpayer's Motion, ¶ 6 & Saporta Aff., ¶¶ 4, 6e; Department's Motion, Cochrane Aff., ¶¶ 8-10.

Conclusions of Law:

Summary judgment is proper where the pleadings, depositions, admissions, affidavits and exhibits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. 735 ILCS 2-1005(c); Petrovich v. Share Health Plan of Illinois, Inc., 188 Ill. 2d 17, 30-31, 719 N.E.2d 756, 764 (1999). Although summary judgment is a drastic measure, it is an appropriate tool to employ in the expeditious disposition of a lawsuit in which “the right of the moving party is clear and free from doubt.” Morris v. Margulis, 197 Ill. 2d 28, 35, 754 N.E.2d 314, 318 (2001) (*quoting* Purtill v. Hess, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986)).

When both parties file motions for summary judgment, only a question of law is raised. Lake Co. Stormwater Management Comm. v. Fox Waterway Agency, 326 Ill. App. 3d 100, 104, 759 N.E.2d 970, 973 (2d Dist. 2001). Here the issue involves the

propriety of the Department's assessment of tax based on its determination that, during some months in the audit period, some of Taxpayer's stores collected tax from customers that was in excess of the amount of tax actually due on the gross receipts from such sales. I will address each motion in turn, after a brief description of the burden of production and persuasion in this tax case.

The Department's Motion included copies of the NTLs it issued to Taxpayer, under the certificate of the Director. Department's Motion, Ex. B. Pursuant to § 4 of the Retailers' Occupation Tax Act (ROTA), those NTLs constitute 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 legislature's grant of a statutory presumption of correctness to the Department's tax notices applies to all aspects of the Department's determination that a particular tax and/or penalty is due. *E.g.*, Branson v. Department of Revenue, 168 Ill. 2d 247, 260, 659 N.E.2d 961, 968 (1995) (statutory presumption applies to Department's determination that taxpayer acted willfully); Soho Club, Inc. v. Department of Revenue, 269 Ill. App. 3d 220, 232, 645 N.E.2d 1060, 1068 (1st Dist. 1995) (statutory presumption applies to Department's determination that plaintiff was engaged in a retail occupation and subject to the ROTA).

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.

Taxpayer's Motion

Taxpayer's Motion asserts that the issue is whether there was an over-collection in accordance with 35 ILCS 120/2-40, and whether it was unjustly enriched by over-collecting taxes and, therefore, liable to remit any such over-collection to the Department. Taxpayer's Motion, ¶ 12. Taxpayer acknowledges the effect of § 2-40 of the ROTA, which provides that:

If a seller collects an amount (however designated) that purports to reimburse the seller for retailers' occupation tax liability measured by receipts that are not subject to retailers' occupation tax, or if a seller, in collecting an amount (however designated) that purports to reimburse the seller for retailers' occupation tax liability measured by receipts that are subject to tax under this Act, collects more from the purchaser than the seller's retailers' occupation tax liability on the transaction, the purchaser shall have a legal right to claim a refund of that amount from the seller. If, however, that amount is not refunded to the purchaser for any reason, the seller is liable to pay that amount to the Department. This paragraph does not apply to an amount collected by the seller as reimbursement for the seller's retailers' occupation tax liability on receipts that are subject to tax under this Act as long as the collection is made in compliance with the tax collection brackets prescribed by the Department in its rules and regulations.

35 ILCS 120/2-40; Taxpayer's Motion, ¶ 14.

Taxpayer's legal argument is that, since it filed returns as a single Taxpayer, it did not over-collect taxes for purposes of ROTA § 2-40, it was not unjustly enriched, and it is not liable to remit any additional amounts to the State. Taxpayer's Motion, ¶ 13; Taxpayer's Response/Reply, ¶ 2. Taxpayer argues that retailers' occupation tax (ROT) is imposed on a corporate entity as a single seller, and, therefore, where a single seller

conducts business in different locations, the amounts of tax collected from customers should be considered collectively, and not considered on a site by site basis separately, as though each location were a separate taxpayer. Taxpayer's Motion, ¶¶ 16, 20. Taxpayer contends that, since, in the aggregate, all of its stores collected less tax from customers than the tax actually due on the gross receipts from all of Taxpayer's sales to all customers, its over-collections of tax from some customers, at some locations, should be netted against its under-collections of tax from all of its customers. *See* Taxpayer's Motion, ¶¶ 17, 20.

