

UT 11-01

Tax Type: Use Tax

Issue: Use Tax On Out-Of-State Purchases Brought Into Illinois

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

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

RECOMMENDATION FOR DISPOSITION

Appearances: John Doe appeared, pro se; Marc Muchin, Special Assistant Attorney General, appeared for the Illinois Department of Revenue.

Synopsis:

Following audit, the Illinois Department of Revenue (Department) issued a Notice of Tax Liability (NTL) to John Doe (John Doe or Taxpayer). The NTL assessed Illinois use tax regarding Taxpayer's receipt of tangible personal property delivered to him from outside the United States in October 2006. Taxpayer protested the NTL and asked for a hearing. The issue at hearing was whether Taxpayer was subject to use tax regarding such property.

The hearing was held at the Department's offices in Chicago. Taxpayer testified and also offered documentary evidence. I have reviewed the evidence offered at hearing, and I am including in this recommendation findings of fact and conclusions of law. I recommend that the NTL be cancelled.

Findings of Fact:

1. Taxpayer conducts business as John Doe Unlimited, and performs electrical design and related services for hire. *See* Taxpayer Ex. 9 (copies of nine invoices detailing services performed by Taxpayer); Hearing Transcript (Tr.), pp. 28-29 (John Doe). (For purposes of this recommendation, whenever a document or exhibit contains the name John Doe Unlimited, I shall refer to Taxpayer).
2. In February 2005, Taxpayer prepared a proposal to perform services related to the “development of a custom switching type ballast to power UV lamps with auxiliary outputs.” Taxpayer Ex. 11 (copy of proposal, dated February 15, 2005). Taxpayer addressed and sent that proposal to ABC Business (ABC BUSINESS), which is located in Ontario, Canada. *Id.*; Tr. pp. 28-29 (John Doe).
3. Thereafter, Taxpayer performed services for ABC BUSINESS, and invoiced ABC BUSINESS for the services he performed. Taxpayer Ex. 9, pp. 1-7 (copies of seven invoices addressed to ABC BUSINESS, dated between November 2005 and September 2006).
4. Although Taxpayer’s proposed to design and manufacture ballasts for ABC BUSINESS (Taxpayer Ex. 11), ABC BUSINESS had another entity, XYZ Business, assemble the ballasts, and Taxpayer performed services for ABC BUSINESS and XYZ Business regarding such products. Taxpayer Ex. 9, pp. 8-12 (copies of, respectively, two invoices to XYZ Business, dated November and December, 2006, and three pages of copies of receipts for expenses Taxpayer incurred regarding work performed by Taxpayer for ABC BUSINESS and XYZ Business); Tr. pp. 29-30 (John Doe). XYZ Business is also located in Canada. Taxpayer Ex. 9, pp. 8-9.

5. During the course of performing services for ABC BUSINESS, Taxpayer communicated with ABC BUSINESS via email, and he also received emails from ABC BUSINESS. Taxpayer Ex. 6 (copies of emails between Taxpayer and ABC BUSINESS personnel, dated October 5, 2006 through October 18, 2006).
6. In October 2006, XYZ Business sent to Taxpayer, via VRT Supply Chain Solutions (VRT) as the importer, eight prototype ballast circuit boards that Taxpayer helped design for ABC BUSINESS, and which XYZ Business assembled. Taxpayer Ex. 3 (copies of, respectively, United States Customs (Customs) form 7501, Entry Summary; United States Customs form 3461, Entry/Immediate Delivery; and a shipping label naming XYZ Business as the shipper, and Taxpayer as the addressee); Taxpayer Ex. 6; Tr. pp. 28-30 (John Doe).
7. The Customs form 7501 names VRT as the broker/filer that completed the summary form on October 13, 2006, regarding the ballasts imported into the United States on October 5, 2006, shipped from XYZ Business to Taxpayer, and delivered to Taxpayer on October 6, 2006. Taxpayer Ex. 3, p. 1. Taxpayer is the named consignee on that form. *Id.*
8. The Customs form 7501 contains a “check the box” declaration section, which allows a filer to tailor its declaration regarding the property being imported into the United States. Taxpayer Ex. 3, p. 1. By checking certain boxes on the form 7051 VRT prepared regarding the property at issue, VRT made the following declaration:

I declare that I am the ... Importer of record and that the actual owner, purchaser or consignee for CBP [Customs and Border Patrol] purposes is as shown above, I further declare that the merchandise ... was not obtained pursuant to a purchase or agreement to purchase and the statements in the invoices as to value or price are true to the best of my knowledge and belief. ***

Taxpayer Ex. 3, p. 1.

