

**ST 09-3**

**Tax Type: Sales Tax**

**Issue: Interstate Commerce (Exemption Issue)**

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

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

v.

**ABC, INC. D/B/A  
XYZ JEWELRY,  
Taxpayer**

**No. 07-ST-0000  
IBT# 0000-0000  
NTL# 00 00000000000000  
00 00000000000000  
00 00000000000000**

**Ted Sherrod  
Administrative Law Judge**

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**RECOMMENDATION FOR DISPOSITION**

**Appearances:** Special Assistant Attorney General Paula Hunter on behalf of the Illinois Department of Revenue; Akram Zanayed of Akram Zanayed and Associates on behalf of ABC, Inc. d/b/a XYZ Jewelry.

**Synopsis:**

The Department of Revenue (“Department”) conducted an audit of ABC, Inc. d/b/a XYZ Jewelry (“taxpayer”) for the period January 2002 through September 2004. At the conclusion of this audit, the Department issued to the taxpayer Notice of Tax Liability (“NTL”) number 00 00000000000000, NTL number 00000000000000 and NTL number 00 00000000000000 which the taxpayer timely protested. An evidentiary hearing in this matter was held on October 1, 2008 during which the taxpayer contested only the

following issue: whether certain sales made during the audit period at issue were exempt from taxation as interstate commerce. During the hearing, the taxpayer conceded that liability assessed with respect to all other issues the taxpayer protested is properly due and owing and is not being contested. After a review of the record in this matter, consisting of testimony received at the evidentiary hearing and documents of record submitted during these proceedings, it is recommended that this matter be resolved in favor of the Department. In support of this recommendation, I make the following findings of fact and conclusions of law.

**Findings of Fact:**

1. On May 14, 2007, the Department issued to the taxpayer NTL number 00 0000000000000, NTL number 0000000000000 and NTL number 00 0000000000000 covering January 2002 through September 2004. Department Group Ex. 1. These NTLs show an aggregate amount of tax due in the amount of \$75,146.68 including interest and penalties. These NTLs were admitted into evidence under the certification of the Director of the Department and established the Department's *prima facie* case. Tr. pp. 9, 10; Department Group Exhibit ("Ex.") 1.<sup>1</sup>
2. The taxpayer, a jewelry store located in Anywhere, Illinois, is owned and operated by John Doe. Transcript of hearing proceedings held October 1, 2008 ("Tr.") pp. 36, 37.
3. The taxpayer is engaged in the retail sale of jewelry, necklaces, bracelets, coins, bangles, earrings and rings to customers from Illinois and others states. Tr. pp. 37, 38.

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<sup>1</sup> Unless otherwise noted, findings of fact apply to the tax period at issue.

4. The taxpayer files ST-1 Sales and Use Tax Returns reporting its gross receipts from selling tangible personal property along with deductions related to such sales. Tr. pp. 16-18; Taxpayer's Ex. 1, 5, 9.
5. The Department audited the taxpayer's ST-1 sales and use tax returns for the period from January 2002 through and including September 2004. Department's Group Ex. 1. This audit was conducted by Patricia Hoyt, a revenue auditor with the Department. Tr. pp. 11, 12. The Department's auditor reviewed a randomly selected sample of the taxpayer's returns filed during the audit period. Tr. pp. 14-16. Consequently, the auditor only examined the taxpayer's books and records pertaining to March 2003, June 2003 and June 2004 (the "test period"). Tr. pp. 14, 15. Based on this audit sample, consisting of the taxpayer's books and records for the aforementioned months, the Department's auditor determined the amount of tax due regarding the sample periods reviewed and then projected the tax due based upon the audit sample months to the entire audit period. Tr. pp. 15, 16.
6. The taxpayer kept copies of all invoices related to sales reported on the taxpayer's sales and use tax returns for the randomly selected months the auditor reviewed. Tr. pp. 52-58; Taxpayer's Ex. 2, 3, 6, 7, 10, 11. Several of these invoices indicated that sales were made to customers having addresses outside of Illinois. Tr. pp. 60-64; Taxpayer's Ex. 2- 4, 6-8, 10-12. The taxpayer reported items where invoices showed an out-of-state purchaser as interstate sales on its ST-1 sales and use tax returns and took deductions for these interstate sales. *Id.*; Tr. pp. 43-45.

7. During the course of her audit, the Department's auditor reviewed the taxpayer's sales invoices related to sales during the test period examined to determine which items were properly deductible as interstate sales. Tr. pp. 16-30.
8. For some of the sales shown in the taxpayer's invoices as having been made to out-of-state residents, the taxpayer provided UPS shipping bills showing that the items purchased by out-of-state residents were shipped and delivered to them outside of the state of Illinois. *Id.* However, for most of the sales deducted by the taxpayer as interstate sales on its ST-1 sales and use tax returns, the taxpayer could not produce UPS or U.S. post office shipping bills or any other documentation showing that the taxpayer shipped merchandise out-of-state for delivery to out-of-state residents. *Id.*
9. The auditor denied interstate sales deductions taken on the taxpayer's ST-1 sales and use tax returns for sales shown on the taxpayer's invoices as being purchases by persons having addresses outside of Illinois where the taxpayer was unable to produce UPS or other shipping documentation related to such sales. Tr. pp. 20-30.