Taxpayer argues that "the auditor did not look at individual transactions from locations but instead looked at [Taxpayer] on a location by location and month by month basis using [Taxpayer's] own documentation to determine whether an over-collection occurred. The State has not presented any evidence that the auditor looked at a single transaction to determine if a true over-collection of sales tax from the customer had occurred." Taxpayer's Motion, ¶ 18. It further argues that "[b]y looking at locations on a monthly basis, the Department treated each location as a separate entity in determining whether an over-collection occurred. Because the Department did not look at individual transactions as required by the statute, it should have looked at [Taxpayer] as a whole to determine whether it over-collected sales tax from its Illinois customers. The Department did not. If it had, the Department would have determined that [Taxpayer], as a single taxpayer, under-collected \$8,518.00 in sales tax from its customers." Taxpayer's Motion, ¶ 20.

Analysis:

A consideration of Taxpayer's arguments begins with a review of some general

principles underlying what is colloquially called Illinois' "sales tax," as described by the Illinois Supreme Court in Hagerty v. General Motors Corp., 59 Ill. 2d 52, 319 N.E.2d 5 (1974):

The Retailers' Occupation Tax Act imposes a tax upon persons engaging in selling tangible personal property at retail. The amount of the tax is computed as a specified percentage of the gross receipts of such sales at retail. [citations omitted] A 'sale at retail' is any transfer for a valuable consideration of the ownership of or title to tangible personal property to a purchaser for use or consumption and not for resale. The retailer is required to remit the tax to the Illinois Department of Revenue.

The Use Tax Act complements the Retailers' Occupation Tax Act. It imposes a tax, at the same rate as the retailers' occupation tax, upon the privilege of using in this State tangible personal property purchased in retail. In the usual situation the tax is collected from the purchaser by the retailer, but to the extent that the retailer remits to the Department of Revenue the tax imposed by the Retailers' Occupation Tax Act with respect to the sale of the same property, he is not required to remit the tax imposed by the Use Tax Act.

Hagerty, 59 Ill. 2d at 54-55, 319 N.E.2d at 6.

There is, however, an express statutory exception to the Supreme Court's acknowledgement that, in the usual situation, a retailer's payment of one tax satisfies its obligations regarding both the ROTA and the UTA. That exception applies where the retailer, for whatever reason, charges and collects from a customer more tax than is actually due on the gross receipts realized from selling the property transferred in that particular transaction. Acme Brick & Supply Co. v. Department of Revenue, 133 Ill. App. 3d 757, 468 N.E.2d 1380 (2d Dist. 1985). The circumstances under which that situation would arise is described in ROTA § 2-40, already quoted, *supra*, and in the complimentary provision of the UTA, § 3-45. That section provides in pertinent part:

If a seller collects use tax measured by receipts that are not subject to use tax, or if a seller, in collecting use tax measured by receipts that

are subject to tax under this Act, collects more from the purchaser than the required amount of the use tax on the transaction, the purchaser shall have a legal right to claim a refund of that amount from the seller. If, however, that amount is not refunded to the purchaser for any reason, the seller is liable to pay that amount to the Department. This paragraph does not apply to an amount collected by the seller as use tax on receipts that are subject to tax under this Act as long as the collection is made in compliance with the tax collection brackets prescribed by the Department in its rules and regulations.

35 ILCS 105/3-45. In § 8 of the UTA, the legislature manifested its clear intent that a retailer’s actual collection of use tax from customers created a trust of those funds for the benefit of the Department. 35 ILCS 105/8 (“To the extent that a retailer required to collect the tax imposed by this Act has actually collected that tax, such tax is held in trust for the benefit of the Department.”).

