

ST 13-07

Tax Type: Sales Tax  
Tax Issue: Unreported/Underreported Receipts (Non-Fraudulent)

Illinois Department of Revenue  
OFFICE OF ADMINISTRATIVE HEARINGS  
James R. Thompson Center  
100 West Randolph Street, Level 7-900  
Chicago, Illinois 60601  
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<b>THE DEPARTMENT OF REVENUE</b>	)		
<b>OF THE STATE OF ILLINOIS</b>	)	<b>No.</b>	<b>XXXX</b>
<b>v.</b>	)	<b>NTL:</b>	<b>XXXX</b>
	)	<b>Account ID:</b>	<b>XXXX</b>
	)		
<b>ABC BUSINESS,</b>	)	<b>Kenneth J. Galvin,</b>	
<b>TAXPAYER</b>	)	<b>Administrative Law Judge</b>	

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**RECOMMENDATION FOR DISPOSITION**

**Appearances:** Mr. Rouhy J. Shalabi, Shalabi & Associates, on behalf of ABC Business; 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 ABC Business’s (hereinafter “ABC BUSINESS”) protest of a Notice of Tax Liability (“NTL”), captioned above, issued on June 1, 2011. The NTL assessed sales tax, penalties and interest based on the Illinois Department of Revenue’s (herinafter “Department’s”) determination that ABC BUSINESS had underreported sales of gasoline during the audit period. An evidentiary hearing was held in this matter on October 31, 2012, with testimony from Mr. Jerry Judkins, Revenue Auditor, for the Department. Following a review of the testimony and the evidence presented, it is recommended that the Notice 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 the Notice of Tax Liability, captioned above, dated June 1, 2011, covering the audit period July, 2007, to February, 2009. Tr. pp. 5-6; Dept. Ex. No. 1.
2. ABC BUSINESS was the subject of an audit conducted by the Department’s Auditor, Jerry Judkins. When the Auditor went to ABC BUSINESS to complete the audit, taxpayer did not have a complete set of vendor invoices, cash register tapes or books and records. Taxpayer did not have a general ledger, bank statements or cancelled checks. Tr. pp. 46-47, 59-60.
3. The Auditor attempted to verify the gallons of fuel purchased by ABC BUSINESS during the audit period by looking at the prepaid sales tax returns filed with the Department by ABC BUSINESS’s vendor and by looking at fuel delivery reports by ABC BUSINESS’s deliverer. Tr. pp. 47-49, 60-61.
4. The Auditor then calculated the projected sales of the gallons of fuel based on the monthly average selling price of a gallon of gas in ABC BUSINESS’s region, as reported by the U.S. Department of Energy. The Auditor subtracted certain statutory deductions that the taxpayer would have been allowed to take on his tax return to arrive at a “Taxable Base.” The Auditor multiplied the “Taxable Base” by the Illinois sales tax rate in effect for that month to arrive at “Tax Due.” The Auditor gave ABC BUSINESS credit for the gallons sold, as reported to the Department on their filed returns, and the tax paid on those gallons. The Auditor followed this method for all months in the audit period. Tr. pp. 11-24, 48-57, 63-64; Dept. Ex. Nos. 2 and 3.

5. The Auditor determined that ABC BUSINESS owed additional tax of \$XXXX for 2007, \$XXXX for 2008 and \$XXXX for 2009, totaling \$XXXX, as shown on the NTL. Tr. pp. 56-57; Dept. Ex. No. 3.
6. The Auditor assessed a negligence penalty on ABC BUSINESS. The negligence penalty was 20% of the tax due, which doubled to 40% because the tax due was not paid during amnesty. The negligence penalty was \$XXXX. The Auditor also assessed a late payment penalty on ABC BUSINESS. The late payment penalty was 15% of the tax due, with 5% added later because the tax due was not paid within 30 days. The late payment penalty doubled because the tax due was not paid during amnesty. The late payment penalty was \$XXXX. The “Auditor’s Comments” state that the taxpayer was notified of amnesty but no payment had been made. Tr. pp. 64-69; Dept. Ex. Nos. 1 and 3.
7. At the evidentiary hearing, ABC BUSINESS introduced no books, records or testimony showing that the Auditor’s calculations of gallons of fuel sold or the selling price of the gallons of fuel sold was incorrect.

**Conclusions of Law:**

The Retailers’ Occupation Tax Act requires that every person engaged in the business of selling tangible personal property at retail in Illinois shall keep records and books of all sales of tangible personal property, together with invoices, sales records or copies of bills of sale. “The Department may adopt rules that establish requirements, including record forms and formats, for records required to be kept and maintained by taxpayers.” 35 ILCS 120/7. The Department has established certain “minimum” requirements for record keeping. 86 Ill. Adm. Code § 130.805(a), entitled “What Records Constitute Minimum Requirements,” states as follows:

In General. A taxpayer shall maintain all records that are necessary to a determination of the correct tax liability under the Act. All required records must be made available on request by the Department. When a taxpayer's business consists exclusively of the sale of tangible personal property at retail, the following records will be deemed by the Department to constitute a minimum for the purposes of the Act:

- 1) Cash register tapes and other data which will provide a daily record of the gross amount of sales.

