

**ST 12-01**  
**Tax Type: Sales Tax**  
**Issue: Unreported/Underreported Receipts (Non-Fraudulent)**

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

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

v.

**ABC AUCTION,  
Taxpayer**

**No. XXXXX  
Account ID XXXXX  
Letter ID XXXXX  
Period XXXXX**

**Ted Sherrod  
Administrative Law Judge**

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**RECOMMENDATION FOR DISPOSITION**

**Appearances:** Special Assistant Attorney General Shepard Smith on behalf of the Illinois Department of Revenue; John Doe, *pro se* on behalf of ABC Auction.

**Synopsis:**

The Department of Revenue (“Department”) audited the taxpayer and issued a Notice of Tax Liability in the amount of \$30,683 for the period January 2004 through December 2005. The issue presented is whether the taxpayer owes Retailers’ Occupation Tax on sales of goods sold at auction during the tax period in controversy. The taxpayer argues that it complied with the Department’s rule which requires that principals engaged in making retail sales be disclosed at or prior to an auction in order for auctioneers acting as agents for such principals to avoid tax on sales they arrange on the principals’ behalf. A hearing in this case was held on August 24, 2011. After reviewing the testimony of record presented at the hearing, and documents admitted

into the record, it is recommended that this matter be decided in favor of the Department. In support of this determination, the following findings of fact and conclusions of law are made.

**Findings of Fact:**

1. The *prima facie* case of the Department, consisting of the Department's SC-10-K, Audit Correction and/or Determination of Tax Due was established by the admission of this document into evidence under the Certificate of the Department's Director. Department Ex. 1.
2. The Department audited the taxpayer's business for the period January 2004 through December 2005 and issued a Notice of Tax Liability on December 31, 2008 for a total amount of \$30,683.09, which established tax due of \$21,560, penalties of \$4,482, and interest of \$4,641.09. *Id.*
3. The taxpayer is a sole proprietorship located in Anywhere, Illinois operated by John Doe who is the sole proprietor. Transcript of Hearing 8/24/11 ("Tr.") p. 36; Department Ex. 2. The sole proprietor, John Doe, is a licensed auctioneer. Tr. p. 7.
4. The taxpayer is engaged in the business of making retail sales (i.e. sales for use or consumption by purchasers) and conducts auctions involving the sale of general merchandise at its business location in Anywhere, Illinois. Department Ex. 2. It specializes in selling used items. Tr. p. 37. During the tax period in controversy, the taxpayer filed tax returns reporting retail sales, and made sales at retail of merchandise it purchased for resale. Tr. p. 17; Department Ex. 2; Taxpayer Ex. 2, 3.
5. While the taxpayer has no employees, John Doe's daughter, Jane Doe ("Jane Doe"), assisted John Doe in conducting the taxpayer's business affairs. Department Ex. 2. She was responsible for the preparation of the taxpayer's books and records of the business.

Tr. p. 32; Department Ex. 2. She was also responsible for assigning lot numbers to goods sold at auction, and receiving/collecting receipts from sales. Tr. pp. 13, 14, 32, 33; Department Ex. 2. She also prepared and filed the taxpayer's sales tax returns, including sales tax returns due for the tax period in controversy. Tr. p. 43.

6. The taxpayer filed tax returns for both 2004 and 2005. Department Ex. 2. The taxpayer reported no taxable sales for 2004. *Id.* While the taxpayer reported taxable sales for 2005, it omitted most of its auction sales from taxable sales. *Id.*
7. The taxpayer did not post or publicly display a list of the names and addresses of any owners of merchandise sold during the audit period in controversy. Tr. p. 43.
8. The taxpayer issued bid slips to keep track of its auction sales. Department Ex. Ex. 2. These bid slips only indicated the bidder's name and the amount the bidder owed to the taxpayer. *Id.* This documentation did not indicate that any third party was the owner of the items sold or that the taxpayer was acting as an agent for any third party principals making such sales. *Id.*
9. The taxpayer retained computer records of the names and addresses of some of the owners of goods sold at auction during the tax period in controversy. Tr. pp. 14, 32; Department Ex. 2.
10. During 2008, the Department performed an audit of the taxpayer's returns filed for 2004 and 2005. Department Ex. 2. This audit was conducted by John Vanderheyden ("Vanderheyden"), an employee of the Department. *Id.*
11. During his audit, Vanderheyden determined that the taxpayer had included auction sales in the taxpayer's total sales in its books and records for 2004 and 2005. *Id.* Based upon this and other audit findings, the auditor proposed the inclusion of auction sales in the

taxpayer's taxable sales for these years. *Id.* The Department's auditor found the taxpayer's exclusion of auction sales from its 2004 and 2005 sales tax returns to be improper and assessed liability for unpaid taxes based upon these improperly excluded gross receipts. *Id.* During the audit, Jane Doe, the taxpayer's bookkeeper, indicated that she did not agree with this audit determination. *Id.*

### **Conclusions of Law:**

The taxpayer in the instant case is engaged in the business of selling tangible personal property at retail in Illinois. Department Ex. 2. The Retailers' Occupation Tax Act ("the Act") imposes a tax on retailers in the State of Illinois pursuant to 35 **ILCS** 120/2 which provides in part:

Tax imposed. A tax is imposed upon persons engaged in the business of selling at retail personal property ...

