

UT 09-5

Tax Type: Use Tax

Issue: Rolling Stock (Purchase/Sale Claimed To Be Exempt)

Use Tax On Aircraft Purchase

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

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

v.

ABC AVIATION, INC.

Taxpayer

**Docket # 00-ST-0000
IBT # 0000-0000
NTL # 00 000000000000**

RECOMMENDATION FOR DISPOSITION

Appearances: John Alshuler, Special Assistant Attorney General, for the Department of Revenue of the State of Illinois; Almon A. Manson, Jr. of Brown, Hay & Stephens, LLP for ABC Aviation, Inc.

Synopsis:

The Department of Revenue (“Department”) issued a Notice of Tax Liability (“NTL”) to ABC Aviation, Inc. (“taxpayer”) that assessed additional tax, penalties, and interest on the purchase of an aircraft pursuant to the Aircraft Use Tax Law (35 ILCS 157/10-1 *et seq.*). The taxpayer purchased the aircraft in December 2004 and filed a use tax return for the purchase; the taxpayer claimed the purchase was exempt from tax because the aircraft qualifies for the rolling stock exemption pursuant to section 3-55(b) of the Use Tax Act (35 ILCS 105/3-55(b)). The Department conducted an office audit,

and based on documentation submitted by the taxpayer, the Department determined that the aircraft did not qualify for the exemption. The taxpayer timely protested the NTL, and an evidentiary hearing was held during which the sole issue presented was whether the purchase of the aircraft is exempt from use tax on the basis that it is used for hire as rolling stock in interstate commerce. After reviewing the record, it is recommended that this matter be resolved in favor of the Department.

FINDINGS OF FACT:

1. On December 30, 2004, the taxpayer purchased a 1973 Mitsubishi MU-2B-25 aircraft from Econo Air, Inc.¹ (Dept. Ex. #1, #2)
2. The taxpayer's business address is in Anywhere, Illinois. (Dept. Ex. #1)
3. The taxpayer does not have a Federal Aviation Administration ("FAA") 135 certificate, which would allow it to operate in interstate commerce for hire. (Tr. p. 26)
4. On January 23, 2008, the Department prepared an SC-10-K, Audit Correction and/or Determination of Tax Due, for the purchase of the aircraft on December 30, 2004. The Department determined the taxpayer owed the aircraft use tax in the amount of \$32,906, plus penalties. (Dept. Ex. #1, p. 3)
5. On April 2, 2008, the Department issued an NTL to the taxpayer that shows tax due in the amount of \$32,906, plus interest and penalties, for the purchase of the aircraft on December 30, 2004. (Dept. Ex. #1, p. 2)

¹ The audit report indicates that the auditor was unable to locate information showing Econo Air, Inc. is an aircraft dealer, which subjects the purchase to the aircraft use tax. (Dept. Ex. #2)

CONCLUSIONS OF LAW:

The Aircraft Use Tax Law (“AUTL”) imposes a tax upon the privilege of using in Illinois any aircraft acquired by gift, transfer, or purchase after June 30, 2003. 35 ILCS 157/10-15. Section 10-35 of the AUTL incorporates by reference the Use Tax Act (“UTA”) (35 ILCS 105/1 *et seq.*), except for the provisions of section 3-70.² Section 12 of the UTA incorporates by reference section 5 of the Retailers' Occupation Tax Act (35 ILCS 120/1 *et seq.*), which provides that the Department’s determination of the amount of tax due shall be *prima facie* correct and shall be *prima facie* evidence of the correctness of the amount of tax due as shown therein. 35 ILCS 157/10-35; 105/12; 120/5.

