

ST 10-06

Tax Type: Sales Tax

**Issue: Unreported/Underreported Receipts (Non-Fraudulent)
Gross Receipts**

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

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

v.

**ABC INC. ,
Taxpayer**

**No.
IBT#
Letter ID**

Period 1/03-6/06

**Ted Sherrod
Administrative Law Judge**

RECOMMENDATION FOR DISPOSITION

Appearances: Special Assistant Attorney General George Foster on behalf of the Illinois Department of Revenue; Judith Gabeau of Gabeau Group Ltd. on behalf of ABC Inc.

Synopsis:

This matter comes on for hearing pursuant to a protest of the Department of Revenue's Notice of Tax Liability ("NTL") number and NTL number filed by ABC Inc. ("taxpayer") on October 14, 2008. The NTLs at issue are dated August 25, 2008 and cover Retailers' Occupation Tax and related taxes for the period January 1, 2003 through June 30, 2006 (the "tax period"). The tax liability assessed by the Department of Revenue ("Department") is \$18,877.59, including penalties and interest, and arises as a

result of the Department's disallowance of exempt sale treatment to the taxpayer's banquet hall rental revenues and related revenues from sales of meals and liquor. A hearing to consider the taxpayer's objections to the Department's determination was held on February 9, 2010. Following the submission of all evidence and a review of the record, 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. The Department's *prima facie* case, inclusive of all jurisdictional elements, was established by the admission into evidence of the Department's Notice of Tax Liability ("NTL") Letter ID number and NTL number, showing a total liability due and owing in the amount of \$18,877.59 including statutory interest and penalty. Department Exhibit ("Ex.") No. 1. The liability assessed by the Department is for the taxable period January 1, 2003 through June 30, 2006. *Id.*
2. ABC Inc. ("taxpayer"), an Illinois corporation having its sole place of business in Chicago, Illinois, commenced business operations in February 1998. *Id.* The taxpayer's president is and was during the tax period John Doe ("Doe"). Tr. pp. 5, 17. Taxpayer owns a banquet hall located in Chicago, Illinois which it rents to "moderate income" customers for birthday parties, weddings, graduation parties and other events. Tr. pp.31-60, 72, 73, 80, 81; Department Ex. 1. During the period January 1, 2003 through June 30, 2006, at issue in this case, taxpayer was engaged in the retail sale of meals and liquor in connection with its operation and rental of this banquet hall facility. Tr. pp. 7, 8, 16, 23, 30, 51.

3. Ivette Ponce (“Ponce”) is a tax auditor employed by the Department. Tr. p. 94. She has been a Department employee since 2000. Tr. p. 95. She specializes in conducting sales and use tax audits. *Id.*
4. In 2006, Ponce audited the books and records of the taxpayer for the period January 2003 through June 2006. Tr. pp. 95, 96; Department Ex. 1, 2. During this audit, Doe, the taxpayer’s president, his wife, an officer of the taxpayer and the taxpayer’s accountant worked with Ponce and provided her with the company’s records for review. Tr. pp. 5, 17, 118, 119; Department Ex. 1. Ponce was provided with the taxpayer’s federal and state income tax returns and bank statements and with some of the taxpayer’s invoices and sales contracts for the tax period. Department Ex. 1. During this audit Ponce determined that the invoices and sales contracts she was provided were incomplete. *Id.* She further determined that the taxpayer did not maintain a complete set of books and records. Tr. pp. 98, 99, 110, 111. Specifically, she determined that the taxpayer did not maintain general ledgers, all sales invoices, and all purchase invoices as required by Department regulation 130.805, 86 Ill. Admin. Code, ch. I, section 130.805. Tr. pp. 98, 99, 106, 146. Since Ponce was not provided with a complete set of books and records, she “circularized” the taxpayer’s liquor suppliers; i.e. obtained supplier information showing the cost of liquor the taxpayer purchased for subsequent sale at retail during the tax period in controversy. Tr. pp. 128, 129; Department Ex. 1, 2. The results of this circularization indicated that the taxpayer failed to collect and remit sales tax on liquor sales for the tax period. Tr. pp. 7, 129, 130; Department Ex. 1 (auditor’s narrative, p. 2).

