

IT 06-19

Tax Type: Income Tax

**Issue: Income Earned In Illinois/Individual Residency
Non-Filers (Income Tax)**

**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

**No. 00-IT-0000
SSN 000-00-0000
Tax Years 1996, 1997**

**Ted Sherrod
Administrative Law Judge**

**ORDER PURSUANT TO TAXPAYER'S MOTION FOR SUMMARY JUDGMENT
AND THE DEPARTMENT'S CROSS MOTION FOR SUMMARY JUDGMENT**

Appearances: Special Assistant Attorney General Rick Walton on behalf of the Illinois Department of Revenue; *John Doe pro se*.

Synopsis:

This matter comes on for hearing pursuant to *John Doe*' (hereinafter "*Doe*" or "taxpayer") protest and request for hearing regarding a Notice of Deficiency (hereinafter "NOD") issued by the Illinois Department of Revenue (hereinafter "Department") wherein the Department proposed an assessment of tax, penalties and interest, for the tax years 1996 and 1997 based upon the taxpayer's failure to file personal income tax returns and timely pay the required tax to the State of Illinois. *Doe* filed a Motion for Summary Judgment (hereinafter "*Doe* Motion") on September 12, 2006. In response, the Department filed a Response to the Taxpayer's Motion for Summary Judgment and

Department's Cross Motion for Summary Judgment (hereinafter "Department's Response") on September 13, 2006 to which the taxpayer filed a reply on October 23, 2006. A hearing on these motions was held on October 30, 2006. During this hearing, the parties agreed to have this matter resolved on summary judgment, and requested that the administrative law judge exclude from the record evidence that *Doe* actually filed returns for any of the tax years in controversy. Following a review of the record, it is recommended that this matter be resolved in favor of the Department.

Findings of Fact:

1. The Department issued a Notice of Deficiency to *John Doe* proposing income tax, penalties and interest for the tax years ending 12/31/96 and 12/31/97. Department's Response Exhibit ("Ex.") 1.
2. The Taxpayer filed no Illinois income tax returns for 1996 and 1997. Based upon information from the Internal Revenue Service, the Department determined that the taxpayer earned adjusted gross income of \$142,921 in 1996 and \$36,487 in 1997, and that the taxpayer was an Illinois resident during each of these years. *Id.*
3. According to information received from the Internal Revenue Service, the taxpayer's mailing address during the tax years 1996 and 1997 was in Anywhere, Illinois. *Id.*
4. The taxpayer maintained Illinois vehicle registrations, including Illinois registration stickers and current license plates, and had a current Illinois driver's license during the tax years in controversy. Department Ex. 2. The taxpayer took no affirmative steps to revoke his Illinois driver's license until May 19, 1999. *Id.*

Conclusions of Law:

An Illinois resident's responsibility for paying Illinois individual income tax on income earned while an Illinois resident is found in Article 2 of the Illinois Income Tax Act ("IITA"), 35 ILCS 5/201 *et seq.* Specifically, section 201 of the IITA provides that "[a] tax measured by net income is hereby imposed on every individual, ... for each taxable year ending after July 31, 1969 on the privilege of earning or receiving income in or as a resident of this State." 35 ILCS 5/201. Further, section 502 of the IITA, 35 ILCS 5/502, mandates that such persons must file tax returns with the state of Illinois.

The Department issued a Notice of Deficiency ("NOD") to the taxpayer for failure to file returns for 1996 and 1997. Department's Response Ex. 1. The Department's determination was based upon information received from the Internal Revenue Service (hereinafter the "IRS") on form 5278 indicating that *John Doe* was a resident of Illinois during these years and that he earned income in the amounts shown in the NOD. *Doe* Motion p. 2; Department's Response Ex. 1, Ex. 6. This information was properly obtained through an authorized written agreement between the Department and the Internal Revenue Service. Department's Response Ex. 1. See 26 U.S.C.A. section 6103(d).

In addition to determining the tax due, the Department assessed penalties pursuant to 35 ILCS 5/1001 and section 3-3(a-5), 35 ILCS 735/3-3(a-5), of the Uniform Penalty and Interest Act ("UPIA"), 35 ILCS 735/3-1 *et seq.* (failure to timely file return). The Department also assessed penalties pursuant to section 3-3(b)(1) of the UPIA, 35 ILCS 735/3-3(b)(1) and section 3-3(b-5)(1) of the UPIA, 35 ILCS 735/3-3(b-5)(1) (failure to make required estimated payments). Department's Response Ex. 1. The

taxpayer timely protested the NOD and requested an administrative hearing. Department's Response Ex. 4.