9. By checking different boxes on the Customs form 7501, VRT could have notified Customs that the merchandise being imported “was obtained pursuant to a purchase or agreement to purchase and that the prices set forth are true to the best of [declarant’s] knowledge and belief.” Taxpayer Ex. 3, p. 1. But VRT did not do so. *Id.*
10. After performing services on the ballasts ABC BUSINESS shipped to Taxpayer, Taxpayer returned those ballasts to ABC BUSINESS, using Federal Express (PONYEX) as the shipper. Taxpayer Ex. 4 (copy of email, dated October 18, 2006, from PONYEX to Taxpayer, with subject heading of PONYEX Shipment Notification, regarding shipment of ballasts); Taxpayer Ex. 5 (copies of, respectively: a fax cover sheet from PONYEX to Taxpayer, dated March 10, 2010; a copy of a pro forma invoice, dated October 18, 2006, naming Taxpayer as shipper and ABC BUSINESS as consignee for shipment of 8 electronic lamp ballasts; and a copy of a PONYEX Customs summary sheet regarding the October 18, 2006 shipment from Taxpayer to ABC BUSINESS (PONYEX summary sheet)).
11. In May 2009, the Department initiated an audit of Taxpayer’s receipt of the ballasts shipped to him, via VRT, on October 6, 2006. Department Ex. 3 (copy of letter from the Department’s audit bureau to Taxpayer, dated May 14, 2009). William Gaffigan conducted the audit. *Id.*
12. Taxpayer responded to Gaffigan’s May 2009 letter, and provided documents to him regarding the ballasts delivered to Taxpayer in October 2006. Taxpayer Ex. 7-8 (copies of emails between Gaffigan and Taxpayer); Taxpayer Ex. 8 (copies of,

respectively: fax cover sheet from Taxpayer to Gaffigan; and PONYEX summary sheet).

13. When communicating with Taxpayer during the course of the audit, Gaffigan repeatedly asked Taxpayer to provide him with a copy of the Customs declaration form regarding the property delivered to Taxpayer on October 6, 2006, and all supporting documentation. Taxpayer Ex. 7; Tr. pp. 12-13 (Gaffigan). Taxpayer responded repeatedly to Gaffigan by email and otherwise, and some of the emails Taxpayer sent to Gaffigan contained .pdf files as attachments. Taxpayer Exs. 7-8.
14. Gaffigan determined that Taxpayer did not provide the documents Gaffigan requested. Tr. pp. 13-14, 17-19 (Gaffigan).
15. Gaffigan subsequently prepared a form SC-10-K, Audit Correction and/or Determination of Tax Due naming WU, c/o Taxpayer, as being liable for use tax regarding the property that was delivered to Taxpayer on October 6, 2006. Department Ex. 1 (copy of form).
16. On January 14, 2010, the Department issued an NTL to Taxpayer regarding his purchase of tangible personal property on October 6, 2006. Department Ex. 2 (copy of NTL). The NTL assessed tax, late filing and late payment penalties, and interest against Taxpayer. *Id.*

Conclusions of Law:

The Use Tax Act (UTA) imposes a tax “upon the privilege of using in this State tangible personal property purchased at retail from a retailer” 35 ILCS 105/3. The Illinois General Assembly incorporated into the UTA certain provisions of the complementary Retailers’ Occupation Tax Act (ROTA). 35 ILCS 105/12. Among the

incorporated provisions is § 5 of the ROTA, which provides that the Department's determination of tax due constitutes prima facie proof that tax is due in the amount determined by the Department. 35 ILCS 105/12; 35 ILCS 120/5. In this case, the Department established its prima facie case when it introduced into evidence a copy of the NTL under the certificate of the Director. Department Ex. 2. That exhibit, without more, constitutes prima facie proof that Taxpayer owes Illinois use tax in the amount determined by the Department. 35 ILCS 105/12; 35 ILCS 120/5.

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.

The persons subject to Illinois use tax are the owners of tangible personal property purchased, at retail, for use in Illinois. 35 ILCS 105/3; Telco Leasing, Inc. v. Allphin, 63 Ill. 2d 305, 309-10, 347 N.E.2d 729, 731 (1976). That intent is reflected within the UTA's definitions of the terms "use" and "purchaser." "Use" is defined as "the exercise by any person of any right or power over tangible personal property incident to the ownership of that property" 35 ILCS 105/2. "Purchaser," in turn, is

defined as “anyone who, through a sale at retail, acquires the ownership of or title to tangible personal property.” *Id.* Based on those definitions, the Illinois Supreme Court has held that “only the owner of property can be a user within the meaning of the Act.” Telco Leasing, Inc., 63 Ill. 2d at 309-10, 347 N.E.2d at 731.

During his opening statement and while testifying, Taxpayer explained that he did not purchase the ballast boards that were delivered to him in early October 2006, and that he received them as part of his agreement to perform services for ABC BUSINESS. Tr. pp. 6 (opening statement), 28-44 (John Doe). He also testified that, after he tested and evaluated the ballasts, he returned them to ABC BUSINESS in Canada. *Id.* In other words, Taxpayer does not claim that either he, or the property, is exempt from use tax; his defense is that his receipt of the property in Illinois was not subject to tax because he did not purchase the property at retail, or at all. *Id.*; *see also* DeWoskin v. Loew’s Chicago Cinema, Inc., 306 Ill. App. 3d 504, 519, 714 N.E.2d 1047, 1060 (1st Dist. 1999) (“Generally, the legislature may define a class which is subject to a specific tax and then exempt a subclass so long as there is some real and substantial difference between those taxed and those not taxed.”); 86 Ill. Admin. Code § 150.125 (“The Use Tax Act complements the Retailers’ Occupation Tax Act. That is why the Use Tax is restricted to cases in which the property is purchased at retail from a retailer.”).

