

IT 96-49  
Tax Type: INCOME TAX  
Issue: Adjusted Base On ROT Audit

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

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DEPARTMENT OF REVENUE	)
STATE OF ILLINOIS	)
	)
v.	) TYE 12/31/87; 88; 89
	)
TAXPAYER	) Mimi Brin
	) Administrative Law Judge

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RECOMMENDATION FOR DISPOSITION

Appearances: Mr. Gust W. Dickett for TAXPAYER; Lois Solomon, Special Assistant Attorney General for Illinois Department of Revenue

Synopsis:

This matter comes on for hearing pursuant to TAXPAYER's (hereinafter referred to as the "Taxpayer" or "TAXPAYER") protest of a Notice of Deficiency (hereinafter referred to as the "NOD") issued by the Illinois Department of Revenue (hereinafter referred to as the "Department") proposing tax deficiencies for the tax years ending 12/31/87 through 12/31/89. A hearing on this matter was held on February 27, 1996. Following the submission of evidence and a review of the record, it is recommended that this matter be resolved in favor of the Department.

Findings of Fact:

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, was established by the admission into evidence of the Notice of Deficiency proposing an income tax deficiency liability of \$31,983.00 to date of issuance of February 15, 1991. Dept. Ex. No. 1

2. The proposed deficiency is for an income tax liability for the years ending 12/31/87, 88 and 89. Dept. Ex. No. 1

3. An administrative hearing was held pertaining to the Retailers' Occupation Tax (hereinafter referred to as "ROT") liability of this taxpayer for the period of September, 1987 through December 31, 1989, with a decision in that matter issued in June, 1992 finding the taxpayer liable for underreporting ROT receipts for that period, as well as upholding a civil fraud penalty for the same ROT period.<sup>1</sup>

4. This taxpayer, through its counsel, Mr. Gust Dickett, filed a petition for relief with the Illinois Department of Revenue Board of Appeals in April, 1994 for these ROT liabilities. Board of Appeals Amended Petition, Docket No. 94-438<sup>2</sup>

5. Taxpayer was originally represented in this income tax cause by counsel from the firm of McKenzie & McKenzie, P.C. Appearance dated January 30, 1992

6. Prior counsel filed a Request For Production of Documents. Request For Production of Documents, marked "Rec'd February 4, 1992 J.P."

7. Said counsel withdrew as taxpayer representative as of August 11, 1992. Attorneys' Motion To Withdraw; Order, August 11, 1992

8. Mr. Gust W. Dickett began his representation of this taxpayer in this income tax matter on October 21, 1992, at which time he made a written request for a continuance of the hearing already set in this matter for October 27, 1992. Letter, October 21, 1992

9. This matter was again set for hearing on December 15, 1992. Notice of Hearing, November 12, 1992

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<sup>1</sup>. An administrative agency make take official notice of its records, including pleadings. 5 ILCS 100/10-35, 100/10-40 The taxpayer had no objection to my taking administrative notice of the administrative decision issued in the ROT matter against this taxpayer. Nor did the Department object to my taking administrative notice, as requested by the taxpayer at hearing, to taxpayer's Board of Appeals petition relating to that cause.

<sup>2</sup>. See, footnote 1, *supra*.

10. Taxpayer made a written request for discovery dated October 27, 1992.  
Discovery No. 1, October 27, 1992

11. Taxpayer served upon the Department a Notice of Deposition in this matter with Department Auditor, Robert Radtke, as the deponent. Notice of Deposition, October 27, 1992

12. Taxpayer did not, at any time, file any motions to compel compliance with discovery.

13. Prior to the December 15, 1992 date set, by notice for hearing, and upon the taxpayer's request, a new hearing date was set for January 15, 1993. Taxpayer's Request to Continue hearing, December 14, 1992; Order, December 15, 1992

14. Taxpayer made a settlement proposal to the Department prior to July 19, 1995, and the matter was continued from time to time pending the Department's consideration of the proposal. Order, July 19, 1995; Order, August 6, 1995; Order, September 6, 1995; Order, October 10, 1995; Order, November 28, 1995

15. By order entered November 28, 1995, this cause was set for hearing for January 24, 1996. Order, November 28, 1995

16. Prior to that hearing, the taxpayer made a written request for a continuance of the hearing date. Notice of Motion, January 22, 1996

17. Pursuant to taxpayer's motion, the cause was set for hearing, as a final hearing date, for February 27, 1996. Order, January 23, 1996

18. On February 26, 1996, the Department filed a motion to continue the hearing (Notice of Motion, February 26, 1996) which was heard prior to the hearing in this matter, on February 27, 1996. The motion was denied. Tr. p. 11

**Conclusions of Law:**

On examination of the record established, this taxpayer has failed to demonstrate by the presentation of testimony or through exhibits or argument, evidence sufficient to overcome the Department's *prima facie* case of tax

liability under the NOD in question. Accordingly, by such failure, and under the reasoning given below, the proposed deficiency determined by the Department to be due and owing from TAXPAYER, must be affirmed as a matter of law. In support thereof, I make the following conclusions:

This instant matter has a lengthy administrative history. Taxpayer, whose original counsel withdrew from this cause, has been represented herein by Mr. Dickett since October, 1992, when he advised the Department that he was retained as counsel. Up until August, 1992, taxpayer had been represented by the same counsel who represented it at the lengthy administrative hearing on taxpayer's ROT liability for the same tax period. Prior to their withdrawal, taxpayer's prior counsel, in February, 1992, requested documents from the Department which are the same documents requested by Mr. Dickett at the time he was retained by the taxpayer.