In its cross motion for summary judgment, the Department seeks to establish the *prima facie* correctness of its determination through the introduction of the NOD and supporting documentation, including the IRS form 5278, under the certificate of the Director pursuant to 35 ILCS 5/904. Department's Response p. 6; Ex. 1, 6. The Illinois courts have held that upon the Department's introduction of the NOD, the burden of proof and the burden of production shifts to the taxpayer to establish that the Department's determination was incorrect. Balla v. Department of Revenue, 96 Ill. App. 3d 293, 295 (1st Dist. 1981). However, the taxpayer argues that the presumption of correctness ordinarily accorded an NOD does not apply in the instant case because the form 5278 entitled "Statement – Income Tax Changes", federal information upon which the NOD is based, was neither authenticated nor substantiated by W-2s, bank statements, 1099s, 1040s or other similar documents identifying the sources of income allegedly received by the taxpayer as shown on the form 5278.¹ *Doe* Motion pp. 2-8. Consequently, the taxpayer maintains, the form 5278 cannot be relied upon as a basis for the NOD. *Id.* Absent the form 5278, the taxpayer contends, the Department's NOD is without foundation and therefore is insufficient to create a presumption of correctness in favor of the Department or shift the burden of proof and the burden of production to the taxpayer. *Id.*

¹ The taxpayer also argues that the NOD and supporting documentation contained in the Department's response are inadmissible hearsay. *Doe* Motion for Summary Judgment p. 3. However, the NOD and supporting documents contained in the Department's Response were introduced into the record under the certificate of the Director and therefore are admissible evidence in this case pursuant to 35 ILCS 5/914.

The taxpayer cites no Illinois case law to support his claim, but instead relies upon federal case law interpreting the Internal Revenue Code. The principal case relied upon by the taxpayer to support his contention is Portillo v. Commissioner, 932 F. 2d 1128 (5th Cir. 1991). *Doe* Motion pp. 5, 6. In Portillo, the taxpayer used 1099s from various companies to calculate his gross receipts amounts for federal income tax purposes. He did not receive a 1099 from one company. When determining his gross receipts from this company, the taxpayer used only his business ledger, which was subsequently stolen. The company ultimately filed a form 1099 reporting payments to the taxpayer significantly in excess of the amount the taxpayer had reported receiving. The Commissioner of the Internal Revenue Service (hereinafter “Commissioner”) took the position that the company’s form 1099 was correct and made the determination that the taxpayer was liable for additional tax.

The court found that this determination was arbitrary because the Commissioner offered no factual basis for accepting one sworn statement, a form 1099, while rejecting another sworn statement, the taxpayer’s form 1040. The court held that the Commissioner could not rely solely on the naked assertion that the taxpayer received a certain amount of unreported income. *Id.* at 1134. Accordingly, the Commissioner’s determination of additional federal income tax due would not be afforded the presumption of correctness until he provided the court with some indicia that the taxpayer received unreported income. *Id.* The taxpayer also cites other federal cases in which the

court has determined the presumption of correctness does not apply based upon a finding that the Commissioner acted arbitrarily. *Doe* Motion pp. 5-7.²

The principal problem presented by the taxpayer's argument is that it relies upon federal case law construing the Internal Revenue Code, a statutory body of law that is not at issue in these proceedings. The issue presented in Portillo and other cases cited by the taxpayer is the validity of federal deficiency assessments under the pertinent provisions of the Internal Revenue Code and federal cases construing that law. The issue in the instant case is whether a Notice of Deficiency issued by the Illinois Department of Revenue pursuant to the Illinois Income Tax Act that is based upon a federal form 5278 is proper and therefore sufficient to establish the Department's *prima facie* case pursuant to section 904 of the IITA, 35 **ILCS** 5/904. *Doe* Motion pp. 3-8.

