

ST 07-9

Tax Type: Sales Tax

Issue: Books And Records Insufficient

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

**THE DEPARTMENT OF REVENUE
OF THE STATE OF ILLINOIS**

v.

**ABC FOOD, INC. d/b/a ABC
MARKET**

Taxpayer

**Docket # 00-ST-0000
IBT # 0000-0000
NTL # 00-00000000000000**

RECOMMENDATION FOR DISPOSITION

Appearances: Kent Steinkamp, Special Assistant Attorney General, for the Department of Revenue of the State of Illinois; John Malec of Martin, Malec & Leopold, P.C. for ABC Food, Inc. d/b/a ABC Market.

Synopsis:

The Department of Revenue (“Department”) conducted an audit of ABC Food, Inc. d/b/a ABC Market (“taxpayer”) for the period of May 1996 through March 1999. During the audit, the taxpayer did not provide the auditor with its books and records, and the auditor estimated the amount of liability owed by the taxpayer. On May 25, 2000, the Department issued a Notice of Tax Liability (“Notice”) to the taxpayer for the additional tax, and the taxpayer timely protested the Notice. At the time that the Notice was issued, the Department’s Bureau of Criminal Investigation had begun a criminal investigation

concerning this matter, and this case was placed on inactive status pending the outcome of the criminal investigation. Upon the completion of the criminal investigation, this matter was removed from the inactive calendar on September 14, 2006. An evidentiary hearing was held on February 21, 2007 during which the taxpayer argued that the defense of laches requires a dismissal of the Notice. After reviewing the record, it is recommended that this matter be resolved in favor of the Department.

FINDINGS OF FACT:

1. The taxpayer operates a convenience store in Cahokia, Illinois. (Tr. p. 21)
2. An investigator from the Department's Bureau of Criminal Investigation reviewed the tax returns of businesses in this area. The investigator noticed a large change between the sales tax reported by the taxpayer and the sales tax reported by the previous owners of the store. (Dept. Ex. #2; Tr. p. 26)
3. The Department's investigator conducted an audit of the taxpayer for the time period of May 1996 through March 1999. (Dept. Ex. #2)
4. The investigator was not able to obtain complete and accurate books and records for the business, so the investigator obtained the names of the suppliers used by the previous owner to determine the liability. (Dept. Ex. #2, 3; Tr. pp. 27-28)
5. Two investigators went to the taxpayer's business to confirm that the taxpayer was using the same suppliers as the previous owners. After obtaining a list of suppliers, an investigator contacted the suppliers to obtain the purchases made by the taxpayer. Only purchases of liquor, beer, and cigarettes were used to determine the liability because food sales are low rate items. (Dept. Ex. #2, 4; Tr. pp. 30-31, 33-35, 45)

6. The investigator marked the taxpayer's purchases up by 10%. The case was transferred to an office auditor who used the purchases marked up by 10% and compared this amount to the sales that were reported on the tax returns. The difference was multiplied by 7% for all the months during the audit period, except for January, February and March of 1999, when the tax rate was 7.25%. (Dept. Ex. #2, 4; Tr. pp. 16-19, 36-37, 43)
7. The investigator chose the markup figure of 10% by first interviewing an employee of the taxpayer, who stated that the markups varied between 5 and 20 percent. The investigator also compared the prices on the items with the purchase invoices and noticed markups ranging from 20% to 50%. The investigator chose 10% because she believed it was a conservative estimate for the markup. (Dept. Ex. #2; Tr. pp. 43-44)
8. For the audit period, the Department prepared corrected tax returns, Forms SC-10-K, that show additional tax due, late filing penalties, late payment penalties, and fraud penalties. The corrected returns were admitted into evidence under the certificate of the Director of the Department. (Dept. Ex. #2)

CONCLUSIONS OF LAW:

The Retailers' Occupation Tax Act ("ROTA") (35 ILCS 120/1 *et seq.*) imposes a tax upon persons engaged in the business of selling at retail tangible personal property.

