

Department Group Ex. (Department Ex.) 1 (consisting of copies of the three NTLs issued to Taxpayer, and a copy of the Department auditor's narrative report, under the Director's certificate of records), p. 4.

2. The Department conducted an audit of Taxpayer for the period from July 2009 through December 2011. Department Ex. 1, pp. 4-6. Jane Stroud (Stroud) conducted the audit. *Id.*, p. 6.
3. Taxpayer was registered with the Department as a retailer during the audit period, and filed monthly returns with the Department. Department Ex. 1, p. 6.
4. Taxpayer did not have complete books and records for Stroud to review during the audit. Department Ex. 1, p. 4; *see also* 35 ILCS 120/7; 86 Ill. Admin. Code § 130.805(a). More specifically, Taxpayer did not have cash register tapes showing its daily sales during the audit period. Department Ex. 1, p. 4; 86 Ill. Admin. Code § 130.805(a)(1).
5. Because Taxpayer lacked the type of records required to be kept by retailers engaged in business in Illinois, Stroud had no way to confirm whether Taxpayer was reporting the correct amounts of total and taxable receipts on the returns it filed regarding the months in the audit period. Department Ex. 1, pp. 4-5.
6. Because Taxpayer did not have cash register tapes showing daily sales, Stroud used a purchase markup method to estimate Taxpayer's sales for the audit period. Department Ex. 1, pp. 4-5. She reviewed Taxpayer's purchase invoices and check stubs to determine the amount Taxpayer spent to purchase tangible personal property (hereafter, goods) for resale. *Id.* She then applied a markup percentage to Taxpayer's cost of such goods, to estimate the amount of receipts Taxpayer would have realized from selling such goods at retail. *Id.*
7. Stroud examined purchase records kept by Taxpayer, and also requested and examined sales

records from vendors that sold goods to Taxpayer for resale. Department Ex. 1, pp. 4-5.

8. Stroud divided purchase records into three groups, cigarettes, liquor and general merchandise. Department Ex. 1, pp. 4-5. She determined and used separate markup percentages to apply for each group of similar purchases. *Id.*
9. After totaling the amount of receipts Stroud estimated that Taxpayer would have realized from selling the goods it purchased for resale, Stroud subtracted from such amount the gross receipts Taxpayer reported on the returns it filed during the audit period. Department Ex. 1, p. 5. Stroud treated the difference between the estimated receipts and those reported on Taxpayer's returns as unreported receipts, and determined that tax was due on the difference. *Id.*
10. Stroud also determined that late payment and negligence penalties were due. Department Ex. 1, p. 6.

Conclusions of Law:

Issue and Arguments

At hearing, Taxpayer offered no evidence, either through the testimony of a witness, or in the form of books and records. Hearing Transcript (Tr.) pp. 5-6. Instead, Taxpayer's counsel argued that Taxpayer disputes and disagrees with the amount of tax owed, based on questions regarding the manner in which the audit was conducted. Tr. pp. 5-6. More particularly, counsel said:

The taxpayer disputes the amount that is going to be owed by the Department.

They have questions about how the audit was performed in the manner which the markups were computed to be applied to the amount of receipts and the fact that an average markup was taken for each category of products, whether alcohol, cigarettes, general merchandise.

An average was determined and then applied to all uniformly then across those categories, which may result in the tax being potentially higher than what is actually owed, if it were to be taken on each item-by-item basis.

So for those reasons, the taxpayer disputes the amount and disagrees with the amount owed.

Tr. p. 5.

Analysis

Section 4 of the ROTA provides, in pertinent part:

As soon as practicable after any return is filed, the Department shall examine such return and shall, if necessary, correct such return according to its best judgment and information. *** In the event that the return is corrected for any reason other than a mathematical error, any return so corrected by the Department shall be prima facie correct and shall be prima facie evidence of the correctness of the amount of tax due, as shown therein. * * *

* * *

If the tax computed upon the basis of the gross receipts as fixed by the Department is greater than the amount of tax due under the return or returns as filed, the Department shall ... issue the taxpayer a notice of tax liability for the amount of tax claimed by the Department to be due, together with a penalty in an amount determined in accordance with Section 3-3 of the Uniform Penalty and Interest Act. Provided, that if the incorrectness of any return or returns as determined by the Department is due to negligence or fraud, said penalty shall be in an amount determined in accordance with Section 3-5 or Section 3-6 of the Uniform Penalty and Interest Act, as the case may be.

Proof of such notice of tax liability by the Department may be made at any hearing before the Department or the Illinois Independent Tax Tribunal or in any legal proceeding by a reproduced copy of the Department's record relating thereto in the name of the Department under the certificate of the Director of Revenue. Such reproduced copy shall without further proof, be admitted into evidence before the Department or in any legal proceeding and shall be prima facie proof of the correctness of the amount of tax due, as shown therein.

* * *

35 ILCS 120/4.

The Department introduced a copy of the NTLs it issued to Taxpayer into evidence under the certificate of the Director. Department Ex. 1, pp. 1-3. Pursuant to § 4 of the 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).

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.

In this matter, the evidence shows that, during the course of an audit, the Department reviewed and examined Taxpayer's returns, and also attempted to review and examine the books and records that Illinois law required Taxpayer to keep regarding its business of selling at retail. Department Ex. 1, pp. 4-5; 35 ILCS 120/7; 86 Ill. Admin. Code § 130.805(a). The Department's auditor, Stroud, determined that Taxpayer did not have many of the required books and records available for her to review, which meant that Taxpayer had no documentary evidence to support the entries it reported on the monthly returns it filed during the audit period. Department Ex. 1, pp. 4-5. Since Taxpayer lacked records to support the amounts reported on its filed returns, Stroud performed the audit using a markup of the goods Taxpayer purchased for resale. This audit method has long been used by the Department, and has been upheld as reasonable, where a taxpayer has failed to keep the type of books and records required by statute. *E.g.*, Fillichio, 15 Ill. 2d at 333, 155 N.E.2d at 7. Based on Stroud's review and consideration of the best information available, the Department issued the two NTLs to Taxpayer, which imposed tax, penalties and interest due. Department Ex. 1, *passim*; 35 ILCS 120/4.

Since Taxpayer offered no evidence at hearing, it has not rebutted the Department's presumptively correct determinations of the amounts due. 35 ILCS 120/4; 35 ILCS 735/3-3; 35 ILCS 735/3-8; Fillichio, 15 Ill. 2d at 333, 155 N.E.2d at 7; Diogenes v. Department of Finance, 377 Ill. 15, 22, 35 N.E.2d 342, 346 (1941).

Conclusion:

I recommend that the Director finalize the NTLs as issued, with penalties and interest to accrue pursuant to statute.

April 17, 2015

John E. White
Administrative Law Judge