5. The taxpayer filed all ST-1 sales tax returns that were due for the tax period at issue. Department Ex. 1 (auditor's narrative, pp. 1, 2). However, the taxpayer provided no documents to substantiate amounts reported on its sales tax returns. *Id.* Consequently, Ponce determined the taxpayer's taxable gross receipts from contracts for banquet hall rentals she reviewed rather than from the taxpayer's ST-1 sales tax returns. *Id.*
6. The taxpayer neither collected nor remitted any sales tax on any sales of meals and liquor. Department Ex. 1. (See page 2 of the auditor's narrative wherein the auditor states: "When reviewing the banquet invoices it was noted that the taxpayer did not collect nor separately state the sales tax on banquet room rental, food and beverage when they catered an event.")¹
7. Because the taxpayer's books and records were inadequate, the auditor arrived at an audit liability by treating as taxable the total gross receipts shown in sales contracts entered into during the tax period that were provided to Ponce by the taxpayer's representatives during the audit. Tr. pp. 98, 106. Since the taxpayer did not provide any banquet contracts for 2006, the average amount of contracts from July 2003 through December 2005 was used to determine taxable banquet sales for 2006. Department Ex. 1 (auditor's narrative, p. 2).

¹ The documents Ponce reviewed, referred to as "invoices" in her audit narrative, actually are banquet hall rental contracts entered into between the taxpayer and its customers during the tax period at issue. Tr. pp. 111, 112.

8. Department's Ex. 5 indicates the dates and contract price amount of all contracts reviewed by Ponce and included in her measure of the taxpayer's taxable gross receipts. Tr. pp. 98, 105, 106.
9. Some of the contracts for the rental of the taxpayer's banquet hall did not specify that meals and liquor were being provided. Tr. pp. 81, 106-111. The Department taxed the gross receipts from these contracts because the price charged pursuant to them was the same as, and in some cases exceeded charges for contracts that included meals and liquor. *Id.*
10. The taxpayer took sales tax deductions for the cost of collecting sales taxes on its sales tax returns for the tax period in controversy. Tr. p. 7; Department Ex.1 (auditor's narrative, p. 2). However, these deductions were disallowed by the auditor because the taxpayer did not separately state, collect or remit sales tax on any of its contracts for banquet hall rental including contracts expressly providing for sales of food and liquor. *Id.*
11. Upon completing the audit, Ponce determined that the taxpayer had underreported its receipts for the period January 1, 2003 through June 30, 2006 by \$153,002.81. Department Ex. 4.
12. During the hearing, the taxpayer produced copies of contracts that were used by Ponce in determining the taxpayer's tax liability, and additional contracts that were not reviewed by the auditor or included in the auditor's measure of the taxpayer's sales tax liability as indicated below:²

² Amount of contract, noted where necessary to distinguish contracts having the same date, is indicated in parenthesis. The date of the event, noted where necessary to distinguish contracts having the same date and amount, is indicated by "Event."

MONTH*	CONTRACTS INCLUDED IN AUDITOR'S MEASURE (Department Ex. 5)	CONTRACTS INCLUDED IN TAXPAYER'S EXHIBITS 1 AND 2
MAY 2003	5/24/03	5/24/03 EXHIBIT 1
JUNE 2003		
JULY 2003	7/9/03	7/9/03 EXHIBIT 1
AUGUST 2003	8/2/03 8/4/03 8/5/03	8/2/03 EXHIBIT 1 8/4/03 EXHIBIT 1 8/5/03 EXHIBIT 1
SEPTEMBER 2003	9/11/03 9/21/03 (\$3514) 9/21/03 (\$1360) 9/26/03	9/11/03 EXHIBIT 2 9/21/03 EXHIBIT 2 9/26/03 EXHIBIT 1
OCTOBER 2003	10/17/03	10/17/03 EXHIBIT 1
NOVEMBER 2003	11/21/03 11/24/03	11/21/03 EXHIBIT 2 11/24/03 EXHIBIT 2
DECEMBER 2003	12/8/03	12/21/03 EXHIBIT 1
JANUARY 2004	1/7/04 1/15/04 1/25/04	1/7/04 EXHIBIT 1 1/15/04 EXHIBIT 2 1/25/04 EXHIBIT 2
FEBRUARY 2004	2/7/04 2/11/04 2/14/04	2/7/04 EXHIBIT 2 2/11/04 EXHIBIT 2 2/14/04 EXHIBIT 2
MARCH 2004	3/4/04 3/5/04 3/16/04 3/21/04 3/31/04	3/5/04 EXHIBIT 2
APRIL 2004	4/13/04 4/17/04 4/22/04 (\$1825) 4/22/04 (\$1400) 4/29/04	4/13/04 EXHIBIT 2 4/17/04 EXHIBIT 2 4/22/04 EXHIBIT 2 4/29/04 EXHIBIT 2
MAY 2004	5/3/04 5/21/04 5/25/04 5/28/04 5/29/04	5/3/04 EXHIBIT 2 5/21/04 EXHIBIT 2 5/25/04 EXHIBIT 2 5/28/04 EXHIBIT 2
JUNE 2004	6/8/04 6/19/04 6/22/04	6/8/04 EXHIBIT 2

