

ST 98-14

Tax Type: SALES TAX

Issue: Unreported/Underreported Receipts (Non-Fraudulent)
Books And Records Insufficient
Disallowed General Deductions
Non-Filer (Failure To File Returns-Extends Limit)

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

THE DEPARTMENT OF REVENUE
OF THE STATE OF ILLINOIS,
Petitioner

v.

TAXPAYER,
Taxpayer

Linda K. Cliffel
Administrative Law Judge

No.

IBT No.

RECOMMENDATION FOR DISPOSITION

APPEARANCES: Marc Muchin, Special Assistant Attorney General, for the Department of Revenue;
Taxpayer appeared *pro se*.

SYNOPSIS:

This matter comes on for hearing pursuant to taxpayer's timely protest of Notices of Tax Liability ("NTL") issued to taxpayer by the Department of Revenue dated July 23, 1996 and July 24, 1996 for service occupation tax ("SOT"). Since taxpayer failed to file or pay SOT for the period October 1985 through December 1993 as shown on the NTL's numbered XXXXX and XXXXX, the issue is whether taxpayer has presented sufficient evidence to overcome the Department's determination of tax due as shown on the NTL's. Following the submission of all 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 against taxpayer, including all jurisdictional elements, was established by the admission into evidence of the NTL's. (Dept. Ex. No. 1)
2. Taxpayer is in the business of repairing jewelry. (Tr. pp. 29-31) She repaired jewelry for various jewelry stores. (Tr. pp. 16-17) She worked as an independent contractor for the stores rather than doing the work for the ultimate consumer. (Tr. pp. 27, 49) She also made custom jewelry per the jewelry store's specifications. Her major account was FICTITIOUS Jewelers. (Tr. p. 18)
3. Taxpayer's business was located at FICTITIOUS ADDRESS from 1985 until 1991 and then she worked out of her home at FICTITIOUS HOME ADDRESS. (Tr. pp. 43, 56) Taxpayer purchased gold from GOLD SUPPLIER which she used in making repairs. (Tr. p. 33) Taxpayer gave GOLD SUPPLIER her resale number and did not pay tax on her purchases. (Tr. pp. 58-59)
4. Taxpayer did not file federal income tax returns for 1985, 1986, 1988, 1989, 1990, 1991, 1992 and 1993. (Tr. p. 65) Taxpayer provided the auditor with a 1987 federal income tax return. The auditor was assigned to conduct an audit of taxpayer based on the records of purchases made by taxpayer from GOLD SUPPLIER for 5 months in 1993 because she had used a discontinued resale certificate. In conducting his audit he used these taxpayer's 1987 income tax return and the invoices from 5 months in 1993 to estimate purchases for all the open years. (Tr. pp. 58-62, Dept. Ex. No. 6)
5. The auditor calculated a cost percentage of 51.47 percent based on taxpayer's 1987 tax return. (Tr. pp. 63-64)
6. Taxpayer had no resale certificates from any of the jewelers she did business with. (Tr. pp. 33-34, 66)

CONCLUSIONS OF LAW:

According to 35 ILCS 115/3,

A tax is imposed upon all persons engaged in the business of making sales of services (referred to as "servicemen") on all tangible personal property transferred as an incident of a sale of service...

The taxpayer in this case is a serviceman under Illinois law. She transfers jewelry findings and gold in conjunction with the rendering of repair services on jewelry. Taxpayer argues that the jewelry stores for whom she performs services collect retailers' occupation tax from its customers, and therefore she is not liable for SOT. Assuming arguendo that taxpayer is correct that her transactions qualify as a sale for resale under §2(b),¹ the taxpayer has failed to present any resale certificates from any of the jewelry stores for which she has done work. In order to overcome the Department's *prima facie* case, the taxpayer must produce competent evidence identified with the taxpayer's books and records. Vitale v. Department of Revenue, 118 Ill. App. 3d 210 (3rd Dist. 1983). Merely questioning the Department's assessment or denying its accuracy is not enough. Quincy Trading Post v. Department of Revenue, 12 Ill. App. 3d 725 (4th Dist. 1973).

If the cost price of the tangible personal property transferred in conjunction with the service is less than 35 percent of the gross selling price, the serviceman is a de minimis serviceman. 35 ILCS 115/2(g). In the case of a de minimis serviceman, his sales of service are not subject to the service occupation tax, but rather the serviceman is subject to tax on the purchase of the tangible personal property from his supplier. TAXPAYER testified that her billings to the jewelry stores were primarily for labor, and that in many instances no tangible personal property was transferred. However, the only income tax return in evidence indicates a 51 percent cost percentage. Without documentary evidence to support her assertion, taxpayer is unable to rebut the Department's *prima facie* case. However, even if TAXPAYER qualified as a de minimis serviceman, her purchases would have been subject to tax.

Taxpayer has provided the Department's auditor with incomplete records which required him to make estimates regarding her liability. When asked about missing tax returns that she claimed she filed, taxpayer testified first that she lost her records when she moved, then when she was evicted and finally that some were lost in the Chicago flood. I find that taxpayer's testimony is not credible. It seems unlikely that taxpayer was not able to remove her records during the pendency of an eviction suit. More troubling is the inconsistency in

¹ Unless otherwise noted, reference to sections are to the Illinois Service Occupation Tax Act, 35 ILCS 115/1 et seq.

her statements that she moved from the downtown area in 1991, but that she lost records in the Chicago flood which occurred in April 1992.

The statute requires a serviceman making sales of service in this State to keep books and records accurately recording sales of services, among other things. 35 ILCS 115/11. When a taxpayer fails to supply the Department with records, the Department is justified in using other reasonable methods to estimate the tax base, and, in doing so, the Department is required only to meet a minimum standard of reasonableness. Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill. App. 3d 203 (1st Dist. 1991). In this case, the Department's auditor was provided with incomplete records by the taxpayer which required him to make estimates.

Under Section 4 of the Retailers' Occupation Tax Act (35 ILCS 120/4) (incorporated by 35 ILCS 115/12 into the Service Occupation Tax Act), a corrected return of the Department is *prima facie* evidence of the correctness of the amount of tax due and the Department's *prima facie* case is established by submitting the corrected return into evidence at the hearing. Elkay Manufacturing Co., v. Sweet, 202 Ill. App. 3d 466 (1st Dist. 1990). After considering the evidence and testimony presented at the hearing in this matter, I find that the taxpayer has failed to overcome the Department's *prima facie* case and that Department's determination of the cost basis of tangible personal property transferred as an incident to the sale of service was reasonable.

WHEREFORE, for the reasons stated above, it is my recommendation that the Notice of Tax Liability be affirmed in its entirety.

Date:

Linda K. Cliffler
Administrative Law Judge