The Department's Auditor testified that when he audited ABC BUSINESS, taxpayer did not have a complete set of vendor invoices, register tapes or books and records. Taxpayer did not have a general ledger, bank statements or cancelled checks. Tr. pp. 46-47, 59-60. The Auditor attempted to verify the gallons of fuel purchased by ABC BUSINESS during the audit period by looking at the prepaid sales tax returns filed with the Department by ABC BUSINESS's vendor and by looking at fuel delivery reports by ABC BUSINESS's deliverer. Tr. pp. 47-49, 60-61.

The Auditor then calculated the projected sales of the gallons of fuel based on the monthly average selling price of a gallon of gas in ABC BUSINESS's region, as reported by the U.S. Department of Energy. The Auditor subtracted certain statutory deductions that the taxpayer would have been allowed to take on his tax return to arrive at a "Taxable Base." The Auditor multiplied the "Taxable Base" by the sales tax rate in effect for that month to arrive at "Tax Due." The Auditor gave ABC BUSINESS credit for the gallons sold, as reported to the Department on their filed returns, and the tax paid on those gallons. The Auditor followed this method for all months in the audit. Tr. pp. 11-24, 48-57, 63-64; Dept. Ex. Nos. 2 and 3.

If a taxpayer fails to maintain adequate records, and does not supply the Department with documentation to substantiate its gross receipts, the Department is justified in using other reasonable methods to estimate the taxpayer's revenues. Masini v. Department of Revenue, 60 Ill. App. 3d 11 (1<sup>st</sup> Dist. 1978). In the instant case, the taxpayer did not maintain adequate records and

the Auditor used a “reasonable” method to estimate the taxpayer’s revenues and the sales tax due on those revenues. The Auditor determined that ABC BUSINESS owed additional tax of \$XXXX for 2007, \$XXXX for 2008 and \$XXXX for 2009, totaling \$XXXX, as shown on the NTL. Tr. pp. 56-57; Dept. Ex. No. 3.

The Auditor assessed a negligence penalty on ABC BUSINESS, pursuant to Section 3-5 of the Uniform Penalty and Interest Act. 35 ILCS 735/3-5. The negligence penalty, \$XXXX, was 20% of the tax due, which doubled to 40% because the tax due was not paid during amnesty. 35 ILCS 735/3-5(e). The Auditor also assessed a late payment penalty on ABC BUSINESS, pursuant to Section 3-3 of the Uniform Penalty and Interest Act. 35 ILCS 735/3-3. The late payment penalty, \$XXXX, was 15% of the tax due, with 5% added later because the tax due was not paid within 30 days. The late payment penalty doubled because the tax due was not paid during amnesty. 35 ILCS 735/3-3(j). The “Auditor’s Comments” state that the taxpayer was notified of amnesty but no payment had been made. Tr. pp. 64-69; Dept. Ex. Nos. 1 and 3.

Sections 4 and 5 of the Retailers Occupation Tax Act provide that the admission into evidence of Department records under the 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 and 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 (1<sup>st</sup> Dist. 1987). The Department’s *prima facie* case is a rebuttable presumption. Copilevitz, supra.

In the instant case, the Department’s *prima facie* case was established by the admission into evidence of the NTL issued to ABC BUSINESS on June 1, 2011 under the certificate of the

Director of Revenue. The burden of proof then shifted to ABC BUSINESS 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 (1<sup>st</sup> Dist. 1991). Documentary proof is required to prevail against an assessment of tax by the Department. Sprague v. Johnson, 195 Ill. App. 3d 798 (4<sup>th</sup> Dist. 1990). A taxpayer cannot overcome the statutory presumption of correctness by denying the accuracy of the Department's assessment. A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3d 826 (1<sup>st</sup> Dist. 1988).

In the instant matter, no one from ABC BUSINESS appeared or testified at the hearing. No documentary evidence on behalf of ABC BUSINESS was offered into evidence. Accordingly, on examination of the record in this case, I conclude that ABC BUSINESS has failed to demonstrate by testimony, through exhibits or through argument, evidence sufficient to overcome the Department's determination that tax, penalties and interest, as determined on the NTL, is due.

WHEREFORE, for the reasons stated above, it is my recommendation that the Notice of Tax Liability, captioned above, issued to ABC BUSINESS on June 1, 2011, be finalized as issued.

March 22, 2013

Kenneth J. Galvin  
Administrative Law Judge