In the definition section of the Act, found at 35 **ILCS** 120/1, a sale at retail is defined as follows:

[Sale at retail] means any transfer of the ownership of or title to tangible personal property to a purchaser, for the purpose of use or consumption, and not for the purpose of resale in any form as tangible personal property to the extent not first subject to a use for which it was purchased, for valuable consideration...  
35 **ILCS** 120/1.

The instant case involves auction sales made by the taxpayer during the conduct of its business as an auctioneer in 2004 and 2005. The issue in this case is whether the taxpayer made sales at retail subject to tax pursuant to the foregoing provisions when acting as auctioneer at auctions conducted during the tax period in controversy or, whether the auctioneer was acting as an agent for third party consignors when making auction sales. The resolution of this case turns upon the proper application to be given the Department's rule found at 86 Ill. Admin. Code, Ch. I, section 130.1914 entitled "Auctioneers and Agents." The Department has promulgated this

rule pursuant to authority granted by the Legislature. See 35 **ILCS** 120/12. Section 130.1914 (“Rule 130.1914”) states as follows:

a) When Persons Act as Agent.

1) Every auctioneer or agent acting for an unknown or undisclosed principal, or entrusted with the possession of any bill of lading... for delivery of any tangible personal property, or entrusted with the possession of any such personal property for the purpose of sale is deemed to be the owner thereof, and upon the sale of such property to a purchaser for use or consumption, he is required to file a return of the receipts from the sale and to pay to the Department a tax measured by such receipts.

2) The receipts from any such sale, when made by an auctioneer or agent who is acting for a known or disclosed principal, are taxable to the principal, provided the principal is engaged in the business of selling such tangible personal property at retail...

b) When Principal is Disclosed.

For purposes of this section, a principal is deemed to be disclosed to a purchaser for use or consumption only when the name and address of such principal is made known to such purchaser at or before the time of the sale and when the name and address of the principal appears upon the books and records of the auctioneer or agent.

86 Ill. Admin. Code, ch. I, section 130.1914.

The Department has elaborated upon the guidelines indicated in Rule 130.1914 by publishing a warning to auctioneers to be diligent regarding the disclosure of sources of inventory prior to auctions, and advising them that, in the absence of such diligence, the auctioneer will be liable for collecting, reporting and paying sales taxes. See Department Information Bulletin FY 91-49, dated April 1, 1991.

The Notice of Tax Liability admitted into the record during the hearing is *prima facie* correct and the burden is upon the taxpayer to rebut that presumption. 35 **ILCS** 120/4. Oral testimony at hearing, without books and records to substantiate such assertions, is insufficient to overcome the Department's *prima facie* case. Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill. App. 3d 203 (1<sup>st</sup> Dist. 1991).

The Department argues that the taxpayer did not disclose the names of principals on whose behalf the taxpayer claims sales at auction were made. Tr. pp. 4-6. Accordingly, it contends that the taxpayer can properly be treated as the seller of the goods that were auctioned by the taxpayer during the tax period in controversy under Rule 130.1914 requiring that a principal be disclosed at or prior to an auction sale in order for the principal rather than the auctioneer to be subject to Retailers' Occupation Tax. *Id.* The taxpayer contends that the principal was properly disclosed and that the taxpayer's auction sales therefore were exempt from taxation.

During the hearing, the taxpayer introduced exhibits containing the names and addresses of all persons the taxpayer claims it acted as agent for when making auction sales in 2004 and 2005. Taxpayer Ex. 1, 3. This voluminous documentary evidence shows that the names and addresses of principals were properly recorded by the taxpayer. The taxpayer contends that this documentary evidence is also sufficient to rebut the Department's *prima facie* case.

John Doe was the sole proprietor of the taxpayer and his daughter, Jane Doe, was responsible for the taxpayer's books and records and prepared the names and addresses of alleged consignors introduced into the record. Tr. p. 32. During her testimony, she authenticated the taxpayer's exhibits and they were identified as copies of information kept on the taxpayer's computer during the tax period at issue. Tr. pp. 14, 32. On their face, these exhibits do not indicate whether the information contained in them was disclosed to purchasers attending the taxpayer's auctions during the tax period in controversy.