	6/26/04	
JULY 2004	7/25/04 7/26/04	7/25/04 EXHIBIT 1 7/26/04 EXHIBIT 1
AUGUST 2004	8/13/04 (\$1800) 8/13/04 (\$1800) 8/25/04 (\$2050) 8/25/04 (\$400) 8/31/04	8/13/04 EXHIBIT 2 8/25/04 EXHIBIT 2 8/31/04 EXHIBIT 1
SEPTEMBER 2004	9/13/04	9/13/04 EXHIBIT 2
OCTOBER 2004	10/9/04 10/20/04 10/23/04	10/9/04 EXHIBIT 2 10/20/04 EXHIBIT 1 10/23/04 EXHIBIT 1
NOVEMBER 2004		
DECEMBER 2004	12/9/04 12/11/04	12/9/04 EXHIBIT 2 12/11/04 EXHIBIT 2
JAUNUARY 2005	1/5/05 1/18/05	1/5/05 EXHIBIT 2 1/18/05 EXHIBIT 1
FEBRUARY 2005 FEBRUARY	2/6/05 (\$1800)Event 6/4/05 2/6/05 (\$1800)Event 8/13/05 2/6/05 (\$2170) 2/12/05 2/15/05 2/23/05 2/27/05	2/6/05 EXHIBIT 1 2/6/05 EXHIBIT 2 2/12/05 EXHIBIT 2 2/15/05 EXHIBIT 2 2/23/05 EXHIBIT 2 2/27/05 EXHIBIT 2
MARCH 2005	3/6/05 3/14/05 3/16/05 3/21/05	3/6/05 EXHIBIT 2 3/14/05 EXHIBIT 2
APRIL 2005	4/1/05 4/8/05 4/14/05 4/20/05 4/23/05 4/28/05	4/14/05 EXHIBIT 2 4/20/05 EXHIBIT 2 4/23/05 EXHIBIT 2
MAY 2005	5/6/05 5/21/05	
JUNE 2005	6/26/05	6/26/05 EXHIBIT 2
JULY 2005	7/3/05 7/14/05	7/3/05 EXHIBIT 2 7/14/05 EXHIBIT 2
AUGUST 2005	8/20/05	

SEPTEMBER 2005	9/10/05	9/10/05 EXHIBIT 2
OCTOBER 2005	10/13/05 10/15/05	
<p>*Contracts dated 9/21/03 (for \$2,800), 4/12/05, 5/10/05, 10/14/05, and 3/1/06 included in taxpayer's Exhibit 1 were not presented to Ponce during her audit, or used by her to determine the taxpayer's taxable gross receipts. Compare Department Ex. 5 and Taxpayer's Ex. 1. Contracts included in taxpayer's Exhibit 2 dated 5/14/04, 3/30/04, 4/22/04, 5/21/04 (for \$1,100), 8/12/05, 6/17/05, 8/24/05, 9/13/05, 10/25/05, 3/14/06, 3/15/06, 4/1/06, 2/21/06 and 4/10/06 also were not presented to Ponce or used in arriving at her determination of taxpayer liability. Compare Department Ex. 5 and Taxpayer's Ex. 2.</p>		

13. Contracts included in taxpayer's Exhibit 1 covered both the rental of the taxpayer's banquet hall and the sale of meals and liquor. Taxpayer's Ex. 1. During the hearing, the taxpayer conceded that contracts for the rental of the taxpayer's banquet hall that also covered sales of food and liquor (i.e. all of the contracts included in taxpayer's Ex. 1) were subject to Illinois Retailers' Occupation Tax. Tr. p. 30; Taxpayer's Ex. 1.

