

ST 07-4

Tax Type: Sales Tax

Issue: Unreported/Underreported Receipts (Non-Fraudulent)

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

THE DEPARTMENT OF REVENUE
OF THE STATE OF ILLINOIS

v.

ABC FOOD AND LIQUOR,
JOHN DOE,
TAXPAYER

No. 05-ST-0000
IBT 0000-0000
NTL Nos. 00 00000000000000-000

Kenneth J. Galvin,
Administrative Law Judge

RECOMMENDATION FOR DISPOSITION

Appearances: Mr. Akram Zanayed, on behalf of ABC Food and Liquor and John Doe; Mr. Shepard Smith, 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 a protest filed by ABC Food & Liquor and its sole proprietor, John Doe, of Notices of Tax Liability No. 00 00000000000000 through 000 issued May 25, 2005 (except for 00 00000000000000 issued August 10, 2005) covering the audit period July, 2001, through November, 2004, assessing retailers' occupation tax due for unreported sales.

An evidentiary hearing was held in this matter on October 3, 2006 with John Doe testifying for ABC, and Lorraine Elzy, Revenue Auditor, and Mr. Smith, testifying for the Department of Revenue. Following a review of the testimony and the evidence, it is

recommended that the Notices of Tax Liability be finalized. 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 Notices of Tax Liability Nos. 00 0000000000000 through 000, issued May 25, 2005 (except for NTL 00 0000000000000 issued August 10, 2005) showing unpaid retailers’ occupation tax, penalties and interest, covering the audit period July, 2001, through November, 2004, as adjusted by the SC 10-K, “Audit Correction and/or Determination of Tax Due.” Tr. pp. 9-10; Dept. Ex. No. 1.

Conclusions of Law:

The Department of Revenue issued Notices of Tax Liability (“NTL”) Nos. 00 0000000000000 through 000 to ABC Food and Liquor and its sole proprietor, *John Doe*, covering the audit period July, 2001, through November, 2004, assessing unpaid retailers’ occupation tax for unreported sales, penalties and interest. Tr. pp. 9-10; Dept. Ex. No. 1. Section 4 of the Retailers’ Occupation Tax Act, (35 ILCS 120/1 *et seq.*), provides that the NTL’s issued by the Department are *prima facie* correct and are *prima facie* evidence of the correctness of the amount of tax due. *Id.* at 120/4. Once the Department has established its *prima facie* case by submitting the NTL’s into evidence, the burden shifts to the taxpayer to overcome the presumption of validity. Clark Oil & Refining v. Johnson, 154 Ill. App. 3d 773 (1st Dist. 1987).

In order to overcome the presumption of validity attached to the NTL’s, the taxpayer must produce competent evidence, identified with its book and records showing that the NTL’s are incorrect. Copilevitz v. Department of Revenue, 41 Ill. 2d 154 (1968). 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 find that the taxpayer has failed to demonstrate by testimony, through exhibits or through argument, evidence sufficient to overcome the Department's determination that retailers' occupation tax is due.

During his opening statement, counsel for *ABC Food and Liquor* and its sole proprietor, *John Doe*, stated that he was contesting that the auditor had failed to make an adjustment to her inventory calculations and that the auditor had overstated the purchases that came from *XYZ Wholesale*. Tr. pp. 8-9. The owner of *ABC Food & Liquor*, *John Doe*, was overseas at the time of the evidentiary hearing and did not testify. Tr. p. 6. The hearing had previously been continued twice because of *John Doe's* absence. *John Doe* testified that he began working at *ABC Food & Liquor* in August, 2005, which is after the period covered by the NTL's. *John* did not have personal knowledge of procedures followed at the store during the audit period but he "set with the old manager" "because of the records that shows about the taxes and stuff." Tr. p. 18. *John Doe* was not competent to testify with regard to the inventory calculations and the purchases from *XYZ Wholesale* and his testimony is insufficient to rebut the Department's *prima facie* case.

Lorraine Elzy, Revenue Auditor, testified that she could not make inventory adjustments for 2001, 2002, 2003 or 2004 because she had received information from the Internal Revenue Service that federal returns had not been filed by *John Doe* for those years and, accordingly, she did not have verifiable ending inventory figures upon which to base an adjustment. Tr. pp. 20-21. Counsel for the taxpayer offered into evidence *John Doe's* tax returns for 2002 and 2003, which

were unsigned, and were not accepted into evidence over the Department's objections. Tr. pp. 51-52.

Ms. Elzy testified that she based her inventory calculations for ABC Food & Liquor on EDA-20's received from third party vendors, as well as invoices received from the taxpayer. Tr. p. 27. A summary of all purchases, prepared by Ms. Elzy, shows that purchases by ABC from XYZ Wholesale went from \$66,012 in 2002 to \$144,737 in 2003. Dept. Ex. No. 2. Mr. Mr. Smith is the President of XYZ Wholesale and he responded to the EDA-20 request made by the Department. Mr. Smith testified that he signed the EDA-20, which shows 2002 purchases by ABC of \$66,012.84 and 2003 purchases of \$144,737.39. Tr. pp. 38-41. Mr. Smith testified that the 2002 purchase figures were derived from computer records and handwritten invoices and the 2003 purchases were derived from computer records only. Tr. pp. 40-42. The only document admitted into evidence for the taxpayer is a listing of inventory for 7/26/2005 and 9/24/2004 prepared by "A.J.W," "Inventory Service and Product/Market Research." Taxpayer's Ex. No. 1. The preparer of this document did not testify.

The Department established its *prima facie* by admitting the NTL's into evidence. No competent testimony or documentary evidence was presented by the taxpayer for me to conclude that inventory calculations or purchases from XYZ Wholesale should be adjusted. The testimony of John Doe and taxpayer's listing of inventory for 7/26/2005 and 9/24/2004 failed to rebut the *prima facie* case of the Department.

WHEREFORE, for the reasons stated above, it is my recommendation that NTL 00 00000000000000 through 000, as amended by the SC-10 K, be finalized.

December 19, 2006

Kenneth J. Galvin
Administrative Law Judge