The record shows that, through the issuance of the form 5278 contained in the record, the Internal Revenue Service advised *John Doe* of income tax changes to federal taxable income determined in a federal Notice of Deficiency issued on or about May 1, 2002. Department's Response Ex. 6. Regarding federal changes affecting the taxable income of any person obligated to file an Illinois income tax return, section 5/506(b) of the Illinois Income Tax Act, 35 **ILCS** 5/506(b) provides as follows:

- (b) Changes affecting federal income tax. In the event the taxable income, any item of income or deduction, the income tax liability, or any tax credit reported in a federal income tax return of any person for any year is altered by amendment of such return or as a result of any other recomputation or redetermination of federal taxable income or loss, and such alteration reflects a change or settlement with respect to any item or items, affecting the computation of such person's net income, net loss, or of any credit

² See Carson v. United States, 560 F. 2d 693 (5th Cir. 1977); Weimerskirch v. Commissioner, 596 F. 2d 358 (9th Cir. 1979); Scar v. Commissioner, 814 F. 2d 1363 (9th Cir. 1987); and Gerardo v. Commissioner, 552 F. 2d 549 (3rd Cir. 1977).

provided by Article 2 of this Act for any year under this Act, or in the number of personal exemptions allowable to such person under ... the Internal Revenue Code, such person shall notify the Department of such alternation. Such notification shall be in the form of an amended return or such other form as the Department may by regulation prescribe, [and] ... shall be filed not later than 120 days after such alteration has been agreed to or finally determined for federal income tax purposes or any federal income tax deficiency or refund, tentative carryback adjustment, abatement or credit resulting therefrom has been assessed or paid, whichever shall first occur.

35 ILCS 5/506³

Doe, by his own admission, does not contest the Department's finding that he failed to file Illinois returns for the tax years 1996 and 1997. See Citizen's Reply to Department's Response to Citizen's Motion for Summary Judgment and Citizen's Response to Department's Cross Motion for Summary Judgment (hereinafter "*Doe* Reply") p. 1 ("[W]os' Motion for Summary Judgment puts forth a very specific legal argument as to why the Notice of Deficiency (NOD) should be dismissed as a matter of law [.]"). Accordingly, the record supports a finding that *Doe* failed to file any returns reporting federal changes and deficiencies indicated in the form 5278 contained in the record.

With respect to taxpayers failing to timely report federal changes or failing to notify the Department of a federal deficiency, section 5/905 of the Illinois Income Tax Act (35 ILCS 5/905) states as follows:

(d) Failure to report federal change. If a taxpayer fails to notify the Department in any case where notification is required by Section ... 506(b), or fails to report a change or correction which is treated in the same manner as if it were a deficiency for federal income tax purposes, a notice of deficiency may be issued ... [.]

35 ILCS 5/905(d)

³ See also 86 Ill. Admin. Code, Ch. I, section 100.9200(a)(4).

The notice of deficiency provided for in 5/905(d) of the IITA falls into the category of NODs described in section 904(b), 35 ILCS 5/904(b) which states as follows:

(b) If a taxpayer fails to file a tax return, the Department shall determine the amount of tax due according to its best judgment and information, which amount so fixed by the Department shall be prima facie correct and shall be prima facie evidence of the correctness of the amount of tax due. The Department shall issue a notice of deficiency to the taxpayer which shall set forth the amount of tax and penalties proposed to be assessed.

35 ILCS5/904(b)

The clear import of section 5/905(d) of the Illinois Income Tax Act, when read in conjunction with section 5/904(b) of this Act, is that a federal change that is not timely reported or federal deficiency that is not reported can be used as a basis for the issuance of a Notice of Deficiency establishing the Department's *prima facie* case. Pursuant to these provisions, all that is required to warrant the issuance of an NOD establishing the presumed correctness of the Department's determination is a showing that a federal change or federal notification of deficiency has been determined and that the taxpayer has failed to file a return reporting such information.

The record clearly shows the issuance of a form 5278 that is both a notice of a federal change and a deficiency notification. Department's Response Ex. 6. *Doe* does not contest the Department's claim that no return was filed for either of the tax years at issue. *Doe* Reply p. 1. Given the foregoing, sections 5/905(d) and 5/904(b) of the IITA plainly indicate that the issuance of a Notice of Deficiency establishing the Department's *prima facie* was proper in this case.