In addition to offering his own testimony, Taxpayer also brought to hearing several documents which he identified and asked to be offered into evidence. Taxpayer Exs. 2-11; Tr. pp. 28-44 (John Doe). One of the exhibits, Taxpayer Exhibit 2, was subject to an objection by the Department (Tr. pp. 30, 37-38), and none of the findings of fact in this recommendation are based on exhibit. *See supra*, pp. 1-5.

The remaining exhibits were admitted without objection. Tr. pp. 39-44. Most of those exhibits were documents created by Taxpayer. Taxpayer Exs. 6-7, 9-11; Tr. pp. 28-44 (John Doe). These exhibits include: a copy of the proposal that Taxpayer prepared and sent to ABC BUSINESS to perform services for it (Taxpayer Ex. 11); copies of invoices Taxpayer prepared and issued to ABC BUSINESS and to XYZ Business, regarding the services he performed for ABC BUSINESS (Taxpayer Ex. 9); copies of emails Taxpayer wrote and sent to ABC BUSINESS regarding the shipment from Canada, and importation into the United States, of the property at issue (Taxpayer Ex. 6); a copy of a digital photograph of one of the ballasts (Taxpayer Ex. 10); and copies of emails Taxpayer sent to Gaffigan regarding the Department's audit of Taxpayer (Taxpayer Ex. 7).

Taxpayer also identified other documents that he personally received from others regarding the transaction at issue. These included the Customs documents and shipping labels he received from VRT regarding the delivery of the ballasts to Taxpayer on October 6, 2006 (Taxpayer Ex. 3), and the documents he received from PONYEX, who was the shipper of the ballasts when Taxpayer returned them to ABC BUSINESS on October 18, 2006. Taxpayer Exs. 4-5, 8.

The Customs documents Taxpayer identified as having received from VRT regarding the shipment at issue corroborate Taxpayer's testimony describing the nature of the property he received on October 6, 2006. Taxpayer Ex. 3. From the Department's perspective, that was a fact question that remained unresolved on the hearing date. Specifically, Gaffigan testified that, as of the date of the hearing, he was unaware of the nature of the tangible personal property that was delivered to Taxpayer on October 6,

2006. Tr. p. 13 (Gaffigan).

The invoices Taxpayer prepared corroborate Taxpayer's testimony explaining that he received the ballasts on October 6, 2006 in order to review, evaluate and test such property as an incident to the agreement to provide services for ABC BUSINESS. Taxpayer Ex. 9. The shipping notification and instructions Taxpayer received from PONYEX further corroborate his testimony that he returned the ballasts to Canada, shortly after he performed services on that property for ABC BUSINESS. Taxpayer Exs. 4-5, 8.

Finally, all of the documents Taxpayer offered as evidence were the type of documents that are required to be kept by persons to document a claim that a particular transaction is not subject to use tax that the person might otherwise owe directly to the Department. 35 ILCS 105/12; 35 ILCS 120/7; Klein Town Builders v. Department of Revenue, 36 Ill. 2d 301, 303-04, 222 N.E.2d 482, 484 (1967). On this point, § 150.1301 of Illinois' Use Tax Regulations provides, in pertinent part:

Section 150.1301 Users' Records

b) If the user is obligated to pay the Use Tax directly to the Department, he must have adequate records to show that he has fulfilled this obligation and to support his claim (if any) that certain purchases for use are not subject to the Use Tax.

c) For example, if the user claims that he has paid a tax in another state with respect to the sale, purchase or use of the same tangible personal property, the user must have, among his records, a receipt for such tax from an authorized collector of the tax or other proof that the user has paid a billing for such tax.

86 Ill. Admin. Code § 150.1301(b).

After considering Taxpayer's credible testimony, as well as the documentary evidence that is closely identified with Taxpayer's books and records (Taxpayer Exs. 3-

11), I conclude that Taxpayer has satisfied his burden to show that he did not purchase the ballasts that were delivered to him on October 6, 2006, either through a purchase at retail or otherwise. Since he has offered documentary evidence to show that he neither purchased nor owned the property that was delivered to him on October 6, 2006, he has rebutted the Department's prima facie case that he owed use tax regarding such property. 35 ILCS 105/3; Telco Leasing, Inc., 63 Ill. 2d at 309-10, 347 N.E.2d at 731; 86 Ill. Admin. Code § 150.125.

Once a taxpayer offers documentary evidence showing that the Department's determinations are not correct, the burden shifts to the Department to prove its case by a preponderance of the competent evidence. *See, e.g., Goldfarb v. Department of Revenue*, 411 Ill. 573, 580, 104 N.E.2d 606, 609 (1952). Here, the Department offered no such evidence.

Conclusion:

I recommend that the Director cancel the NTL in its entirety.

May 4, 2011

John E. White
Administrative Law Judge