

ST 15-05

Tax Type: Sales Tax

Tax Issue: Propriety of Penalty

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

THE DEPARTMENT OF REVENUE)	Docket No.	XXXX
OF THE STATE OF ILLINOIS)	Account No.	XXXX
v.)	NTL No.	XXXX
ABC Business)		
)	John E. White,	
Taxpayer)	Administrative Law Judge	

RECOMMENDATION FOR DISPOSITION

Appearances: Mansoor Ansari, Ansari Tax Law Firm, appeared for ABC Business, LLC; George Foster, Special Assistant Attorney General, appeared for the Illinois Department of Revenue.

Synopsis:

This matter arose when ABC Business, LLC (Taxpayer) protested a Notice of Tax Liability (NTL) the Illinois Department of Revenue (Department) issued to it to assess retailers' occupation tax (ROT), penalties, and interest, following an audit of Taxpayer's business.

The hearing was held at the Department's offices in Chicago. At that hearing, counsel for Taxpayer challenged only the penalties assessed. I have reviewed the evidence admitted at hearing, and I am including in this recommendation findings of fact and conclusions of law. I recommend that the NTL be finalized as issued.

Findings of Fact:

Facts Regarding Taxpayer's Organization & Business

1. Taxpayer is an Illinois LLC which engaged in the business of selling beauty supplies at retail in Happyville, Illinois. Department Ex. 1 (consisting of a copy of the NTL issued to

Taxpayer, and a copy of the Department auditor's narrative report, under the Director's certificate of records), p. 4.

2. Taxpayer was registered with the Department as a retailer, and filed monthly returns with the Department. Department Ex. 1, pp. 2-3.

Facts Regarding the Department's Audit of Taxpayer

3. The Department conducted an audit of Taxpayer's business for the period from January 2010 through December 2011. Department Ex. 1, pp. 1-2. Lisa Fox (Fox) conducted the audit. *Id.*, p. 6.
4. Taxpayer did not have complete books and records for Fox to review during the audit. Department Ex. 1, pp. 2-3. The missing books and records included cash register tapes showing Taxpayer's actual daily sales. *Id.*, pp. 3-4, 7; *see also* 35 ILCS 120/7; 86 Ill. Admin. Code § 130.805(a)(1).
5. Instead of keeping cash register tapes showing its actual daily sales, Taxpayer made, kept, and produced for audit copies of computer spreadsheets on which it entered amounts purporting to reflect Taxpayer's daily cash and credit sales. Department Ex. 1, p. 3. However, because Taxpayer had no source documents which corroborated the entries on those spreadsheets, Fox had no way to confirm whether Taxpayer was reporting the correct amounts of receipts on the returns it filed regarding the months in the audit period. *Id.*
6. In the absence of source documents showing daily sales, Fox used a purchase markup method to estimate Taxpayer's sales for the audit period. Department Ex. 1, pp. 3-4.
7. Fox examined purchase records kept by Taxpayer, and also requested and examined sales records from vendors that sold goods to Taxpayer for resale. Department Ex. 1, pp. 3-4. She applied a markup percentage to Taxpayer's cost of such goods, to estimate the amount of

receipts Taxpayer would have realized from selling such goods at retail. *Id.*

8. After Fox reviewed the sales records she obtained from Taxpayer's vendors, she determined that Taxpayer purchased goods in amounts that were greater than those reflected on the purchase records Taxpayer produced for audit, and more than were reported as Taxpayer's cost of goods sold, on Taxpayer's federal returns. Department Ex. 1, pp. 3-4.
9. Fox took into account revisions (reductions) to Taxpayer's purchases of goods for resale, after Taxpayer produced evidence showing loss of inventory due to theft, and evidence showing Taxpayer's sale of remaining inventory when the business closed. Department Ex. 1, pp. 3-4.
10. After totaling the amount of receipts Fox estimated that Taxpayer would have realized from selling the goods it purchased for resale, Fox subtracted from such amount the gross receipts Taxpayer reported on the returns it filed during the audit period. Department Ex. 1, pp. 3-4, 7. Fox treated the difference between the estimated receipts and those reported on Taxpayer's returns as unreported receipts, and determined that tax was due on the difference. *Id.*, pp. 3-4.
11. Fox also determined that late payment and negligence penalties should be assessed, as well as late filing penalties for two of the months in the audit period. Department Ex. 1, pp. 5, 7.

Conclusions of Law:

The Department introduced a copy of the NTL it issued to Taxpayer into evidence under the certificate of the Director. Department Ex. 1. Pursuant to § 4 of the ROTA, that NTL constitutes the Department's prima facie case in this matter. 35 ILCS 120/4, 7. The Department's prima facie case is a rebuttable presumption. 35 ILCS 120/7; Copilevitz v. Department of Revenue, 41 Ill. 2d 154, 157, 242 N.E.2d 205, 207 (1968); DuPage Liquor Store, Inc. v. McKibbin, 383 Ill. 276, 279, 48 N.E.2d 926, 927 (1943).

A taxpayer cannot overcome the statutory presumption merely by denying the accuracy of the Department's assessment. A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3d 826, 833, 527 N.E.2d 1048, 1053 (1st Dist. 1988). Instead, a taxpayer has the burden to present evidence that is consistent, probable and closely identified with its books and records, to show that the assessment is not correct. Fillichio v. Department of Revenue, 15 Ill. 2d 327, 333, 155 N.E.2d 3, 7 (1958); A.R. Barnes & Co., 173 Ill. App. 3d at 833-34, 527 N.E.2d at 1053.

