

UT 11-06  
Tax Type: Use Tax  
Issue: Use Tax On Aircraft Purchase

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

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THE DEPARTMENT OF REVENUE  
OF THE STATE OF ILLINOIS

v.

ABC COMPANY,      Ted Sherrod  
Taxpayer

No.            XXXX  
Account ID XXXX  
Letter ID    XXXX  
Period        XXXX

Administrative Law Judge

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**RECOMMENDATION FOR DISPOSITION**

**Appearances:** Special Assistant Attorney General John D. Alshuler, on behalf of the Illinois Department of Revenue; Sidney H. Axelrod of the Law Offices of Sidney H. Axelrod for ABC Company.

**Synopsis:**

ABC Company, an Illinois Limited Liability Company, purchased an aircraft from an aircraft retailer on or about June 23, 2006. It took possession of this aircraft in Bend, Oregon and, soon after taking possession, moved this aircraft into Illinois where it remained for two and one-half to three months during 2006. The taxpayer did not pay Illinois use tax on the aircraft. The Department determined that the aircraft was purchased for use in Illinois and sent the taxpayer a Notice of Tax Liability for Illinois use tax. The taxpayer filed a timely protest to this notice, arguing that the aircraft was not used in Illinois. A hearing in this matter, conducted by Administrative Law Judge Julie-April Montgomery, was held on November 5, 2010 during

which the taxpayer submitted the testimony of two witnesses and documentary evidence.<sup>1</sup> The Department also presented documentary evidence in support of its determination. After reviewing the documents presented, and the transcript of testimony given at the hearing, it is recommended that this matter be resolved in favor of the Department. In support of this recommendation, 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 the Department's SC-10-K, Audit Correction and/or Determination of Tax Due and Notice of Tax Liability No. XXXXX showing use tax and related tax liabilities. Department Group Exhibit ("Ex.") 1.<sup>2</sup>
2. The taxpayer is an Illinois Limited Liability Company ("LLC") and is registered pursuant to the Illinois Limited Liability Company Act, 805 ILCS 180/1-1 *et. seq.* Transcript ("Tr.") p. 4. The taxpayer's principal stockholder is John Doe ("John Doe"), a resident of Illinois residing in Anywhere, Illinois. Tr. pp. 8, 17.
3. The taxpayer completed the purchase of a single engine aircraft, serial number XXXXX (the "aircraft") in July or August, 2006. Tr. pp. 8, 9. The aircraft was purchased from an aircraft dealer having its principal place of business in Cedar Rapids, Iowa. Tr. p. 9.
4. John Doe took possession of the aircraft in Bend, Oregon during July or August 2006. Tr. pp. 8, 9. Soon after taking possession of the aircraft in July or August 2006, the taxpayer took the aircraft to Illinois where it was stored for two and one-half to three

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<sup>1</sup> Although this matter was heard by Administrative Law Judge Montgomery, she is currently on leave and is unable to write this recommendation.

<sup>2</sup> Unless otherwise noted, findings of fact apply to the period June 23, 2006 through May 8, 2009, the date on which the taxpayer was involuntarily dissolved. Tr. pp.4, 8.

months, until October or November 2006. Tr. pp. 9, 10, 15, 18. While the aircraft was in Illinois, it was flown for testing, training and other purposes. Tr. pp. 22-24.

5. Soon after taking possession of the aircraft, John Doe determined that the aircraft was damaged and took the aircraft to North American Jet in Wheeling, Illinois for repairs that were covered by the manufacturer's warranty. Tr. p. 9. After storage in Illinois for two and one half to three months, the aircraft was taken to Iowa, where repairs to the aircraft were performed. Tr. pp. 9, 10. Subsequently, on or about December 26, 2006, the aircraft was flown from Iowa to Gary, Indiana where it has been hangered at the Gary Jet Center until the present. Tr. pp. 10, 11, 15.
6. Subsequent to its removal to Gary Indiana in 2006, the aircraft has been returned to Illinois numerous times for repair and warranty service. Tr. pp. 15, 17-19; Department Ex. 2.
7. The taxpayer was billed by Indiana for use tax on the aircraft and for aircraft registration fees. Tr. pp. 11-13; Taxpayer's Ex. 2. These taxes and fees were paid by the taxpayer on Nov. 1, 2010. Tr. p. 13; Taxpayer's Ex. 2. During the hearing, the Department conceded that, as a result of the payment of Indiana use tax on the aircraft, the taxpayer is entitled to a credit in the amount of \$10,500 for Indiana use tax paid on the aircraft pursuant to 35 **ILCS** 105/3-55 (d). Tr. pp. 4, 5, 31, 32; Taxpayer's Ex. 2.
8. On September 22, 2009, the Department issued a Notice of Tax Liability to the taxpayer that shows tax due in the amount \$22,673, plus interest and penalties, for use tax due on the purchase of the aircraft in 2006 and use of this aircraft in Illinois. Department Group Ex. 1.