35 ILCS 120/2. Section 7 of the ROTA provides in part as follows:

Every person engaged in the business of selling tangible personal property at retail in this State shall keep records and books of all sales of tangible personal property, together with invoices, bills of lading, sales records, copies of bills of sale, inventories prepared as of December 31 of each year or otherwise annually as has been the custom in the specific trade and other pertinent papers and documents. * * * All books and records and

other papers and documents which are required by this Act to be kept shall be kept in the English language and shall, at all times during business hours of the day, be subject to inspection by the Department or its duly authorized agents and employees. 35 ILCS 120/7.

Section 4 of the ROTA provides that the corrected return issued by the Department is *prima facie* correct and is *prima facie* evidence of the correctness of the amount of tax due, as shown therein. 35 ILCS 120/4. Once the Department has established its *prima facie* case by submitting a certified copy of the corrected return into evidence, the burden shifts to the taxpayer to overcome this presumption of validity. A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3d 826, 832 (1st Dist. 1988); Clark Oil & Refining Corp. v. Johnson, 154 Ill. App. 3d 773, 783 (1st Dist. 1987). To prove its case, a taxpayer must present more than its testimony denying the Department's assessment. Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill. App. 3d 203, 217 (1st Dist. 1991); Sprague v. Johnson, 195 Ill. App. 3d 798, 804 (4th Dist. 1990). The taxpayer must present sufficient documentary evidence to support its claim. *Id.*

The taxpayer argues that it has been prejudiced by the long period of time that passed waiting on the determination concerning whether criminal charges would be filed. It claims that the long period of time reduced its ability to respond to the Department's Notice. The taxpayer believes that the doctrine of laches should prevent the Department from pursuing the assessment because it made it difficult for the taxpayer to defend itself. In addition, the taxpayer contends that despite the assessment, there is insufficient evidence to support it. The taxpayer notes that the records from the suppliers were not part of the evidence, and it maintains that it did not have a chance to look at the documents and cross-examine the Department's conclusions regarding them.

The Department argues that the taxpayer timely protested the Notice in the year 2000, and at that time the taxpayer could have secured any records that it had to prepare for a hearing. The Department notes that although a long period of time elapsed, the taxpayer's attorney participated in the regular status conferences while the case was inactive, and he did not object to the case being held inactive. The Department also points out that the reason it sought the supplier records was because the taxpayer did not provide books and records at the time of the audit. The Department maintains that a conservative markup figure was used, and the auditors conducted the audit in a reasonable manner. The Department contends that it has supported its case, and the taxpayer has not overcome the Department's *prima facie* case.

A review of the record supports a finding that the taxpayer has failed to present sufficient evidence to overcome the Department's *prima facie* case. The taxpayer did not keep books and records of its sales as required by section 7 of the ROTA.¹ Without books and records, the Department was required to make its determination according to its best judgment and information. 35 ILCS 120/4. The Department was compelled to estimate the amount of the taxpayer's sales by obtaining the amount of the taxpayer's purchases from its suppliers. The Department marked up the purchases by 10%, which is a conservative markup, and then estimated the liability. The taxpayer could have obtained, through discovery, the documents that the Department relied upon in making its determination, but apparently did not do so. The Department's *prima facie* case was established when the certified copies of the corrected returns were admitted into

¹ The only documents presented by the taxpayer during the hearing were copies of its sales tax returns. (Taxpayer Ex. #1-4)

evidence. In response, the taxpayer failed to present any evidence, identified with its books and records, showing the Department's determination was inaccurate.

In addition, the doctrine of laches does not bar the Department from proceeding in this case. Laches is an equitable doctrine that bars an action if the plaintiff unreasonably delayed bringing the suit. Gacki v. Bartels, 369 Ill. App. 3d 284, 292-293 (2nd Dist. 2006). The doctrine of laches only applies if the defendant shows prejudice or hardship from the delay. *Id.* The taxpayer has not presented any facts indicating that it was prejudiced by the delay in this case. The taxpayer was aware of the potential liability while the audit was taking place and could have maintained its records at that time. The delay in the proceedings did not affect its ability to obtain records to refute that Department's determination. Nothing would support a finding that laches should apply.

Recommendation:

For the foregoing reasons, it is recommended that the Notice of Tax Liability be upheld.

Linda Olivero
Administrative Law Judge

Enter: June 11, 2007