Jane Doe offered testimony regarding the relationship between the taxpayer's exhibits and the legally required disclosures to be made at or prior to the time of a sale of auctioned goods, stating, during the hearing, as follows:

Q. Was the name list like this here posted?

A. Yes.

Q. At every sale?

A. Yes

Tr. p. 31.

For the reasons enumerated below, I do not find this testimony to be credible.

The Department's 2008 audit of the taxpayer was conducted by John Vanderheyden, an employee of the Department. Department Ex. 2. Vanderhayden testified during the evidentiary hearing that the information indicated in the taxpayer's exhibits was not produced at the audit. Tr. p. 44. Since this evidence is the only documentary proof offered by the taxpayer in support of its claim, I find it improbable and doubtful that such exculpatory evidence would not have been produced to the auditor had it been available at the time the audit was conducted. Because these records were not produced to the auditor, I cannot determine whether the copies of such records offered at the hearing accurately reflect whatever records were available when the audit was conducted or, more importantly, were in fact the records available at the time the auctions at issue occurred. As a consequence, I do not find this documentary evidence sufficiently persuasive to afford it any more than limited weight in determining whether the taxpayer has rebutted the *prima facie* correctness of the Department's assessment.

Moreover, during the hearing, the auditor testified that he was told that information concerning the purported principals participating in auctions conducted by the taxpayer was kept in a computer located in taxpayer's office at the auction site. Tr. p. 44. He further testified that he was presented with no evidence that the information contained on this computer was made available to the public or that the public was made aware of access to these computer records.

Tr. pp. 44-45. This testimony is consistent with information contained in the auditor's narrative wherein the auditor indicates that Jane Doe stated the following:

She said the office was accessible to her customers since they paid her there. She also said if the customers wanted to know who owned the merchandise they could look at her computer.

The taxpayer's assertion that the names and addresses of purported principals for whom the taxpayer claims it acted as agent were kept in the taxpayer's computer and not generally disclosed prior to and during the auction constitutes an admission, and an exception to the otherwise hearsay nature of the auditor's recollection noted in his narrative, because it is completely at odds with Jane Doe's testimony that this information was posted. Guthrie v. Van Hyfte, 36 Ill. 2d 252 (1966) (Prior out of court statements which were contradictory to testimony given at trial can constitute substantive evidence against the testifying witness as an admission). For this reason, I do not find credible Jane Doe's claim that this information was disclosed to bidders by being posted at the auction site as required by Rule 130.1914.

Finally, the record indicates that the taxpayer booked its sales revenues in the following manner:

ABC Auction would use Bid Slips. The bid slip only had the bidder's name and the amount they owed to ABC Auction. They would take the Bid slip [and] they would make a daily summary. They would take the Daily summary to make a Monthly summary. They would add up the entire Monthly summary to get their total Sales for the year.  
Department Ex. 2.

The foregoing indicates that the taxpayer booked all of its sales, including all of its auction sales, as sales by the taxpayer in its internal accounting books and records. Since the taxpayer's books reflect that all sales were sales made by the taxpayer, such accounting is completely consistent with the audit determination that tax was due on all of the taxpayer's sales.

Moreover, the burden of producing records supporting the taxpayer's claim that its sales were exempt in the instant case clearly rests with the taxpayer. Specifically, section 7 of the Retailers' Occupation Tax Act provides as follows:

To support deductions made on the tax return form, or authorized under this Act, on account of receipts from ...any other kind of transaction that is not taxable under this Act, entries in any books, records or other pertinent papers or documents of the taxpayer in relation thereto 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 such 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.

A review of the record indicates that the taxpayer has failed to provide sufficient evidence in its books and records that the auction sales at issue in this case constituted exempt sales. The record indicates that the auditor found no evidence that any of the taxpayer's revenues were booked as sales commissions or in any other manner that might corroborate the taxpayer's claim that it acted only as an agent for principals that were actually engaged in making retail sales. Nor is there any evidence that any of the taxpayer's auction sales involved the collection of revenues for its alleged principals and the payment of revenues to principals, a typical characteristic of the type of consignment sales the taxpayer contends it was engaged in. Given the forgoing, I find that the taxpayer failed to maintain books and records establishing the non-taxable character of the taxpayer's auction sales as required by section 7 of the Retailers' Occupation Tax Act, noted above.

As noted above, the Department has expressly notified taxpayers that it considers the disclosure of principals prior to or at the time of auction sales essential in order for an auctioneer to escape sales tax liability for taxation purposes. See Department Information Bulletin FY 91-49, *supra*. For the reasons enumerated above, the documentary evidence proffered by the

taxpayer is insufficient to show that such disclosure at or prior to auction sales was undertaken in accordance with Rule 130.1914. The taxpayer having presented no other admissible documentary evidence to establish its claim, I find that the taxpayer has failed to rebut the Department's *prima facie* determination that the taxpayer was a retailer of the merchandise sold at auction as reflected in the Department's SC-10-K, Audit Correction and/or Determination of Tax Due during the tax period in controversy.