### **Conclusions of Law:**

The Use Tax Act ("UTA") 35 ILCS 105/1 *et seq.* imposes a tax upon the privilege of using in Illinois tangible personal property purchased at retail from a retailer. 35 ILCS 105/3. The Department determined that the taxpayer was required to pay Illinois use tax on its purchase of the aircraft pursuant to this provision. Department Ex. 1.

The record shows that the aircraft was sold to the taxpayer for delivery to the taxpayer, and that the taxpayer is an Illinois corporation. Tr. pp. 4, 8, 9. Section 4 of the UTA provides that "[E]vidence that tangible personal property was sold by any person for delivery to a person residing or engaged in business in this State shall be prima facie evidence that such tangible personal property was sold for use in this State." 35 ILCS 105/4. Moreover, section 12 of the UTA incorporates by reference section 4 of the Retailers' Occupation Tax Act (35 ILCS 120/1 *et seq.*), which provides that the certified copy of the Notice of Tax Liability issued by the Department "shall be prima facie proof of the correctness of the amount of tax due, as shown therein." 35 ILCS 105/12; 35 ILCS 120/4.

The burden shifts to the taxpayer to overcome this presumption of validity when the Department establishes its *prima facie* case by submitting the Notice of Tax Liability into evidence. Clark Oil and Refining Corp. v. Johnson, 154 Ill. App. 3d 773,783 (1<sup>st</sup> Dist. 1987). To prove its case, the taxpayer must present more than its testimony denying the Department's assessment. Sprague v. Johnson, 195 Ill. App. 3d 798, 804 (4<sup>th</sup> Dist. 1990). The taxpayer must submit sufficient documentary evidence to support its claim for an exemption. *Id.*

The taxpayer contests the Department's determination that the aircraft was used in Illinois subsequent to its purchase by the taxpayer in June, 2006. Tr. p. 32. The taxpayer summarizes its basis for this contention as follows:

Contrary to what the Department has presented, we feel there has never been any real use in the State of Illinois. The fact that the plane was brought for service to Palwaukee Airport was done pursuant to what was required by the - there was an agreement because the recommendation of the seller of plane was that the best place -- the manufacturer of the plane was that the closest place to do any service was at the Palwaukee Airport. It wasn't there voluntarily. It wasn't there for the purpose of coming in and out. It was there for one purpose only, and that was to repair the plane because there was a problem created by the manufacturer. Tr. p. 32.

In effect, the taxpayer contends that the aircraft was not used in Illinois because the presence of the aircraft in Illinois was at the behest of the aircraft's manufacturer and its authorized service provider, and was solely for the purpose of having the service provider perform warranty repairs. Essentially, the taxpayer is claiming that it cannot be deemed to engage in the taxable use of the aircraft in Illinois when the decision to bring the aircraft into Illinois was beyond its control. It claims that the presence of the aircraft in Illinois was dictated by the necessity of having warranty repairs performed on the aircraft at this location, with custody of the aircraft having been given to the Illinois repair service provider prescribed by the manufacturer which controlled the location, method and timing of the performance of warranty repairs.