Some examples will help illustrate the statutory exception to the general rule that a retailer’s payment of ROT relieves its obligations under both the ROTA and the UTA. Suppose a retailer has a store in Cook County, where the applicable tax rate, including local municipal taxes added to the state rate, adds up to a rate of 10% on each dollar of gross receipts from retail sales. Suppose also that, for whatever reason, Taxpayer charged and collected tax from the first customer of the day at a rate of 20% on the dollar, and charged and collected from every other customer tax at a rate of 5% on the dollar. If the retailer has four customers in a given day, and each purchased \$100 worth of property, the seller’s books and records would show the following:

| | Gross receipts or selling/purchase price of goods sold: | Total use tax charged and collected (or ROT reimbursed): | Total receipts including tax |
|------------|---|--|---------------------------------|
| Customer 1 | 100 | 20 | 120 |
| Customer 2 | 100 | 5 | 105 |
| Customer 3 | 100 | 5 | 105 |
| Customer 4 | <u>100</u> | <u>5</u> | <u>105</u> |
| Totals | 400 | 35 | 435 |

In this illustration, the amount of ROT mathematically due on the amount of gross receipts is \$40, yet the retailer has collected only \$35 in reimbursing itself for the amount claimed as being due for ROT, or in the amount claimed as being due for use tax. If the seller kicks in the extra \$5, and actually pays the total amount of \$40 to the Department, it might appear, at least at first blush, as though it has satisfied the amount of ROT actually due on the gross receipts it realized from selling at retail. But what about the extra \$10 that the retailer charged and collected from the first customer of the day, which was in excess of the \$10 that Illinois law authorized as being actually due on the gross receipts realized from selling the property transferred in that particular transaction? Is the extra \$10 the retailer's to keep, and/or to apply to its own expenses, for example, to pay its own ROT liability? Not under the plain terms of UTA § 8, or under the plain terms of ROTA § 2-40 and UTA § 3-45.

Under the plain text of UTA § 8, the total amount of use tax that the retailer collected from the first customer in the illustration above is “held in trust for the benefit of the Department.” 35 **ILCS** 105/8. Under the plain text of ROTA § 2-40, and UTA § 3-45, unless the retailer refunds to the customer from whom it improperly collected tax in error, it is required to pay the amount of tax over-collected from the customers to the Department. 35 **ILCS** 105/3-45; 35 **ILCS** 120/2-40. When considering the transactions in the illustration, therefore, the related statutory provisions mean that, unless the retailer refunds the extra \$10 to the first customer from whom it collected that amount in error, the retailer owes not only \$40 as its ROT liability, based on its taxable receipts, but it also owes the additional \$10 in use tax that it over-collected from its customer. 35 **ILCS** 105/3-45, 8; 35 **ILCS** 120/2-40.

But let's also consider an illustration with different facts, and where the facts have at least one thing in common with the facts as shown by the evidence presented in this case. Suppose that another retailer has a store in Cook County, where the applicable municipal and state tax rates together total 10% on the dollar. Suppose also that, for whatever reason, Taxpayer charged and collected tax from the first customer of the day at a rate of 5% on the dollar, and charged and collected from every other customer tax at a rate of 20% on the dollar. If the retailer has four customers in a given day, and each purchased \$100 worth of property, the seller's books and records would show the following:

| | Gross receipts or selling/purchase price of goods sold: | Total use tax charged and collected (or ROT reimbursed): | Total receipts including tax |
|------------|---|--|---------------------------------|
| Customer 1 | 100 | 5 | 105 |
| Customer 2 | 100 | 20 | 120 |
| Customer 3 | 100 | 20 | 120 |
| Customer 4 | <u>100</u> | <u>20</u> | <u>120</u> |
| Totals | 400 | 65 | 465 |