Conclusions of Law:

During the tax period at issue in this case, the taxpayer, the owner and operator of a banquet hall, was a retailer of tangible personal property, namely meals and liquor, in Illinois. Department Ex. 1. As such, it was subject to the mandates of the Illinois Retailers' Occupation Tax Act ("ROTA"), which imposes a tax upon persons engaged in the business of selling tangible personal property at retail. 35 ILCS 120/2. The Department audited the taxpayer for the period January 1, 2003 through June 30, 2006, and determined a liability for unreported and unpaid taxes of \$18,877.59 representing over \$153,000 in unreported gross receipts. Department Ex. 4. The taxpayer never identified any of its gross receipts from sales of meals and liquor as taxable gross receipts

on its monthly Retailers' Occupation Tax ("ROT") returns. Department Ex. 1 (auditor's narrative). During the hearing, the taxpayer admitted that a portion of these receipts resulting from contracts to provide meals and liquor as well as banquet facility use were indeed taxable. Tr. p. 30. It, nevertheless, maintains that the audit determination was in error because, it contends, Ivette Ponce, the Department's auditor ("Ponce" or "auditor") included in the measure of taxable sales gross receipts from the rental of the taxpayer's banquet hall facility that did not relate to any sale of tangible personal property. Tr. pp. 8, 9, 156-164.

The taxpayer contends that, while some of its contracts for banquet hall rental expressly included meals and liquor, others stated a gross price without indicating whether or not the price covered food and beverage items. *Id.* It contends that gross receipts from contracts that did not expressly state that meals and liquor were to be sold should not be taxed. *Id.*

The Department compared prices enumerated for banquet hall rental including meals and liquor with those in which the amount charged did not state whether meals and liquor were included and found that the prices charged were essentially the same in both cases. Tr. pp. 106-111. As a consequence, Ivette Ponce, the Department's auditor concluded that contracts in which charges for meals, liquor and banquet hall rental were not broken out covered the same goods and services as contracts in which a charge for meals and liquor, as well as banquet hall rental, were enumerated. *Id.* Accordingly, Ponce treated both types of contracts as providing for the sale of tangible personal property taxable pursuant to 35 ILCS 120/2. *Id.*

The legal basis for the Department's assessment of contracts providing for the sale of both meals and liquor in connection with banquet hall rentals is the Department's ROTA regulation 130.2145(e) and (g). This regulation states, in part, as follows:

(e) Rental of Banquet, Meeting and Conference Rooms – True-object Test

The taxation of charges for the rental of a banquet, meeting, conference or similar room in conjunction with the providing of food or beverages will depend upon the nature of the transaction. The Department uses the "true-object" test to characterize the nature of these transactions. ...

(2) If the true object of the transaction is the sale of food or beverages, any room rental charges are part of the seller's costs of doing business and are includable in the seller's taxable gross receipts even if the charges for the room rental are separately stated on the agreement or bill between the seller and its customers. ... The rental of the room is considered an inseparable link in the sale of good and beverages to the customer and is not merely incidental to the seller's business of selling food and beverages. ...

(g) True Object – Sale of Food and Beverages

The Department deems the providing of any food other than snacks to be the true object of the transaction and not the rental of the room. If alcoholic beverages are either provided or sold by the rentor to the persons attending the event for which the room is rented, the true object of the transaction will always be deemed the sale of food or beverages and not the rental of the room.

However, there is an exemption in the Department's regulation 130.2145 for gross receipts from the rental of banquet, meeting and conference rooms where the true object of the rental agreement with the customer is the rental of the facility rather than the provision of meals and liquor. Specifically, this regulation, at subpart (f), Example 3, provides as follows:

Example 3: A person rents a room for a wedding reception from a hotel, but that person separately contracts for the food and beverages with a caterer instead of the hotel. The contract between the hotel and the customer did not specify any particular caterers. The true object of the transaction is deemed to be the rental of the room since the caterer and not the hotel provides the food and beverages. No Retailers'

Occupation Tax is incurred on the hotel's rental charges in this instance.

The taxpayer believes that its transactions in which meals and liquor are not specifically enumerated in contracts with customers are akin to the non-taxable transaction described above. Tr. pp. 8, 9.