**Conclusions of Law:**

The Retailers' Occupation Tax Act ("ROTA"), 35 ILCS 120/1 *et seq.*, imposes a tax upon persons engaged in the business of selling at retail tangible personal property. 35 ILCS 120/2. With respect to exemptions from the obligation to pay tax prescribed by the foregoing section, section 7 of the ROTA provides as follows:

It shall be presumed that all sales of tangible personal property are subject to tax under this Act until the contrary is established, and the burden of proving that a transaction is not taxable hereunder shall be upon the person who would be required to remit the tax to the Department if such transaction is taxable.

35 ILCS 120/7

Sections 4 and 5 of the ROTA provide that the certified copy of the correct return issued by the Department "shall be prima facie proof of the correctness of the amount tax due, as shown therein." 35 ILCS 120/4; 35 ILCS 120/5. Once the Department has established its *prima facie* case by submitting the corrected return into evidence, the burden shifts to the taxpayer to overcome this presumption of validity. A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3d 826, 832 (1<sup>st</sup> Dist. 1988). The taxpayer must present sufficient documentary evidence to support its claim. *Id.* In the instant case, the taxpayer argues that it does not owe Retailers' Occupation Tax ("ROT") on various sales of merchandise determined to be taxable by the Department's auditor because they were tax-exempt sales. Specifically, the issue presented in this case is whether the Department properly disallowed taxpayer's claimed deductions for sales made in interstate commerce pursuant to section 2-60 of the ROTA, 35 ILCS 120/2-60.

Section 2-60 provides as follows:

Interstate commerce exemption. No tax is imposed under this Act upon the privilege of engaging in a business in interstate commerce or otherwise, when the business may not, under the Constitution and statutes of the United States, be made the subject of taxation by this State.

With respect to her denial of the taxpayer's deductions for sales made in interstate commerce, the Department's auditor testified as follows:

Q: So your reason for denying the deduction is simply because they didn't keep a copy of how they shipped it?

A: We have to have documentation to show that it was, in fact, shipped out-of-state, just because the taxpayer writes an address on an invoice, it's not documentation that the actual product was shipped out-of-state.

Tr. p. 23

The taxpayer claims that it has provided sufficient documentation to show that the amounts it claimed on its sales tax returns to be exempt pursuant to section 2-60 of the ROTA qualified for the interstate commerce exemption. Tr. pp. 68-72. The Department's regulation concerning sales of property to out-of-state state customers provides in pertinent part as follows:

The [ROT] tax does not extend to gross receipts from sales in which the seller is obligated, under the terms of his agreement with the purchaser, to make physical delivery of the goods from a point in this State to a point outside this State, ... provided that such delivery is actually made. 86 Ill. Admin. Code, ch. I, section 130.605(b)

This regulations further provides that in order to establish that gross receipts are exempt on the basis of out-of-state deliveries the seller is required to retain proof that there was such an agreement and a bona fide delivery outside this state. Specifically, regulation section 130.605(e) states as follows:

To establish that the gross receipts from any given sale are exempt because the tangible personal property is delivered by the seller from a point within this State to a point outside this State under the terms of an agreement with the purchaser, the seller will be required to retain records, to support deductions taken on his tax returns proof which satisfies the Department that there was such an agreement and a bona fide delivery outside this State of the property which is sold. The most acceptable proof of this fact will be:

- 1) If shipped by common carrier, a waybill or bill of lading requiring delivery outside this State;
- 2) If sent by mail, an authorized receipt from the United States Post Office Department for articles sent by registered mail, parcel post, ordinary mail or otherwise, showing the name of the addressee, the point outside Illinois to which the property is mailed and the date of such mailing; if the receipt does not comply with these requirements, other supporting evidence will be required;
- 3) If sent by seller's own transportation equipment, a trip sheet signed by the person making delivery for the seller and showing the name, address and signature of the person to whom the goods were delivered outside this State; or, in lieu

thereof, an affidavit signed by the purchaser or his representative, showing the name and address of the seller, the name and address of the purchaser and the time and place of such delivery outside Illinois by the seller, together with other supporting data as required by Section 130.810 of this Part and by Section 7 of the Act. 86 Ill. Admin. Code, ch. I, section 130.605(e)<sup>2</sup>

In the instant case, the taxpayer was able to identify shipping records (UPS shipping documentation) corresponding to only a small fraction of the invoices showing items purchased by customers with out-of-state addresses. Tr. pp. 27, 28. However, the taxpayer could not identify shipping records corresponding to the remaining deductions taken on the taxpayer's sales tax returns for out-of-state shipments for shipments the taxpayer contends it made to customers shown as having out of state addresses on copies of its invoices. *Id.*