Since the Illinois legislature expressly permits the Department to properly issue an NOD establishing the Department's *prima facie* case based upon evidence that a federal change or deficiency notification has not been reported, it is unnecessary to resort

to federal case law to determine whether the form 5278 is a sufficient basis to support the Department's determination. This issue has already been addressed and answered by the legislature, which has stated in unequivocal terms that the Department can properly rely upon the issuance of a form 5278 without more as a basis for an NOD establishing its *prima facie* case where the record shows that the taxpayer has failed to report a federal change or deficiency shown to exist by such documentation. 35 ILCS 5/904(b); 35 ILCS 5/905(d). Since the Department is expressly permitted by the Illinois Income Tax Act to rely upon the form 5278 issued to *Doe* in arriving at an assessment establishing the Department's *prima facie* case, I find case law construing the Internal Revenue Code, a statutory body of law that does not expressly permit such reliance, unpersuasive and not in point.

Even if the cases cited by the taxpayer were applicable to the facts presented in this case, I find the taxpayer's reliance upon the cases he has cited to be misplaced. As noted above, in Portillo, the principal case cited by the taxpayer for his claim that the NOD at issue is an arbitrary and unsubstantiated, or "naked" assessment (Portillo, supra at 1133), the Commissioner arbitrarily accepted a Form 1099 over a conflicting form 1040. Similarly, in Weimerskirch v. Commissioner, 596 F. 2d 358 (9th Cir. 1979), also cited by the taxpayer as support for his claim, the Commissioner assessed a deficiency based upon the taxpayer's alleged heroin sales, but failed to present any evidence from which one could infer that the taxpayer was involved in heroin sales in any way. Similar facts are presented in other cases the taxpayer cites that address the "naked" assessment issue. See Gerardo v. Commissioner, 552 F. 2d 549, 554 (3d Cir. 1977) (finding a "naked" assessment "absent proof in the record that Gerardo was involved in gambling

activities” during a portion of the tax period in controversy); Carson v. U.S., 560 F. 2d 693, 696 (5th Cir. 1977) (“[T]he presumption of correctness notwithstanding, a wagering excise tax assessment cannot stand without some evidence tending to support an inference that the taxpayer engaged in gambling activities during the period assessed[.]”); Scar v. Commissioner, 814 F. 2d 1363, 1368 (9th Cir. 1986) (finding an arbitrary assessment where “the deficiency is not based on a determination of deficiency of tax reported on the taxpayers’ return [and] ... refers to a tax shelter the Commissioner concedes has no connection to the taxpayers or their return[.]”).⁴ Here, not only is there no conflicting evidence to contradict the IRS Form 5278, but there is also independent evidence that supports the Department’s finding that *Doe* was an Illinois resident during the tax periods in controversy.

With respect to its finding that *Doe* was a resident of Illinois during the tax periods in controversy and therefore subject to the Illinois Income Tax, the Department relies not only upon the information set forth in the form 5278, but also upon information it independently obtained from the Illinois Secretary of State’s office indicating that *Doe* maintained an Illinois driver’s license, vehicle registrations and current license plate stickers during the tax years at issue. Department’s Response Ex. 5. The fact that the Department produced evidence indicative of residency in an attempt to corroborate its finding clearly distinguishes the facts at issue from the factual premises relied upon the courts as a basis for a finding of a “naked” assessment in Portillo, Weimerskirch and

⁴ While *Doe* cites other cases in his Motion, with the exception of United States v. Janis, 428 U.S. 433 (1976), none address facts supporting a finding of a “naked” assessment. Janis, moreover, is not in point since it only addresses the classification of an assessment as a “naked” assessment when it is based upon illegally obtained evidence, a circumstance not at issue here.

similar cases because these cases address situations in which an assessment “is without [a]ny foundation whatsoever.” United States v. Janis, 428 U.S. 433, 441 (1976).

Even if the taxpayer is correct in concluding that the IRS Form 5278 is an insufficient basis for the Department’s assessment (which I do not concede), to find that the assessment at issue is without foundation, one must ignore the supporting evidence the Department has produced to establish that the taxpayer was a resident of Illinois during the tax years at issue. I find this documentation persuasively supports the finding indicated in the IRS form 5278 that *Doe* was a resident of Illinois, as the Department avers. See 86 Ill. Admin. Code, ch. I, section 100.3020(g) identifying evidence that a person has registered a vehicle in Illinois and holds an Illinois driver’s license as indicia of Illinois residency. Consequently, I find that Portillo and other cases discussed above, even if applicable in construing the Illinois Income Tax Act, do not support the taxpayer’s claim that the Department’s assessment, as it pertains to the Department’s jurisdiction to impose tax, is arbitrary and without any rational foundation. Accordingly, I find that the cases the taxpayer relies upon as a basis for his contention that the Department has failed to establish its *prima facie* case regarding its jurisdiction to tax *Doe*, are not applicable to the facts presented here.