The ROTA provides that a Notice of Tax Liability issued by the Department is *prima facie* proof of the correctness of the amount of tax due as shown therein. 35 ILCS 120/4. Pursuant to 35 ILCS 120/4, the Department's Notice of Tax Liability, submitted as the Department's Exhibit 1, is *prima facie* correct and constitutes *prima facie* evidence of the correctness of the amount of tax due as shown therein. See also A.R. Barnes & Co, v. Department of Revenue, 173 Ill. App. 3d 826 (1st Dist. 1988). The burden shifts to the taxpayer to show that such determination is incorrect once the Department establishes the *prima facie* correctness of the amount of tax due by the admission into evidence of this correction of returns. *Id.* In order to overcome the presumption of validity attached to the Department's determination, the taxpayer must produce competent evidence that is not so improbable as to be unworthy of belief and that is identified with its books and records, showing that the Department's findings are incorrect. Copilevitz v. Department of Revenue, 41 Ill. 2d 154 (1968); Fillichio v. Department of Revenue, 15 Ill. 2d 327 (1958). Testimony alone cannot rebut the Department's *prima facie* case unless it is corroborated or identified with reference to the taxpayer's books and records. Copilevitz, supra; A.R. Barnes, supra; Soho Club, Inc. v Department of Revenue, 269 Ill. App. 3d 220 (1st Dist. 1995).

The auditor arrived at an audit liability by taxing the total gross receipts indicated on contracts the taxpayer produced for the auditor's review during the audit of the taxpayer conducted in 2006 including gross receipts indicated in contracts that did not specify whether meals and liquor were included in the contract price. Tr. pp. 98, 106-111. The taxpayer contends that contracts that did not state meals and liquor were included should be construed to provide for the rental of the banquet hall only, with any food or liquor to be treated as having been arranged for separately by the customer with a different vendor. Tr. pp. 8, 9. Such arrangements would be exempt in accordance with the example indicated in subsection (f) of regulation 130.2145, noted above.

During the hearing, the taxpayer attempted to prove that some of the contracts used to determine the taxpayer's liability did not include charges for meals or liquor. It sought to prove this claim by introducing into the record copies of contracts reviewed by the auditor and additional contracts entered into during the tax period at issue that were not disclosed to Ponce, the Department's auditor, during her audit of the taxpayer. Tr. pp. 19-51, 123, 124; Taxpayer's Ex. 1, 2; Department Ex. 5. With respect to contracts included in the auditor's measure of tax liability that included meals and liquor along with a banquet hall rental charge, included in the record as taxpayer's Exhibit 1, the taxpayer admitted that all of the receipts indicated in these contracts were taxable. Tr. p. 30.

With respect to contracts that were not presented to Ponce during the audit (identified in Finding of Fact 12, above), they could not have been included in the measure of the tax determined to be due because Ponce did not become aware of these additional contracts until they were produced at the hearing. Tr. pp. 123, 124. Since the

proceeds indicated in these contracts were not taxed, these contracts do not constitute books and records that corroborate the taxpayer's claim that some of the contract receipts the auditor included in her measure of tax liability did not evidence sales that were subject to the ROTA, and, therefore, do not rebut the Department's *prima facie* case.

With respect to contracts the taxpayer introduced at hearing that did not indicate whether meals and liquor were included in the contract price included as part of the taxpayer's Exhibit 2, I cannot conclude that the auditor's finding of liability was in error based upon them because they generally are, on their face, fatally defective.³ Section 7 of the ROTA, 35 ILCS 120/7 mandates that documentation kept by a retailer in support of its claimed exempt sales "shall be in detail sufficient to show the name and address of the taxpayer's customer in each transaction, the character of every such transaction, the date of every transaction, the amount of receipts realized from every such transaction and such other information as may be necessary to establish the non-taxable character of such transaction under this Act." 35 ILCS 120/7. Although the contracts show customer names, and the date and amount of each sale, they do not provide important information that is essential to support the taxpayer's claims. Specifically, they do not indicate whether the sale of meals and liquor is includable in the price being charged. See Taxpayer's Ex. 2. As a consequence, these documents fail to demonstrate the non-taxable

³ The only contract included in the taxpayer's Exhibit 2 that contains any indication that the contract only covered the banquet hall rental charge is dated 11/24/03. The price included in this contract is the same as prices indicated for banquet hall rental including food and beverages indicated in some of the contracts in the taxpayer's Exhibit 1 which, as indicated in Finding of Fact 12, were entered into during the same period as contracts indicated in Exhibit 2. For this reason, and for other reasons indicated below, I do not find this contract to be credible.

character of the taxpayer's transactions at issue because they do not clearly state what the charges are for.