So, in this illustration, while only \$40 is properly due on the retailer's actual gross receipts from sales, the retailer actually collected \$65, or what appears, at first blush, to be \$25 more than was proper. But when viewing the tax collections on a transaction by transaction basis, one can clearly see that the retailer charged and collected an extra \$10 from each of three customers, for a total over-collection of \$30. Unless the retailer can show that it returned to those three customers the \$10 it over-charged and collected from each, the retailer's payment of \$40 to the Department does not satisfy his duties under § 3-45 of the UTA, or under § 2-40 of the ROT. In addition to the \$40 due on the gross receipts it realized from such sales, it also owes the \$30 it over-collected from its customers, and which it did not refund to such customers. 35 ILCS 105/3-45, 8; 35 ILCS

120/2-40.

Returning to Taxpayer's instant Motion, Taxpayer's burden is to show, with competent evidence closely associated with its books and records, that there is no dispute over any fact material to its Motion, and that, when taking into account those undisputed facts, it is entitled to judgment as a matter of law. Here, what Taxpayer wants to show, as a matter of law, is that the Department's determinations — that Taxpayer owes tax in the amount of \$35,777 because some of Taxpayer's stores, during some months in the audit period, collected from customers \$35,777 in charges designated as tax, which was in excess of the amount of tax properly due on the gross receipts Taxpayer received from making sales to such customers, and which Taxpayer did not refund to such customers — are incorrect.

In its Motion, Taxpayer concedes that the Department determined that it “collected excess taxes totaling \$35,777 ... at specified locations during certain months, in violation of the [ROTA] ... and that the over-collection from these locations is now due to the State.” Taxpayer's Motion, ¶ 9; Taxpayer's Motion, Saporta Aff., ¶ 6e. But its Motion presents no evidence showing that this purely factual determination is incorrect. That is, it presented no evidence that some of its stores did not, in fact, collect from customers \$35,777 that was in excess of the amount of tax actually and properly due.

Illinois retailers are obliged to keep books and records showing, among other things, the total receipts realized from selling property at retail, as well as the non-taxable nature of certain transactions and/or certain receipts. 35 **ILCS** 120/7; Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill. App. 3d 203, 219, 577 N.E.2d 1278, 1288 (1st Dist. 1991). One of the deductions a retailer takes when calculating its taxable receipts is

to subtract from its total receipts the amount of tax that the retailer added to its selling prices of the goods sold, and which it collected from customers. Mel-Park Drugs, Inc., 218 Ill. App. 3d at 219, 577 N.E.2d at 1288. As part of Taxpayer's Motion, Taxpayer included its CFO's affidavit, in which he averred that he reviewed the books, records, and returns [of Taxpayer] for the audit period and ... verif[ied that] ... the over-collection of sales tax of \$35,777 was based on [Taxpayer's] internally prepared monthly figures for each location and not on a transaction basis." Taxpayer's Motion, Saporta Aff., ¶ 6e. But Taxpayer's Motion presents no competent evidence to show why the entries in its own records were in error, or were not trustworthy.

Had Taxpayer's records indicated, for example, that it had received more taxable receipts than were reported on its returns, the Department would be justified to determine that additional tax was due, based on the receipts that Taxpayer did not report on its monthly returns. In its Motion, Taxpayer concedes precisely this point. Taxpayer's Motion, p. 2 n.1 ("ABC admits that the auditor determined that there was an additional \$14,124 in unreported sales income under the [ROTA] during the audit period. ABC has paid any and all sales taxes and interest due for this unreported amount."). Taxpayer's Motion fails to persuade that the Department auditor's review of Taxpayer's financial books and records regarding the amounts of tax collected by some of Taxpayer's individual stores during some parts of the audit period renders the Department's factual determinations incorrect, as a matter of law. The Illinois appellate court, in fact, presumed that this would be the proper way for the Department to determine whether a retailer collected more tax than was lawfully due on the retailer's sales. Acme Brick & Supply Co. v. Department of Revenue, 133 Ill. App. 3d 757, 766, 468 N.E.2d 1380,

1386-87 (2d Dist. 1985) (“the Department can determine the over-collection of taxes merely by examining the Illinois seller's books, *i.e.*, receipts, invoices, and then calculating the amount over-collected.”).