There is no indication in the official administrative file that taxpayer's prior counsel did not receive the requested documents within the twenty-eight days indicated, in that no motions to compel appear of record. Nor are there any motions to compel of record filed by Mr. Dickett, in spite of the fact that he represents at the hearing on the February, 1996 motion to continue, that he never received the requested documentation.

These factors are troublesome. Until January 1 1996, the Department regulations provided a remedy to a party whose discovery requests were not complied with. Pursuant to 86 Ill. Admin. Code ch. I, sec. 200.130, following a party's failure to comply with an Administrative Law Judge's order to comply with a discovery request, the aggrieved party could request an order preventing the noncomplying party from, *inter alia*, "introducing designated matters or documents in evidence". *Id.* at sec. 200.130(b) This, of course, requires the aggrieved party to file the necessary request with the ALJ for an order requiring compliance. The amendments to this regulation, effective January 1, 1996, specifically provide that a party may seek, by way of a motion to compel addressed to the Administrative Law Judge, an order compelling the noncomplying

part to respond to a discovery request, and if there is no compliance to an order entered as a result of such a motion, sanctions can be brought, again following appropriate motion. *Id.* at sec. 200.130(a)(b), as amended

Thus, Department regulations have, at all pertinent times, afforded a party a remedy for a failure to receive documents it considers essential to its cause. These remedies for relief are discretionary with the party wishing compliance with its discovery requests. Since the Department provides a remedy for noncompliance, the party that fails to pursue its remedies waives its right to complain at hearing.

In addition, not only did taxpayer not utilize its remedies to insure compliance with its discovery requests, it's claim at hearing that the previous ALJ in this matter told counsel not to worry about the discovery is no more than hearsay and can not be given any weight.

There are other facts which lend support to finding as not sufficient taxpayer's representations regarding purported comments by the previous ALJ. This income tax liability results from the administrative determination that the taxpayer underreported its income to the Department for ROT purposes by about 65% and that it did so fraudulently.<sup>3</sup> The hearing on the ROT liability was held prior to this hearing, with the auditor testifying therein and with his work papers being part of that evidentiary record. Taxpayer was represented in that matter by the same counsel that initially represented it herein. Thus, taxpayer has had the auditor's work papers since its ROT hearing.

In addition, taxpayer's current counsel filed a notice to depose the auditor in this matter, who was also the auditor in the ROT cause. There is nothing of record to indicate that the deposition did not proceed as noticed. Certainly, there is no record that the taxpayer complained that the deponent did not appear as required or that the deposition did not otherwise proceed. In

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<sup>3</sup>. Taxpayer did not file an administrative review action following the administrative decision regarding its ROT liabilities for these tax years.

fact, taxpayer's counsel admits that he spoke with the auditor in this cause.

Tr. p. 6

Further, taxpayer's present counsel filed taxpayer's ROT petition for relief with the Board of Appeals. Taxpayer, in that petition, complained, *inter alia*, that the record [in the ROT hearing] was not sufficient to legally support a civil fraud penalty. It did not cite, as a grounds for relief, that it did not receive necessary documentation to attempt to rebut the Department's *prima facie* case.<sup>4</sup> The reasonable inference, therefore, is that the taxpayer, and its current counsel, had the audit documents and work papers upon which the ROT cause was based, and, therefore, had the documents upon which the instant NOD is premised.

Finally, both the taxpayer and the record admit that the taxpayer had made a settlement offer in this matter prior to mid-July, 1995. Tr. p. 7; Order, July 19, 1995; Order, August 29, 1995; Order, September 6, 1995; Order, October 10, 1995; Order, October 30, 1995; Order, January 23, 1996. In actuality, taxpayer was discussing settlement in this cause as early as December, 1992, when taxpayer's current counsel met with Department's counsel to discuss settling this matter following reaudit, by the filing an amended return for 1989 and by taxpayer conceding the earlier years. Taxpayer's request for continuance, December 14 1992; Order, December 15 1992. In taxpayer's Request for a Continuance dated December 14, 1992, taxpayer acknowledges that it filed discovery requests for Department records in October and November, 1992,<sup>5</sup> and that the taxpayer met with the Department's counsel at which time the parties discussed, with specificity, how this matter could be settled.