A determination whether the taxpayer used the aircraft in Illinois by bringing it into the state and keeping it there from July or August 2006 until October or November of that year requires an examination of the scope and breadth of the term "use" as defined in the UTA. Section 2 of UTA defines "use" broadly, as follows:

"Use" means the exercise by any person of any right or power over tangible personal property incident to the ownership of the property except that it does not include the sale of such property in any form as tangible personal property in the regular course of business to the extent that such property is not first subjected to a use for which it was purchased ...[.] 35 ILCS 105/2.

The taxpayer admits that it owned the aircraft while it was present in Illinois and that the aircraft was acquired at retail from a retailer. Tr. pp. 9, 10, 17. Consequently, the only question presented is whether the taxpayer's dominion and control over the aircraft while it was in Illinois constituted a use of property coming within the definition of taxable "use" as defined in section 2 of the UTA.

The taxpayer's claim, that its dominion and control over the aircraft while it was awaiting repairs in Illinois did not constitute the taxable use of the aircraft under the broad definition of "use" contained in the UTA, is not supported by the record in this case. As noted above, the Illinois legislature has defined "use" broadly to encompass "the exercise ... of any right or power over tangible personal property incident to ...ownership of the property" (emphasis added). 35 **ILCS** 105/2. The record shows that the taxpayer clearly exercised its power of ownership over the aircraft by moving it to Illinois immediately after the aircraft was purchased and by allowing the manufacturer's recommended service provider to perform work on the aircraft that was needed to make it operational. Tr. pp. 9, 10.<sup>3</sup>

As the owner of the aircraft, the taxpayer had the ability and authority to allow or not allow an aircraft repair service provider to perform work or install equipment on the aircraft. However, the taxpayer essentially contends that it effectively forfeited this "right or power ... incident to... ownership" by allowing the manufacturer to decide who would perform warranty repairs and by transferring control over the aircraft to the manufacturer's designated service provider for the purpose of having repairs completed. Tr. pp. 5, 9, 10. However, assuming the taxpayer did cede control to the manufacturer and its service representative over the location, method and timing of repairs to the aircraft, its doing so does not negate a finding that it

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<sup>3</sup> The record indicates that the aircraft's propeller was damaged and needed to be repaired. Tr. pp. 9, 10. The taxpayer testified that it was taken to Wheeling Illinois "on instruction of the manufacturer" to have this repair service performed. Tr. p. 9.

nevertheless engaged in the taxable use of the aircraft while it was in this state. The Illinois courts have held that the exercise of the power to allow property one owns to be used in any manner that benefits the owner is itself the exercise of a power incident to the ownership of the property in this state and thus a taxable use of property in Illinois coming within the definition of "use" contained in section 2 of UTA. Philco v. Department of Revenue, 40 Ill. 2d 312, 317 (1968), quoting Miller Brewing Co. v. Korshak, 35 Ill. 2d 86, 93 (1966) ("We there stated that '(t)he power to allow property one owns to be used for one's benefit ... is the 'exercise' of an 'incident of ownership under this act.' "). In the instant case, assuming the taxpayer was required by the manufacturer to divest itself of custody and control over the aircraft by bringing it into Illinois and turning it over to the manufacturer's authorized service provider in Illinois for the purpose of having the aircraft repaired or stored awaiting repairs, the taxpayer's exercise of its authority to cede such control to others for use of property for the taxpayer's benefit itself constituted a taxable "use" permitting the imposition of use tax at issue in this case. Philco, supra.

As noted above, the taxpayer contends that the manufacturer and its authorized service provider, rather than the taxpayer, effectively dictated the aircraft's presence in Illinois and controlled the use of the aircraft in this state by requiring that the taxpayer take the aircraft into Illinois for repairs. For the reasons noted above, the control over the aircraft exercised by the manufacturer and its authorized service provider over the location, method and timing of repairs to the aircraft, even if proven, would not negate a finding that the taxpayer engaged in a taxable use of the aircraft while it was in this state. Moreover, even if the taxpayer's claim constituted a legally valid defense to the Department's assessment, the taxpayer would not be able to prevail in the instant case because the taxpayer's contention that it was required by the manufacturer and