Further, Taxpayer’s chief complaint is that the Department’s auditor determined that tax was due in an improper manner. But it never provides evidence — either as an exhibit to its Motion, or as an exhibit to its Response to the Department’s Motion — to show that it did *not* over-collect tax, on a transaction by transaction basis, during the audit period. In a nutshell, a taxpayer cannot defeat the Department’s prima facie case simply by arguing that the Department should have performed its audit in a way other than the way it was conducted. It must also produce books and records which show that the Department’s determinations are incorrect. PPG Industries, Inc. v. Department of Revenue, 328 Ill. App. 3d 16, 33, 765 N.E.2d 34, 48 (1st Dist. 2002) (agreeing that, once the Department presents its prima facie case at hearing, a taxpayer “has the responsibility to introduce evidence at the hearing to prove the legitimacy of its claim ... through documentary evidence, meaning books and records, and not mere testimony.”); Mel-Park Drugs, Inc., 218 Ill. App. 3d at 222, 577 N.E.2d at 1290 (“While [taxpayer] may have sketched out an alternative theory for estimating its gross receipts, it has not met its burden to overcome the prima facie case.”).

In its Motion, Taxpayer also suggests that ROTA § 2-40 limits the Department’s power to assess tax for over-collections to those instances where it can show an over-collection on single transactions, and “not the accumulation of transactions in a time period at a specific location.” Taxpayer’s Motion, ¶ 19. That section, however, does no such thing. To be sure, records kept on a transaction by transaction basis reflect the

actual nature and extent of a retailer's tax collections much better than summaries of tax collections from all transactions during a month. Mel-Park Drugs, Inc., 218 Ill. App. 3d at 222, 577 N.E.2d at 1288-89; *see also supra*, pp. 9, 11 (illustrations). But if UTA § 3-45 and ROTA § 2-40 meant what Taxpayer suggests they mean, all a retailer would have to do to avoid any over-collection liability would be to not keep, or to not produce for audit, detailed records. And again, Taxpayer's Motion does not include any of the detailed records it claims were available for review at the time the audit was conducted. Taxpayer's Motion; Taxpayer's Response/Reply, ¶¶ 5-6.

The party filing a motion for summary judgment has both the initial burden of production and the ultimate burden of proof. Pecora v County of Cook, 323 Ill. App. 3d 917, 933, 752 N.E.2d 532, 545 (1st Dist. 1999). Until the movant meets this initial burden, the non-movant has no burden whatsoever. Rice v AAA Aerostar, Inc., 294 Ill. App. 3d 801, 805, 690 N.E.2d 1067, 1070 (4th Dist. 1998). On the other hand, if the movant does satisfy its burden, the nonmoving party must present a factual basis that would arguably entitle him to a judgment. Hernandez v. Alexian Brothers Health System, 384 Ill. App. 3d 510, 518, 893 N.E.2d 934, 940-41 (1st Dist. 2008).

Here, Taxpayer's Motion does not show, as a matter of law, that the Department's determinations are incorrect. Its Motion includes no competent evidence showing that, on a transaction by transaction basis, Taxpayer's stores did not collect a total of \$35,777 in tax that was in excess of the gross receipts or selling purchase prices realized from selling property during the audit period. Indeed, Saporta admits that Taxpayer's "internally prepared monthly figures for each location ... [showed an] over-collection of sales tax of \$35,777" Taxpayer's Motion, Saporta Aff., ¶ 6e; *see also* Quincy Trading

Post, Inc. v. Department of Revenue, 12 Ill. App. 3d 725, 732, 298 N.E.2d 789, 794 (4th Dist. 1973) (statements by taxpayer's employee properly deemed admissions of taxpayer). Further, neither Taxpayer's Motion nor its Response/Reply presents any competent evidence or claim that the Department's NTLs are incorrect because it refunded any and all tax over-collected by some stores to the particular customers from whom it had erroneously collected from them.