A reasonable inference that these contracts did not cover meals and liquor might be discerned from these contracts if the charges stated therein were uniformly substantially lower than contracts included in the record that covered banquet hall rental, meals and liquor. However, the record states that charges indicated in contracts that did not state what was covered were generally the same as, or even higher than, charges indicated in contracts that covered banquet hall rental, food and beverages. Tr. pp. 81, 106-111. Given this fact, in the absence of specificity regarding what was being sold pursuant to these contracts, these documents are unclear and therefore contain insufficient information to verify the non-taxable character of the transactions the taxpayer claims are exempt. As a consequence, these documents fail to meet the requirements enumerated in section 7 and therefore are not sufficient, on their face, to support the claim of exemption from the application of the ROTA the taxpayer seeks.

Moreover, in summarizing why the Department's auditor did not find the taxpayer's exhibits that did not state whether food and liquor were covered to be reliable indicia that food and liquor were not covered by these agreements, the Department notes the following:

It wasn't reasonable to assume that there was banquet hall rental only because either the invoices or the contracts that the auditor looked at specifically indicated sale of food and beverage ... or the invoices that didn't have any specific indication of food and liquor being provided, the amounts were such that they were roughly equivalent or even higher for that banquet. ... so the only reasonable assumption for the

auditor [to] make, especially in lieu of no adequate books and records, was that those contracts as well provided [for] food and beverage. Tr. pp. 146, 147.

For the aforementioned reasons, I do not find the taxpayer's testimony that these agreements were not intended to cover food and beverages to be credible.

Similarly, I find that some of the testimony given in this case was so improbable as to be unworthy of belief. Doe, the taxpayer's president, testified that where liquor was not provided by the taxpayer to the taxpayer's customers, these customers were allowed to sell liquor acquired from persons other than the taxpayer on the taxpayer's premises. Tr. pp. 67-72. To believe this testimony, one would have to conclude that all of the taxpayer's customers wishing to sell liquor they did not buy from the taxpayer were duly licensed liquor vendors that could sell liquor without violating the state's prohibition against selling liquor without a license. See 235 ILCS 5/1-1. Given the admittedly modest nature of the taxpayer's customers (Tr. p. 80), this does not seem plausible.

Moreover, such liquor sales would have been subject to ROT absent an applicable exemption covering such sales. 86 Ill. Admin. Code, ch. I, section 130.2060 ("Persons engaged in the business of selling alcoholic beverages to purchasers for use or consumption are required to remit Retailers' Occupation Tax to the Department upon their gross receipts from such sales[.]"). However, the taxpayer presented no evidence indicating that taxes were collected on such sales and remitted to the Department or, alternatively, exempt from tax.

The record also indicates that the taxpayer significantly understated the amount of tax due on liquor the taxpayer purchased for resale on returns filed for the tax period at issue. Tr. pp.128, 129; Department Ex. 1 (auditor's narrative, p. 2). According to the

auditor's narrative, these returns showed no tax due on any liquor sales even though Department regulation 130.2145 states that the rental of a banquet hall in tandem with liquor sales constitutes the taxable retail sale of alcoholic beverages by the banquet hall lessor. See 86 Ill. Admin. Code, ch. I, section 130.2145(g).⁴ Since the taxpayer's only business was renting the banquet facility it owned, the only explanation for the taxpayer's liquor purchases is that liquor was sold along with banquet packages. The taxpayer's returns reporting no liquor sales were, therefore, unworthy of belief. I find that the incredulity of the taxpayer's assertions made through its erroneous returns undermines the credibility of all of the taxpayer's claims regarding the frequency of its taxable sales of food and liquor.