its authorized service provider to bring the aircraft into Illinois is not supported by any documentary evidence contained in the record. As previously noted, to prove its contention, the taxpayer must submit sufficient documentary evidence to support its claim. Sprague, supra. While the taxpayer has testified that the aircraft's presence in Illinois was required by the aircraft's manufacturer, it has not presented a copy of the warranty agreement or any other document that substantiates this testimony. The Illinois courts have consistently held that mere testimony of this nature without corroborating documentation is insufficient to rebut the presumed correctness of the Department's determination of liability. Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill. App. 3d 203, 217 (1991); PPG Industries, Inc. v. Department of Revenue, 328 Ill. App. 3d 16, 34 (1<sup>st</sup> Dist. 2002). In the instant case, the taxpayer's testimony, that the presence of the aircraft in Illinois for service was dictated by the manufacturer, without corroborating documentary evidence, is insufficient evidence to prove this factual premise of its claim that the manufacturer and its authorized service provider, rather than the taxpayer, effectively used the aircraft in this state.

The taxpayer further contends that it did not engage in a taxable use of the aircraft in Illinois because it did not operate the aircraft while it was stored in this state awaiting repairs. Tr. p. 32 ("It wasn't there for the purpose of coming in and out[.] It was there for one purpose only, and that was to repair the plane because there was a problem created by the manufacturer[.]"). This contention is not supported by the evidence contained in the record. During testimony, John Doe, the taxpayer's principal stockholder, conceded that the aircraft was flown by him or at his direction for testing, training and other purposes while it was being stored in Illinois awaiting repairs. Tr. pp. 22-24. Moreover, even if it could be shown that the aircraft was not operated by the taxpayer while it was in Illinois, this evidence would be insufficient to

establish the taxpayer's claim. As noted in Time, Inc. v. Department of Revenue, 11 Ill. App. 3d 282, 288 (1<sup>st</sup> Dist. 1973), "[T]he use tax is not a tax which arises out of the use or operation of tangible personal property, but rather it is a tax placed upon the exercise of powers or rights incident to ownership. (Citations omitted). Therefore... the exercise of power over personal property incident to ownership ...is a taxable use in Illinois." As noted above, the taxpayer engaged in the exercise of power over personal property, the aircraft, incident to ownership in Illinois by bringing or allowing the aircraft to be brought into this state for repairs. For this reason, I find that the taxpayer is subject to Illinois use tax whether or not the taxpayer actually operated the aircraft while it was stored in this state. Time, Inc., *supra*.<sup>4</sup>

During the hearing, the Department conceded that, if the taxpayer could prove that it paid use tax on aircraft to Indiana, it would be entitled to a credit against its Illinois use tax liability in the amount of the Indiana use tax it had already paid. See 35 **ILCS** 105/3-55 (d). During the hearing, the taxpayer introduced into the record documentary evidence that Indiana use tax on the aircraft was paid to the Indiana Department of Revenue and the Department has admitted that this evidence is sufficient to prove that the taxpayer is entitled to a credit against Illinois use tax liability for this tax payment. Tr. pp. 9, 11-13, 31, 32; Taxpayer's Ex. 2. Accordingly, the taxpayer is entitled to a credit in the amount of use tax paid to Indiana (\$10,500) against the use tax liability determined by the Department to be due pursuant to the Department's Notice of Tax Liability.

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<sup>4</sup> The taxpayer has not sought to rely upon the temporary storage exemption contained at section 35 **ILCS** 105/3-55 (e). The temporary storage exemption provides that "the temporary storage, in this State, of tangible personal property that is acquired outside this State and that, after being brought into this State and stored here temporarily, is used solely outside this State" is exempt from Illinois use tax. *Id.* The record in this case shows that this exemption is inapplicable here because the taxpayer did not use the aircraft solely outside of Illinois after its storage in Illinois for two and one half to three months awaiting repairs during 2006. The record indicates that the aircraft was returned to Illinois for service and repairs on numerous occasions after 2006. Tr. pp. 15, 17-19; Department Ex. 2.

Wherefore, for the reasons stated above, it is my recommendation that Notice of Tax Liability Letter ID number XXXXXXXX at issue in this case be modified to credit the taxpayer for Indiana use tax paid on the aircraft as noted above, and, as so modified, be finalized.

Ted Sherrod  
Administrative Law Judge

Date: March 17, 2011