The Department contends that Departmental regulations require that the taxpayer be able to associate each invoice having an out of state addressee with a shipping document showing an out of state shipment in order to claim the interstate commerce exemption. Tr. pp. 23, 24. While, pursuant to Department regulation 130.605, a waybill or bill of lading is "the most acceptable proof" that a sale of tangible personal property shipped by common carrier is exempt interstate commerce, it is not the only proof that is acceptable. Pursuant to this regulation, it is not the type of document that is determinative, but rather what the documentation that is provided conclusively demonstrates. Accordingly, the decisive question presented by the taxpayer's purported

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<sup>2</sup> The record in this case does not indicate that any deliveries of merchandise sold during the audit period at issue were made by the owner or employees of the taxpayer.

proof of interstate sales is whether it demonstrates that the parties to the sale intended to obligate the taxpayer to deliver merchandise outside of Illinois.

In support of its claim of exemption, the taxpayer has produced copies of all of its invoices for sales during the randomly selected months the Department's auditor reviewed on which the interstate commerce exemption is being claimed. Taxpayer's Ex. 2, 3, 6, 7, 10, 11. Each invoice bears the name of the customer and the address to which the taxpayer claims shipment was made. However, none of the invoices contain any indication that the items being sold were to be shipped to the purchaser by interstate commerce or otherwise. *Id.* Such indicia of an agreement between the parties for shipment using interstate commerce might have included a shipping charge, a reference on the invoice to the fact that the item is to be shipped to an out-of-state customer or a request that the customer acknowledge interstate delivery by return receipt.

As noted above, Department regulation 130.605(b) requires that a taxpayer be allowed to take an exemption for sales in interstate commerce where the taxpayer can present evidence of an agreement with the purchaser to deliver goods outside of Illinois. In the instant case, the invoices that are not supported by shipping documents do not in any fashion indicate delivery to another state or that the parties intended for the items that were sold to be sent in interstate commerce. Consequently, although the taxpayer has presented invoices showing sales to out-of-state customers, because these invoices do not indicate the existence of an agreement or intent to ship or deliver goods outside of Illinois, I find that the invoices that are not corroborated by shipping documentation do not present evidence that such sales were in interstate commerce.

As noted above, the ROTA provides that the correction and/or determination of tax due as well as the NTL issued by the Department is *prima facie* proof of the correctness of the amount of tax due as shown on these documents. 35 ILCS 120/4. It is well-settled Illinois law that in order to overcome the presumption of validity attached to the Department's corrected returns the taxpayer must produce competent evidence, identified with their books and records showing that the Department's returns are incorrect. Copilevitz v. Department of Revenue, 41 Ill. 2d 154 (1968); Masini v. Department of Revenue, 60 Ill. App. 3d 11 (1<sup>st</sup> Dist. 1978). Oral testimony alone is not sufficient to overcome the *prima facie* correctness of the Department's determinations. Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill. App. 3d 203 (1<sup>st</sup> Dist. 1991); A.R. Barnes & Co., supra.

In the instant case, the documentation the taxpayer has presented is sufficient to show that a sale of merchandise took place and that the buyer had an address outside of Illinois. However, these invoices contain no averments of any kind regarding whether or not out-of-state shipment was intended by the parties. Consequently, the only evidence that these invoices involved shipments outside of Illinois is the taxpayer's testimony that the items were delivered to a location outside of Illinois. This testimony is insufficient, as a matter of law, to support a claim of exemption from the application of the ROTA and, thus, does not rebut the statutory presumption of taxable sales.<sup>3</sup>

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<sup>3</sup> The taxpayer also argues that the sample months used to calculate the taxpayer's exempt sales should have been adjusted by substituting a month other than June for either June 2003 or June 2004. Tr. p. 68. However, the taxpayer has offered no rationale why the sample months the auditor used overstated the amount of tax due and presented no evidence to support this claim. Accordingly, the taxpayer has not demonstrated that the Department's audit failed to meet a minimum standard of reasonableness as required by Illinois case law. See Fillichio v. Department of Revenue, 15 Ill. 2d 327 (1959); Masini v. Department of Revenue, 60 Ill. App. 3d 11 (1st Dist. 1978).

For the reasons noted above, I find that the evidence the taxpayer has presented is not sufficient, on its face, to support a claim of exemption from the application of the ROTA to sales to out-of-state addressees determined by the Department's auditor to be taxable. Consequently, this evidence rebuts neither the statutory presumption of taxable sales pursuant to section 7 of the ROTA nor the Department's *prima facie* case.

**WHEREFORE**, for the reasons stated above, it is my recommendation that the Department's Notices of Tax Liability number 00 0000000000000, number 00 0000000000000 and number 00 0000000000000, be affirmed in their entirety.

**Ted Sherrod**  
**Administrative Law Judge**

**Date: December 16, 2008**