The Notice of Tax Liability and the Correction of Returns reflect that the Department has assessed a late payment penalty in the amount of \$4,312 and a late filing penalty in the amount of \$170, pursuant to section 3-3 of the Uniform Penalty and Interest Act, 35 **ILCS** 735/3-3. Department Ex. 1. In the pre-trial order, the parties identified as an issue in this case whether the late-filing and late-payment penalties assessed should be abated. Section 3-8 of the UPIA, 35 **ILCS** 735/3-8 provides that the penalties imposed by section 3-3:

...[S]hall not apply if the taxpayer shows that his failure to file a return or pay tax at the required time was due to reasonable cause. Reasonable Cause shall be determined in each situation in accordance with the rules and regulations promulgated by the Department.

The Department has promulgated a regulation in which it defines reasonable cause and describes how it intends to administer the UPIA. 86 Ill. Admin. Code, ch. I, section 700.400.

This regulation provides, in part as follows:

...Whether a taxpayer acted with reasonable cause shall be [determined] on a case by case basis taking into account all pertinent facts and circumstances. The most important factor to be considered in making a determination to abate a penalty will be the extent to which the taxpayer made a good faith effort to determine his proper tax liability and to file and pay his proper liability in a timely fashion.

86 Ill. Admin. Code, Ch. I, section 700.400(b)

The regulation further provides as follows:

A taxpayer will be considered to have made a good faith effort to determine and file and pay his proper tax liability if he exercised ordinary business care and prudence in doing so. A determination of whether a taxpayer exercised ordinary business care and prudence is dependent upon the clarity of the law or its interpretation and the taxpayer's experience, knowledge and education.  
86 Ill. Admin. Code, ch. I, section 700.400(c)

Although the issue of "reasonable cause" was implicitly included by the parties in the pre-trial order entered in this case, the taxpayer offered no evidence at the hearing on this issue, and presented no arguments concerning this matter during these proceedings. In particular, the taxpayer's sole proprietor and his daughter have not shown that they were inexperienced, that they had no knowledge of the rules and regulations governing auctioneers, that they sought professional guidance or that they relied upon erroneous information from the Department or from a professional from whom they sought guidance. At best, the record indicates that they were under the mistaken impression that keeping a record of the names and addresses of purported principals for whom the taxpayer allegedly acted as agent was sufficient to comply with the disclosure requirements of Rule 130.1914 so as to avoid liability on certain of the taxpayer's auction sales. Unfortunately, the taxpayer's mistaken belief that it was not liable for tax is not sufficient to justify abatement of the penalties for late filing and late payment. Columbia Quarry Co. v. Department of Revenue, 40 Ill. 2d 47 (1968).

The existence of reasonable cause justifying the abatement of tax penalties is a factual determination to be decided only on a case by case basis. Hollinger International, Inc. v. Bower, 363 Ill. App. 3d 313 (1<sup>st</sup> Dist. 2005). The Department's determination that penalties were properly assessed is presumed to be correct. A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3d 826 (1<sup>st</sup> Dist. 1988). Once the presumed correctness of the Department's assessment

is established, the burden shifts to the taxpayer to prove that this determination was in error. Copilevitz v. Department of Revenue, 41 Ill. 2d 154 (1968); Central Furniture Mart v. Johnson, 157 Ill. App. 3d 907 (1<sup>st</sup> Dist. 1987); Vitale v. Department of Revenue, 118 Ill. App. 3d 210 (3d Dist. 1983); Vitale v. Department of Revenue, 118 Ill. App. 3d 210 (3d Dist. 1983); Masini v. Department of Revenue, 60 Ill. App. 3d 11 (1<sup>st</sup> Dist. 1978); A.R. Barnes & Co., supra. In the instant case, the taxpayer has alleged no facts or circumstances that would provide a factual basis for a determination that the taxpayer made a good faith effort to determine, report and pay the correct amount of taxes due for the tax period in controversy or that would otherwise support a finding of reasonable cause. In this state of the record, I find that the *prima facie* correctness of the Department's determination that the assessment of penalties in the instant case was proper was not overcome or rebutted. As a consequence, I must conclude that reasonable cause to abate the taxpayer's non-compliance penalties at issue has not been proven in this case.

### **Conclusion**

For the aforementioned reasons, it is recommended that the tax, interest and penalties, as reflected in the SC-10-K, Audit Correction and/or Determination of Tax Due (Department Ex. 1) contained in the record be affirmed.

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

**Date: January 30, 2012**