Finally, and most importantly, the legal premise underlying Taxpayer's Motion — that a single Taxpayer doing business in multiple locations in Illinois is entitled to offset any over-collections of use tax from customers by some stores with the amounts of use tax its other stores did not collect from their customers — is contrary to express provisions within the ROTA and the UTA. If, in fact, some of Taxpayer's stores collected use tax from customers that was in excess of the amount properly due from them — and Taxpayer does not assert that none of its stores did so during the audit period — then, as a matter of law, Taxpayer owes such over-collected amounts of use tax to the Department, *unless* it can show that it refunded such amounts to the customers who were the purchasers in such transactions. 35 **ILCS** 105/3-45, 8; 35 **ILCS** 120/2-40; Acme Brick & Supply Co., 133 Ill. App. 3d at 766, 468 N.E.2d at 1384 (“the purpose of the [statutory predecessor of ROTA § 2-40] is to prevent the unjust enrichment of an Illinois seller when the seller improperly collects a tax measured by receipts which are not subject to the retailers' occupation tax or collects more than the amount of tax due on receipts which are subject to the tax.”).

A retailer that conducts business in more than one location within Illinois does not gain the right to convert, to its own use, the use tax some of its stores over-charged and

collected from some purchasers in error, so as to compensate for its other stores erroneous collection of too little use tax from their customers. 35 **ILCS** 105/8. Regardless whether a retailer conducts business in one location or in a thousand, “[t]o the extent that a retailer required to collect the tax imposed by this Act has actually collected that tax, such tax is held in trust for the benefit of the Department.” *Id.*

I conclude that Taxpayer has not satisfied its burden of production and persuasion to show, as a matter of law, that the Department’s determinations, giving rise to the NTLs issued against it, were incorrect. Therefore, its Motion is denied.

The Department’s Motion

Ordinarily, the taxing authority has the burden of proof regarding a taxpayer’s liability to the government. Balla v. Department of Revenue, 96 Ill. App. 3d 293, 296, 421 N.E.2d 236, 238 (1st Dist. 1981). The Illinois legislature, in order to aid the Department in meeting its burden of proof in this respect, has provided that the findings of the Department concerning the correct amount of tax due are prima facie correct. *Id.* As previously noted, the Department presented, as part of its Motion, the three NTLs it issued to Taxpayer, under the certificate of the Director. Department’s Motion, Ex. B.

Here, and for purposes of its Motion, the Department has the same burden as the Taxpayer does. That is, it has the burden to show that there is no dispute over the facts material to the Department’s determination that Taxpayer over-collected tax from customers in the amount of \$35,777, and that, as a matter of law, Taxpayer owes that amount to the Department.

In its Motion, the Department presented evidence showing that Taxpayer over-collected tax from customers in the amount of \$35,777. It did so through the affidavit of

the audit supervisor, and through the certified copies of its NTLs. In response to that affidavit, Taxpayer presented no counter-affidavit, and the affidavit of its CFO, offered as part of Taxpayer's own Motion, shows that there is no dispute that some of Taxpayer's stores over-collected tax in the amount of \$35,777. Taxpayer's Motion, Saporta Aff., ¶ 6e; Taxpayer's Response/Reply.

Within its Motion, the Department asserted that "The Department concluded that the [T]axpayer had over-collected tax (\$35,777.00) from their customers during the audit period and that the over-collected tax had not been refunded to the customer or remitted to the Department." Department's Motion, ¶ 2. Whether Taxpayer refunded the taxes it does not dispute some of its stores over-collected from customers to the customers from whom they were collected is a fact that is material to Department's claim that it is entitled to judgment as a matter of law. 35 ILCS 105/3-45, 8; 35 ILCS 120/2-40. The affidavit the Department attached to its Motion does not include an evidentiary averment like the assertion set forth in ¶ 2 of its Motion. So here, the question is whether I may infer, from the undisputed facts of record, that Taxpayer did not refund the \$35,777 some of its stores over-collected from customers during some months in the audit period.