Nor can the taxpayer escape the presumed correctness of the Department’s determination that the taxpayer earned income, in the amount shown in the Department’s NOD, by relying on the “naked assessment” exception to the presumption of correctness enumerated in Portillo, Weimerskirch and other cases addressing “naked” assessments the taxpayer has cited. As is true in Illinois (see Balla, *supra*), pursuant to the Internal Revenue Code, “[T]he general rule is that a presumption of correctness attaches to the

Commissioner’s deficiency determination; the taxpayer has the burden of disproving it.” Pfluger v. Commissioner, 840 F. 2d 1379, 1382 (7th Cir. 1988). As noted, the Federal courts, in construing the Internal Revenue Code, have crafted a narrow exception “where the Commissioner’s determination is arbitrary and erroneous or without rational foundation.” *Id.* It is not disputed that, pursuant to the line of cases the taxpayer cites, “before the Commissioner can rely on [the] presumption of correctness, the Commissioner must offer some substantive evidence showing that the taxpayer received income ... [.]” Weimerskirch, *supra* at 360. However, the threshold for properly invoking the presumption of correctness is not as high as *Doe* would have us believe.

The gravamen of *Doe*’ claim is that evidence of the taxpayer’s receipt of income that is not supported by original documents such as the taxpayer’s bank statements, W-2s or income tax returns is insufficient to provide a rational basis for a determination of liability or to support the presumption of correctness normally accorded the taxing authority’s determination. *Doe* Motion pp. 2-8. The taxpayer contends that such determinations are “naked” or utterly without rational foundation.

In Coleman v. United States, 704 F. 2d 326 (6th Cir. 1983), however, the court noted that the IRS does indeed have the authority to issue determinations that are not “naked assessments” in the complete absence of original books and records. While the court in Coleman determined that the government had produced no evidence whatsoever and the assessment at issue in that case was therefore a “naked assessment”, the court states as follows:

It should be noted that reversing the district court here does not strip the IRS of the ability to collect taxes in the absence of original records. It has long been held that the Commissioner may estimate assessments by “any reasonable method”, and such estimates will be

accorded the full presumption of correctness, subject to being overturned only upon proof by the taxpayer that he is entitled to a specific refund. See DeLorenzo v. United States, 555 F. 2d 27 (2d Cir. 1977). The practical effect of this authority is illustrated in Heyman v. United States, 497 F. 2d 121 (5th Cir. 1974), wherein the IRS prepared summaries of gambling records seized by Florida police and then utilized the summaries to project the gambling activity which was documented within a brief time over the entire year during which it was proved that gambling had occurred. The underlying records were subsequently destroyed by state officials. In a refund suit, each taxpayer sought to be relieved from his burden of proof “because of the destruction of his records rendering it impossible, each says, to establish that the assessment against him is incorrect.” 497 F. 2d at 122. The Court, however, specifically upheld the Commissioner’s summaries and projections. Had such “secondhand” records been available in the matter *sub judice*, or any demonstrably reasonable methodology of estimation, it is likely that even the destruction of the Coleman’s original returns would not have precluded reliance upon the assessment’s presumption of correctness.
Coleman, *supra* at 329.

See also Cook v. United States, 46 Fed. Cl. 110, 114 (Fed. Cl. 2000) (“[A]n assessment is not ‘naked’ simply because the administrative file supporting its entry is lost – what is critical, given the de novo nature of the proceedings before this court, is that admissible evidence exists to support the assessment[.]”).