Pursuant to these provisions, the Department determined the amount of tax due; the Department’s determination and the Notice of Tax Liability were admitted into evidence. Once the Department established its *prima facie* case by the admission of these documents, the burden of proof shifted to the taxpayer to overcome this presumption of validity. 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 testimony denying the Department's assessment. Sprague v. Johnson, 195 Ill. App. 3d 798, 804 (4th Dist. 1990). The taxpayer must present sufficient documentary evidence to support its claim. *Id.*

It is well-settled that tax exemption provisions are strictly construed in favor of taxation. Heller v. Fergus Ford, Inc., 59 Ill. 2d 576, 579 (1975). The party claiming the exemption has the burden of proving clearly and convincingly that it is entitled to the exemption, and all doubts are resolved in favor of taxation. *Id.*

² Section 3-70 of the UTA allows an exemption for property acquired by a nonresident. 35 ILCS 105/3-70.

The rolling stock exemption under the UTA provides in relevant part as follows:

Multistate exemption. To prevent actual or likely multistate taxation, the tax imposed by this Act does not apply to the use of tangible personal property in this State under the following circumstances:

* * *

(b) The use, in this State, of tangible personal property by an interstate carrier for hire as rolling stock moving in interstate commerce or by lessors under a lease of one year or longer executed or in effect at the time of purchase of tangible personal property by interstate carriers for-hire for use as rolling stock moving in interstate commerce as long as so used by the interstate carriers for-hire 35 ILCS 105/3-55(b).

The term “rolling stock” includes aircrafts. See 86 Ill. Admin. Code, ch. 1, §130.340(b).

In order for the taxpayer to qualify for this exemption, the taxpayer must establish that (1) the aircraft was used by an interstate carrier for hire and (2) the aircraft in question moved in interstate commerce. In order to prove that the aircraft moved in interstate commerce, the taxpayer must show that its interstate use was regular and frequent or more than merely incidental. National School Bus Service, Inc. v. Department of Revenue, 302 Ill. App. 3d 820, 826-827 (1st Dist. 1998).

The taxpayer contends the aircraft qualifies for the rolling stock exemption because it was purchased for commercial use in interstate commerce. The taxpayer’s president testified that he relied on information from the FBO (fixed base operator) in Anywhere, Illinois, who said there was a need for commercial charter aircrafts in Anywhere. (Tr. p. 10) The demand for charters in the Anywhere area, however, never materialized. (Tr. p. 22) The FBO gave the taxpayer an FAA 135 certificate number that was used on the taxpayer’s sales tax exemption form. (Tr. p. 11) The taxpayer believed that the FBO would place the taxpayer’s aircraft on the FBO’s 135 certification, but that never happened. (Tr. pp. 11, 19) The taxpayer claims that there were at least 2 or 3

interstate charter flights that took place during the first six months after the aircraft was purchased. (Tr. pp. 15, 27-28, 32-33) This was in addition to the flights required by the FAA and for insurance purposes. (Tr. pp. 14, 28)

The Department argues that the aircraft is subject to the tax because the taxpayer's intent to use the plane in interstate commerce is not sufficient to warrant the exemption. The plane was not actually used in interstate commerce either by an interstate carrier for hire or by a lessor who may have used it in interstate commerce for hire. The Department contends that there is no exception for a business opportunity that failed to materialize.

The evidence presented by the taxpayer does not establish that the aircraft qualifies for the rolling stock exemption. The taxpayer admitted it does not have an FAA 135 certificate, which means that it is not recognized by the FAA as an interstate carrier for hire, and the taxpayer does not have a certificate of authority to engage in interstate commerce. Although the testimony indicated the aircraft had two or three interstate charter flights, the taxpayer apparently did not have authority from the FAA to engage in these flights, and the taxpayer did not present the aircraft flight logs to substantiate these flights. Even if it is assumed that the aircraft was used in three interstate charter flights, this small number of interstate flights during the four and a half years that the taxpayer has owned the aircraft would not be sufficient to constitute regular and frequent interstate flights that are necessary for the exemption. Because the taxpayer has failed to meet its burden of overcoming the Department's *prima facie* case, the exemption must be denied.

It is, therefore, recommended that the Department's Notice of Tax Liability be upheld.

Linda Olivero
Administrative Law Judge

Enter: October 13, 2009