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<sup>4</sup>. In fact, not only did audit work papers become part of the record in the ROT matter, but that ALJ states, in her Recommendation, that she made all of those documents available to taxpayer's counsel prior to that hearing. Recommendation, pp. 5-6. 10

<sup>5</sup>. Taxpayer's counsel referred to a discovery request made in November, 1992. Although I located taxpayer's request made in October, 1992, and located the reference to its November request in a taxpayer request for continuance, I did not find a taxpayer discovery request dated in November, 1992.

Additionally, Department's counsel needed to have knowledge of the income tax audit, itself, in order to assess the value of the settlement proposal made. Nor is it unreasonable to assume that Department's counsel communicated with the audit while it was conducting its examination of taxpayer's books and records.

The reasonable implication from the above is that the taxpayer was well aware, as far back as 1992, of the basis for this NOD. Clearly, if the taxpayer did not have, for this hearing, the documents it sought, it was not prejudiced in the least as there was a reaudit in this instant matter as well as an extended settlement process. At no time were there averments, by either party, that either of these processes failed because the auditor's work papers were not available. Therefore, taxpayer's protests of prejudice at this hearing are disingenuous.

With regard to the Department's motion for continuance, I note that the Department filed a continuance request on February 21, 1996 wherein the bases for the request included the fact that the Department and the taxpayer were still working toward a settlement of this matter and that the audit department was still reviewing the taxpayer's books and records. The Department filed another continuance request on February 26, adding that it had just received the auditor's report which the Department litigator had not seen before. The Department does not represent that it could not go forward with the hearing under these circumstances, nor does it suggest any prejudice to it if the hearing were held on that date. Surely, the Department could not make such representations as the Department has the easiest access to the Department's auditor involved in this matter. Therefore, it is not difficult for the Department litigator to be fully apprised of the basis of the NOD as well as to be informed of all methods used by the auditor involved.

Again, these representations do not warrant a continuance of hearing in a case which is as aged as this one, in which the parties have had years to come to a resolution of the issues prior to hearing, and, have attempted to do so, albeit to no avail. The Department has been reviewing this taxpayer's books and

records since 1992, and the parties have been discussing settlement since that time at the very least, and most definitely since July, 1995. Further, Department's counsel was well aware that this NOD was based upon an ROT assessment which was finalized as a result of a hearing wherein the auditor testified and audit documents were made part of the record. Tr. pp. 13-14, 17

Finally, I note, as I did at the hearing on the motion to continue, that auditor's notes and work papers are a regular, basic part of any assessment file. Both counsel in this matter are experienced tax attorneys and are particularly knowledgeable about Illinois Department of Revenue assessment and hearing methods. To a much less seasoned practitioner, the absence of work papers does not go unnoticed, and, this is of particular interest in a matter such as this where a reaudit was conducted and there were settlement discussions.

Therefore, with consideration to the above, I find that neither the Department nor the taxpayer was prejudiced by proceeding to hearing in this cause on the date set, by prior order, as a final hearing date after many years of continuances.

Regarding the substance of the hearing, the Department's *prima facie* case was established by the admission into evidence of the Notice of Deficiency which also included a detailed synopsis and breakdown of the basis for the tax penalties assessments. Dept. Ex. No. 1; 35 **ILCS** 5/904 Once the Department's *prima facie* case was entered into evidence, the burden shifts to the taxpayer to overcome it by producing competent evidence, closely associated with its books and records, showing that the Department's NOD is incorrect. A.R. Barnes & Co. v. Dept. of Revenue, 173 Ill. App.3d 826 (1st Dist. 1988); Masini v. Dept. of Revenue, 60 Ill. App.3d 11 (1st Dist. 1978)

Although the taxpayer provided the Department with books and records for settlement purposes (Taxpayer Request for a Continuance of hearing, December 14, 1992; Order, December 15, 1992; Motion for Continuance, February 26, 1996), the taxpayer chose not to present any documentary evidence at hearing.

At hearing, taxpayer's counsel, who had a power of attorney on file and who had participated in numerous status conferences and filed motions for continuances, indicated that taxpayer construed its action as being in the nature of a default to these proceedings. Tr. p. 14 However, at the hearing, taxpayer's counsel objected to the admission into evidence of the Department's exhibits numbers 1 and 2 (Tr. p. 17) and asked me to take "judicial" notice of taxpayer's petition filed before the Board of Appeals as Docket Number 94-0438. Thus, taxpayer is not in default in these proceedings. See, 735 **ILCS** 5/2-1301(d); Teitelbaum v. Reliable Welding Co., 106 Ill. App.3d 651 (2nd Dist. 1982) (default judgment can only be entered for want of an appearance or failure to plead)

Taxpayer failed to rebut the *prima facie* correctness of the Department's Notice of Deficiency at issue herein. It is, therefore, my recommendation that the instant Notice of Deficiency be finalized as issued.

9/26/96

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Mimi Brin  
Administrative Law Judge