In sum, federal case law, upon which *Doe* premises his entire claim, expressly refutes the contention that a “naked assessment” arises whenever secondary documentation that does not include original documents is presented as a basis for an assessment by a taxing authority. Accordingly, contrary to *Doe*’ claim, the Department’s use of the form 5278 summarizing the results of a federal investigation of *Doe*’ federally reported or otherwise determined income for 1996 and 1997 as circumstantial evidence of *Doe*’ income for those years is not precluded as a “naked assessment” solely because it is based upon secondary evidence of original documentation that has not been produced.
Coleman, *supra*; Cook, *supra*. Since the taxpayer has presented no other basis for a

determination that the Department's assessment in this case is a "naked assessment", I find that the Department's assessment was proper and therefore established the Department's *prima facie* case. 35 ILCS 5/904; Balla, *supra*. As a consequence, the introduction of this assessment established the presumed correctness of its determination that the taxpayer received the amounts of income determined based upon the form 5278 at issue during the tax years in controversy.

Once a proper assessment has been offered, the burden shifts to the taxpayer to prove that the assessment made against him was erroneous. *Id.* The taxpayer, by his own admission, was required to rebut any proper *prima facie* case established by the Department in order to prevail. *Doe* Motion pp. 4, 5. The taxpayer has made no effort to present a rebuttal case of any kind, preferring instead to rely solely upon his legal claim that the Department's determination is a "naked assessment" that does not establish its case.

A motion for summary judgment is appropriate where the pleadings, affidavits and depositions on file, when viewed in a light most favorable to the non-moving party, show no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Busch v. Graphic Color Corp., 169 Ill. 2d 325 (1996). In the instant case, the Department introduced its NOD into the record which, it contends, shows: 1) that the taxpayer was a resident of Illinois and therefore subject to the Illinois Income Tax during the tax years in controversy, and 2) that the taxpayer derived income while a resident of Illinois during the tax years in controversy in the amounts shown in the NOD. Department's Response pp. 1, 2, 12, 13, 16-19. The Department contends that, as a

matter of law, the NOD established its *prima facie* case, which the taxpayer was required to rebut. *Id.*

The taxpayer seeks to conclude this case based solely upon a determination that the Department has failed to establish either jurisdiction (i.e. that the taxpayer was an Illinois resident during the years in controversy) or the amount of income subject to taxation as a matter of law because the Department's NOD failed to establish a *prima facie* case. *Doe* Motion pp. 2-8.

The material facts in this matter are not at issue. Therefore, the only determination to be made is whether *Doe* or the Department is entitled to judgment, as a matter of law. Based upon sections 904(b) and 905(d) of the Illinois Income Tax Act, 35 ILCS 5/904(b) and 35 ILCS 5/905(d), noted above and upon the legal precedents cited herein, I find that *Doe* has failed to show that the Department's assessment was improper or that it could not be relied upon to establish the Department's *prima facie*. Since *Doe* has not attempted to rebut the Department's *prima facie* case, I find my determination to be a conclusive resolution of this matter.

The taxpayer also contests the constitutionality of applying 35 ILCS 5/904 to establish the Department's *prima facie* case based upon an NOD premised solely upon second hand information (an IRS form 5278). *Doe* Motion p. 4 ("Furthermore, an administrative proceeding is governed by the fundamental principles and requirements of due process of law[.] ... [D]ue process of law demands that *Doe* have an 'opportunity to defend by confronting any adverse witnesses'. Goldberg v. Kelly, 397 U.S. 254, 268 (1970)[.] [T]he dubious 'Form 5278' can never be used as evidence since it affords no

due process method of confrontation since no one knows who prepared it or even where it came from[.]”).

The resolution of the constitutional issue raised by the taxpayer must necessarily consider the constitutionality of section 904 of the IITA. It is a settled tenet of administrative law jurisprudence that administrative agencies must presume the constitutionality of the statutes they interpret, and thus have no power to determine the type of constitutional issue the taxpayer has presented. Texaco-Cities Service Pipeline Co. v. McGaw, 182 Ill. 2d 262, 278 (1998), (citing Moore v. City of East Cleveland, 431 U.S. 494 (1977)). Accordingly, I have no authority to adjudicate the constitutionality of 35 ILCS 5/904 as applied to the facts presented in this case.

IT IS THEREFORE ORDERED that summary judgment be granted in favor of the Department and against the taxpayer. It is further ordered that the Notice of Deficiency for the years 1996 and 1997 at issue in this case be finalized, as issued.

Ted Sherrod
Administrative Law Judge

Date: November 15, 2006