Issue and Arguments

At hearing, Taxpayer acknowledged that it was not challenging the tax assessed, because it was not able to supply cash register tapes that might have disproved the auditor's findings. Tr. pp. 4, 10. Taxpayer's counsel asked only that the penalties and interest assessed as part of the NTL be abated. *Id.*, pp. 4, 10.

Analysis

Section 4 of the ROTA provides, in pertinent part:

As soon as practicable after any return is filed, the Department shall examine such return and shall, if necessary, correct such return according to its best judgment and information. *** In the event that the return is corrected for any reason other than a mathematical error, any return so corrected by the Department shall be prima facie correct and shall be prima facie evidence of the correctness of the amount of tax due, as shown therein. ***

If the tax computed upon the basis of the gross receipts as fixed by the Department is greater than the amount of tax due under the return or returns as filed, the Department shall ... issue the taxpayer a notice of tax liability for the amount of tax claimed by the Department to be due, together with a penalty in an amount determined in accordance with Section 3-3 of the Uniform Penalty and Interest Act. Provided, that if the incorrectness of any return or returns as determined by the Department is due to negligence or fraud, said penalty shall be in an amount determined in accordance with Section 3-5 or Section 3-6 of the Uniform Penalty and Interest Act, as the case may be.

Proof of such notice of tax liability by the Department may be made at any hearing before the Department or the Illinois Independent Tax Tribunal or in any legal proceeding by a reproduced copy of the Department's record relating

thereto in the name of the Department under the certificate of the Director of Revenue. Such reproduced copy shall without further proof, be admitted into evidence before the Department or in any legal proceeding and shall be prima facie proof of the correctness of the amount of tax due, as shown therein.

35 ILCS 120/4; *see also* 35 ILCS 735/3-3; 35 ILCS 735/3-5.

Here, Fox determined that the late payment and negligence penalties should be added to the tax due for the entire audit period, and that a late filing penalty should be added to the tax required to be shown due for two of the months in the audit period. Department Ex. 1, pp. 5, 7. The Department then assessed those penalties in the NTL. Department Ex. 1, p. 1.

The two penalties described in § 3-3 of the Uniform Penalty and Interest Act (UPIA) are imposed based on a mathematical percentage of the amount of tax the Department determines is due. 35 ILCS 735/3-3; 35 ILCS 735/3-5; Diogenes v. Department of Finance, 377 Ill. 15, 22, 35 N.E.2d 342, 346 (1941) (“The taxpayer's return, as amended by the Department to include the ‘A’ penalty, was prima facie correct, and the duty rested upon the plaintiff to establish that his tax return had been filed on time and that the penalty was, in consequence, improperly exacted.”); Department of Finance v. Gandolfi, 375 Ill. 237, 240, 30 N.E.2d 737, 739 (1940) (“Our decision in Department of Finance v. Cohen, supra, that the power to review and revise tax returns under the Retailers' Occupation Tax Act is ministerial, and not judicial, as requiring merely a calculation or computation from data upon which all minds must ordinarily reach the same result, applies with equal force to the assessment of penalties under sections 4 and 5.”). The negligence penalty, authorized by UPIA § 3-5, is also measured as a percentage of the tax found due, and is imposed “if any return or amended return is prepared negligently, but without intent to defraud, and filed” 35 ILCS 735/3-5(a).

Section 3-8 of the UPIA provides that the penalties imposed under §§ 3-3 and 3-5 of the UPIA “shall not apply if the taxpayer shows that his failure to file a return or pay tax at the required time was due to reasonable cause.” 35 ILCS 735/3-8. This provision places the burden of production and persuasion on the taxpayer to show that the particular penalties assessed should not have been applied. *Id.* Whether the taxpayer acted reasonably, in other words, is a question of fact upon which evidence is required. *Id.* (“Reasonable cause shall be determined in each situation in accordance with the rules and regulations promulgated by the Department.”); PPG Industries, Inc. v. Department of Revenue, 328 Ill. App. 3d 16, 33, 765 N.E.2d 34, 48 (1st Dist. 2002) (agreeing that “[taxpayer] had the burden of overcoming [the Department’s] ... *prima facie* case through documentary evidence, meaning books and records, and not mere testimony.”).

Here, the evidence confirms that the Department determined that late payment and negligence penalties were due regarding the tax assessed, and that a late filing penalty was also due for two of the months in the audit period. Department Ex. 1, pp. 1, 5, 7; 35 ILCS 120/4. Since Taxpayer offered no evidence at hearing, it has not borne its burden to show that any of the penalties were improperly applied. 35 ILCS 735/3-3; 35 ILCS 735/3-5. For the same reason, Taxpayer has failed to show that any of the penalties should be abated for reasonable cause. 35 ILCS 735/3-8; PPG Industries, Inc., 328 Ill. App. 3d at 33, 765 N.E.2d at 48.

Conclusion:

I recommend that the Director finalize the NTL as issued, with penalties and interest to accrue pursuant to statute.

April 17, 2015

John E. White
Administrative Law Judge