In Loyola Academy v. S & S Roof Maintenance, Inc., 146 Ill. 2d 263, 586 N.E.2d 1211 (1992), the Illinois Supreme Court noted that "it is well established that in deciding a motion for summary judgment, the court may draw inferences from the undisputed facts. However, where reasonable persons could draw divergent inferences from the undisputed facts, the issue should be decided by the trier of fact and the motion should be denied." *Id.*, at 272, 586 N.E.2d at 1215. I conclude that there is only one inference reasonably drawn from the undisputed facts regarding the Department's assessments of

tax here, and the undisputed facts regarding the bases for those assessments. The inference reasonably drawn from such facts, and from this record as a whole, is that Taxpayer did not refund the tax monies to the customers from whom it collected them. It is not reasonable to infer the opposite fact — that is, that Taxpayer refunded \$35,777 to the customers from whom it over-collected such amounts as tax, and the Department issued three over-collection assessments to Taxpayer, anyway.

When drawing this inference, I rely, in part, on the court's decision in Village of Montgomery v. Aurora Township, 387 Ill. App. 3d 353, 899 N.E.2d 567 (2d Dist. 2008). In that case, the court was reviewing the trial court's grant of summary judgment to defendants, after the parties filed cross-motions for summary judgment in a suit in which the plaintiff sought a declaratory judgment to determine the parties' rights, obligations, and liabilities concerning a bridge located between the municipal boundaries of a city and a village. *Id.*, at 354-55, 899 N.E.2d at 568-69. When considering whether the trial court's grant of judgment was proper regarding the issue of whether defendants had jurisdiction over the bridge, the appellate court held, in part, that the materials accompanying the cross-motions for summary judgment plainly indicated that the defendant had never taken responsibility for maintaining the bridge. *Id.*, at 362, 899 N.E.2d at 574. Here, the evidence shows that Taxpayer has never asserted that it refunded to customers the \$35,777 that it concedes some of its stores over-collected from customers during some of the audit period. Taxpayer's Motion, Saporta Aff., ¶ 6e; Taxpayer's Response/Reply.

On this point, moreover, since both parties filed cross-motions for summary judgment, only a question of law is at issue. Lake Co. Stormwater Management Comm.,

326 Ill. App. 3d at 104, 759 N.E.2d at 973. The only issue of law presented by Taxpayer's Motion is its claim that Illinois law requires that a single taxpayer doing business in several locations within Illinois be allowed to offset any over-collections of use tax that some of its stores may have made during an audit period by the amounts of use tax other stores did not collect from customers during the audit period. *See* Taxpayer's Motion; Taxpayer's Response/Reply. Finally, if what is contained in the pleadings and affidavits would have constituted all of the evidence before the court and upon such evidence there would be nothing left to go to a jury, and the court would be required to direct a verdict, then a summary judgment should be entered. Fooden v. Board of Governors of State Colleges and Universities, 48 Ill. 2d 580, 587, 272 N.E.2d 497, 500 (1971).

The Department's Motion contains evidence showing that: some of Taxpayer's stores over-collected use tax in the amount of \$35,777 from customers during some months in the audit period; Taxpayer did not refund the use tax collected in error from such customers; and Taxpayer did not pay over such amounts to the Department. Department's Motion, Cochrane Aff., Exs. A-B. After reviewing the entire record in this contested case, the Department has established that Taxpayer does not dispute those facts. *See* Taxpayer's Motion; Taxpayer's Response/Reply. Under the plain text of UTA §§ 3-45 and 8, and ROTA § 2-40, Taxpayer owes the amount of tax over-collected from customers to the Department. 35 **ILCS** 105/3-45, 8; 35 **ILCS** 120/2-40; Acme Brick & Supply Co., 133 Ill. App. 3d at 766, 468 N.E.2d at 1384.

Conclusion:

I recommend that Taxpayer's Motion be denied, that the Department's Motion be granted, and that the Director finalize the NTLs as issued.

June 15, 2009
Date

John E. White, Administrative Law Judge