

UT 11-05

Tax Type: Use Tax

Issue: Use Tax On Imported Goods

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

THE DEPARTMENT OF REVENUE
OF THE STATE OF ILLINOIS

v.

JOHN DOE,

TAXPAYER

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No. XXXXXXXX

NTL: XXXXXXXX

Kenneth J. Galvin,

Administrative Law Judge

RECOMMENDATION FOR DISPOSITION

Appearances: Mr. Patrick W. Griffin, The Law Office of Patrick W. Griffin, on behalf of John Doe; Mr. George Foster, Special Assistant Attorney General, on behalf of the Department of Revenue of the State of Illinois.

Synopsis:

This matter comes on for hearing pursuant to John Doe’s protest of four Notices of Tax Liability, captioned above, issued on July 7, 2008. The basis of these assessments was the Department’s determination that John Doe had not paid use tax due to the Department for items purchased from a foreign country and brought into Illinois through U.S. Customs in 2004. An evidentiary hearing was held in this matter on January 25, 2011, with John Doe testifying. Following a review of the testimony and the evidence submitted by the taxpayer, it is recommended that the four Notices of Tax Liability be finalized as issued. In support thereof, the following “Findings of Fact” and “Conclusions of Law” are made.

Findings of Fact:

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, is established by the admission into evidence of four Notices of Tax Liability, XXXXXXXX, and XXX, dated July 7, 2008. Tr. pp. 6-7; Dept. Ex. No. 1.
2. On January 29, 2007, the Department advised John Doe by letter that an audit had been initiated on his purchase or importation of tangible personal property from a foreign country. On February 16, 2007, John Doe responded in a letter to the Department that the items included in the audit were not purchased by him or for his use. "The items are components of hot runner systems for the plastic injection molding industry. They were purchased by ABC Machinery Corporation (Bolton Ontario, Canada) from XYZ Company (Burgwald-Bottendorf, Germany)." According to John Doe's letter to the Department, the items were dropped-shipped to him "for testing and then passed on to the end-user that purchased them from ABC." On April 6, 2007, the Department sent a letter to John Doe acknowledging receipt of the February 16, 2007, letter and requesting "written documentation from ABC stating who you are to them and why they shipped merchandise to you." "Please explain what happens to the merchandise after it has been tested." Tr. pp. 10-13; Taxpayer's Ex. Nos. 1, 2 and 3.
3. On June 20, 2008, the Department sent John Doe an EDA-129, "Notice of Audit Closure," stating that "[A]fter reviewing your tax returns and corresponding records, we determined that adjustments were needed." On July 7, 2008, the Department issued the four Notices of Tax Liability ("NTL") that are at issue in this proceeding. On September 3, 2008, John Doe filed a protest of the NTL's. Tr. pp. 13-14; Taxpayer's Ex. Nos. 4, 5 and 6.

Conclusions of Law:

The Use Tax Act, 35 ILCS 105/1 *et seq.* (hereinafter referred to as the “UTA”) imposes a tax upon the privilege of using in this State tangible personal property purchased at retail from a retailer...” *Id.* at 105/3. The UTA was passed to complement and prevent evasion of the Retailers’ Occupation Tax Act (“ROTA”). Needle Co. v. Department of Revenue, 45 Ill. 2d 484 (1970). “Functionally, the Use Tax Act serves to tax property purchased out of State by Illinois residents that is not taxable under the Retailers’ Occupation Tax Act and, at the same time, attempts to eliminate the competitive disadvantage of in-State businesses.” Chicago Tribune Co. v. Johnson, 106 Ill. 2d 63 (1985).

The UTA makes numerous sections of the ROTA applicable to the UTA. Section 12 of the UTA incorporates sections 4 and 5 of the ROTA. These ROTA sections provide that the admission into evidence of Department records under a certificate of the Director establishes the Department’s *prima facie* case and is *prima facie* evidence of the correctness of the amount of tax due. 35 ILCS 120/4,120/5; Copilevitz v. Department of Revenue, 41 Ill. 2d 154 (1968). Once the Department’s *prima facie* case is established, the burden of proof is shifted to the taxpayer to overcome the Department’s *prima facie* case. Clark Oil & Refining Corp. v. Johnson, 154 Ill. App. 3d 773 (1st Dist. 1987). In the instant case, the Department’s *prima facie* case was established by the admission into evidence of the four NTL’s under the certificate of the Director of Revenue. The burden of proof then shifted to John Doe to overcome the Department’s *prima facie* case.

In order to overcome the presumption of validity attached to the Department’s determinations of tax due, the taxpayer must produce competent evidence, identified with its books and records showing that the determinations are incorrect. Copilevitz, *supra*. Testimony alone is not enough. Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill. App. 3d 203 (1st Dist. 1991).

Documentary proof is required to prevail against an assessment of tax by the Department. Sprague v. Johnson, 195 Ill. App. 3d 798 (4th Dist. 1990). On examination of the record in this case, I conclude that John Doe has failed to demonstrate by testimony, through exhibits or through argument, evidence sufficient to overcome the Department's determination that use tax is due.