To rebut the Department's *prima facie* case the taxpayer must present testimony that is not unworthy of belief and that can be corroborated by the taxpayer's books and records. Copilevitz, *supra*; Fillichio, *supra*. In the instant case, the taxpayer has presented no documentary evidence to prove that the auditor's determination that gross receipts from banquet hall sales included in the auditor's measure of the taxpayer's tax liability was inaccurate, arbitrary or unreasonable. Specifically, it has provided no evidence sufficient to rebut the Department's *prima facie* that proves that any of these contracts were exempt. Much of the documentary evidence the taxpayer presented either pertained to contracts that were not treated as taxable by the Department's auditor, or to

⁴ The record indicates that the Department applied the state tax rate to the taxpayer's total gross receipts for the tax period determined from the taxpayer's banquet hall rental contracts. Tr. pp. 126, 127; Department Ex. 1 (auditor's narrative), Department Ex. 3. This audit adjustment confirms that the taxpayer reported no sales taxes on its returns for the tax period at issue.

contracts the taxpayer admitted were taxable. Tr. pp. 30, 35, 36; Taxpayer's Ex.1. The remainder of the documentary evidence the taxpayer introduced constituted contracts that were too ambiguous to prove the taxpayer's claims or that were not credible. Absent corroborating evidence pertaining to the contracts included in the Department's measure of the taxpayer's tax liability that is unambiguous, credible and identified with the taxpayer's books and records, support for the taxpayer's claims consists of no more than unsupported assertions concerning the general contents of the taxpayer's contracts. Argument and testimony that cannot be substantiated by credible and unambiguous documentary evidence is insufficient to overcome the *prima facie* correctness of the Department's Notice of Tax Liability. 35 ILCS 120/7; Copelivitz, *supra*.

The taxpayer also is contesting the Department's failure to take into account deductions from gross receipts taken by the taxpayer for the cost of collecting sales taxes on returns filed for the tax period in controversy.⁵ The record shows that the auditor determined that the taxpayer did not collect or separately state sales tax on any of its contracts for banquet hall rental. Department Ex. 1 (auditor's narrative p. 2). Section 3 of the ROTA, 35 ILCS 120/3 provides, in part, as follows:

Except as provided in this Section, the retailer filing the return under this Section shall, at the time of filing such return, pay to the Department the amount of tax imposed by this Act less a discount of 2.1% prior to January 1, 1990 and 1.75% on and after January 1, 1990 ... which is to reimburse the retailer for the expenses incurred in keeping records, preparing and filing returns, remitting the tax and supplying data to the Department upon request.

⁵ While argument concerning the applicability of this deduction was not presented during the hearing, this issue is encompassed by the enumeration of issues to be decided in this case set forth in the pre-trial order entered in this matter. The pre-trial order states that the issue to be decided is whether the Department's Notices of Tax Liability correctly assessed tax due for the tax period in controversy.

In accordance with the foregoing, the Department's regulation 150.905, 86 Ill. Admin. Code, ch. I. section 150.905, provides as follows:

150.905. Deduction for collecting tax.

The retailer, in remitting the Use Tax which he has collected from the purchaser, may deduct 1.75% thereof or \$5.00 per calendar year, whichever is greater, as an allowance for the retailer's cost of collecting such tax. This allowance is available when the tax is remitted with a return that is filed when due under the Act, but is not available in any case in which the tax is paid late (with or without a return, and whether formally assessed by the Department or not). Also, the discount for collecting tax is not allowable when the Use Tax is remitted directly to the Department by a user.

Pursuant to the above indicated regulation, a cost of collecting discount is available only when a taxpayer collects and timely remits taxes that are due and owing to the State. In the instant case, the auditor determined that the taxpayer did not collect or remit any tax on its contracts for banquet hall rental and related food and beverage sales. Department Ex. 1 (auditor's narrative. p. 2). Since the auditor determined that no tax had been collected or timely remitted, she denied the cost of collection deduction the taxpayer took on its returns. Given the regulatory prerequisite that tax be collected and timely paid over to the state before a cost of collection discount can be taken, I find the auditor's determination that no sales tax was reported, collected or remitted on any of the taxpayer's returns a sufficient basis for denying the deduction for the cost of collecting tax the taxpayer claimed on its returns for the tax period at issue in this case.

WHEREFORE, for the reasons stated above, it is my recommendation that the Department's assessment determination indicated in Notice of Tax Liability number and Notice of Tax Liability number at issue in this case be affirmed in their entirety.

Ted Sherrod
Administrative Law Judge

Date: March 30, 2010