The NTL's were issued in the instant case because customs records obtained by the Department identified the taxpayer, John Doe, residing in Anywhere, Illinois, as the individual importing the tangible personal property. These records also show that the property came into the country under the taxpayer's name and were shipped to Anywhere, Illinois. Tr. p. 4; Taxpayer Ex. No. 1. Under the UTA, a use tax is imposed on all tangible personal property purchased from a retailer and used in this State.

John Doe's testimony was that the tangible personal property at issue was purchased by ABC Machinery Corporation located in Bolton Ontario, Canada from XYZ Company located in Burgwald-Bottendorf, Germany. According to his testimony, the items were dropped-shipped to John Doe for testing and then passed on to the end-user who had purchased them from ABC. Tr. pp. 11-12; Taxpayer's Ex. No. 2.

The problem with this testimony is that John Doe offered no documentary evidence with regard to either his relationship with ABC or the use of the tangible personal property after he had received it. As the Department's counsel argued in his closing statement, John Doe has not produced documentary evidence to show exactly what the nature of his relationship is with ABC or whether he actually is ABC. Tr. p. 54. "We don't know if John Doe is the same as ABC, if he owns ABC, ... if he's selling these items and not collecting use tax so that he owes use tax in that manner." Tr. p. 57. Department's counsel argued further that no documentary evidence has been

offered to show what John Doe does with the merchandise after he gets it, whether he is the end-user or whether he uses the merchandise in some type of manufacturing process.¹ Tr. p. 58.

Eleven of the FedEx air waybills for the shipped merchandise² list the “recipient” as “John Doe, ABC Corp., Anywhere, Illinois.” Taxpayer’s Ex. Nos. 8, 9, 10 and 11. John Doe was asked on cross-examination if he was “aware that the ABC web site shows the Chicago office for ABC to be your home address.” He responded: “Yes, I do.” Tr. p. 32. According to John Doe, “that’s the way it’s done in small business in general, as in selling for a company or something, they may list an agent as their office.” Tr. p. 33. So what the record in this case shows is that the web site for ABC shows John Doe’s home address in Anywhere as their Chicago office. The purchases at issue were shipped to this address with eleven of the waybills addressed to “John Doe, ABC Corp.” In tax cases, all facts are to be construed and all debatable questions resolved in favor of taxation. Wyndemere Retirement Community v. Department of Revenue, 274 Ill. App. 3d 455 (2d Dist. 1995). It is reasonable to conclude, based on the evidence in this case, that John Doe “is the same as ABC.”

Documentary proof is required to prevail against an assessment of tax by the Department. Sprague v. Johnson, 195 Ill. App. 3d 798 (4th Dist. 1990). Testimony alone is not enough. Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill. App. 3d 203 (1st Dist. 1991). In the instant case, no documentary proof was admitted into evidence with regard to John Doe’s relationship with ABC and the use of the imported merchandise. This information was requested as far back as April

¹ Counsel for John Doe argued in his opening statement that the property was “unquestionably exempt” pursuant to 35 ILCS 105/3-5(18) “which exempts manufacturing and assembly machinery and equipment used primarily in the process of manufacturing or assembling tangible personal property.” Tr. pp. 5-6. John Doe testified on cross-examination that he has been working in “the industry” since he was a teenager and within the industry, tools and dyes are not charged any type of use tax. However, he testified that he had no knowledge as to whether exemption certificates had been issued for any of the purchases at issue. Tr. pp. 47-48.

² These air waybills are contained in Taxpayer’s Exhibit No. 8, pp. 13, 23, 34, 35, 46, Exhibit No. 9, p. 17, Exhibit No. 10, pp. 7, 8, 19 and Exhibit No. 11, pp. 5, 6.

6, 2007 when the Department asked John Doe for written documentation from ABC explaining the relationship between them and why they shipped merchandise to him. Taxpayer's Ex. No. 3. Without this evidence, I am forced to conclude that John Doe has failed to rebut the Department's *prima facie* case that use tax is owed on the imported property.

Finally, John Doe asked to have admitted into evidence a letter purportedly written by an employee of ABC dated September 17, 2009, and addressed to "To Whom It May Concern." The writer of the letter was not called to testify at the evidentiary hearing and the Department objected to its admission as "being hearsay." "There's nobody that authored the letter here to testify." The Department's objection to the admission of this letter was sustained. Tr. pp. 29-30.

The initial status in this case was scheduled for October 22, 2008. A pre-trial conference was set for October 19, 2010 setting the case for evidentiary hearing on December 21, 2010. On December 21, 2010, John Doe filed an "Emergency Motion to Continue Trial" while his recently retained attorney became familiar with the case. The evidentiary hearing was scheduled and held on January 25, 2011. It seems clear that John Doe had ample and adequate time, over two years since the initial status, to subpoena a witness to testify as to his relationship with ABC and the use of the imported merchandise.

WHEREFORE, for the reasons stated above, it is my recommendation that the four NTL's assessed against John Doe, captioned above, be finalized as issued.

ENTER:

April 25, 2011

Kenneth J. Galvin
Administrative Law Judge