

UT 12-04

Tax Type: Use Tax

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

STATE OF ILLINOIS  
DEPARTMENT OF REVENUE  
OFFICE OF ADMINISTRATIVE HEARINGS  
ANYWHERE, ILLINOIS

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THE DEPARTMENT OF REVENUE  
OF THE STATE OF ILLINOIS,

v.

SLEEPY HOTELS CORPORATION,  
Taxpayer

No. XXXXX

Account ID XXXXX

Letter ID XXXXX

Period 6/1/08

Ted Sherrod  
Administrative Law Judge

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**RECOMMENDATION FOR DISPOSITION**

**Appearances:** Special Assistant Attorney General George Foster on behalf of the Illinois Department of Revenue; Jane Doe, Esq., on behalf of Sleepy Hotels Corporation.

**Synopsis:**

This matter comes on for hearing pursuant to a protest filed by the taxpayer, Sleepy Hotels Corporation (“Sleepy Hotels” or “taxpayer”), contesting the Department’s Notice of Tax Liability for Form EDA-94, Auditor-prepared Use Tax Report issued December 10, 2010. The basis of the assessment was the Department’s determination that the taxpayer failed to pay use tax due to the Department on tangible personal property the Department contends the taxpayer purchased on or about June 1, 2008. The taxpayer claims that it never purchased the property in controversy and never owned or used it in Illinois. An evidentiary hearing was held in this matter on April 25, 2012 during which Mary Black and John Doe, employees of the taxpayer, testified on the taxpayer’s behalf. Following a review of the testimony and the evidence

submitted by the taxpayer, it is recommended that the Notice of Tax Liability at issue in this case be cancelled.

**Findings of Fact:**

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, is established by the admission into evidence of the Department's Notice of Tax Liability for Form EDA-94, Auditor-prepared Use Tax Report issued December 10, 2010 assessing Illinois use tax in the amount of \$XXXXXX (including penalty and interest) for the period 6/1/08. Department Ex. 1. The Department's assessment is based upon a summary of customs documentation, admitted under the Certificate of the Director, designating the taxpayer as the "consignee" of "Woven fabrics of artificial staple fibers nesoi, dyed, nesoi" (hereinafter "fabrics") having an estimated value of \$XXXXXX. Department Ex. 2.
2. The taxpayer is identified in the Department's work papers by its federal identification number. The federal identification number of the taxpayer identified in the Department's work papers is FEIN XXXXXX. Department Ex. 2. The corporation having this federal identification number is Sleepy Hotels Corporation ("Sleepy Hotels"), a subchapter C corporation for federal income tax purposes, having its principal address in Anywhere, Illinois. Taxpayer's Ex. 3.
3. The taxpayer is a wholly-owned subsidiary of Global Sleepy Corporation ("Global Sleepy"), and was included in Global Sleepy's federal consolidated return for the tax year and calendar year ended 12/31/08. Taxpayer's Ex. 4.
4. Sleepy Hotels filed a *pro forma* federal Form 1120 return that was included in Global Sleepy's federal consolidated return for the tax year and calendar year ended December 31, 2008. Tr. p. 32; Taxpayer's Ex. 3, 4. Sleepy Hotels' balance sheet for 2008, filed as

part of its *pro forma* Form 1120 return for that year, indicates that Sleepy Hotels had no assets during calendar year 2008. Taxpayer's Ex. 3.

5. Sleepy Hotels' profit and loss statement filed as part of its *pro forma* form 1120 for the tax year and calendar year 2008 indicates that Sleepy Hotels engaged in no business activity during 2008 and had no revenues or indebtedness during that calendar year. *Id.*

### **Conclusions of Law:**

The issue in this case is whether the taxpayer is liable under the Illinois Use Tax Act ("UTA"), 35 ILCS 105/1 *et seq.*, for use tax assessed on fabrics the Department contends it purchased and had delivered to its place of business in Anywhere, Illinois. Tr. p. 5; Department Ex. 1. The assessment made by the Department is based upon several sections of the UTA. The 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. "Purchase at retail" means the acquisition of the ownership of tangible personal property through a sale at retail. 35 ILCS 105/2. "Sale at retail" means any transfer of the ownership of tangible personal property to a purchaser, for the purpose of use and not for the purpose of resale. *Id.*

The Department's *prima facie* case is established at hearing before the Department, or in any other legal proceeding, through the introduction into evidence of the Department's records under the Certificate of the Director. 35 ILCS 120/8 (incorporated by reference into the UTA at 35 ILCS 105/12).<sup>1</sup> In the instant case, the Department's *prima facie* case was established by the introduction of the Notice of Tax Liability at issue in this case under the Certificate of the Director. To overcome the Department's *prima facie* case, the taxpayer must present consistent, probable evidence that is identified with its books and records. Copilevitz v. Department of Revenue, 41 Ill. 2d 154 (1968); Central Furniture Mart V. JMary Blacknson, 157 Ill. App. 3d

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<sup>1</sup> Unless otherwise noted, all statutory references are to 35 ILCS 105/1, *et seq.*, the Illinois Use Tax Act.

907 (1<sup>st</sup> Dist. 1987). Testimony alone is not enough. Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill. App. 3d 203 (1<sup>st</sup> Dist. 1991); A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3d 826 (1<sup>st</sup> Dist. 1988). Documentary proof is required to prevail against an assessment of tax by the Department. Sprague v. Johnson, 195 Ill. App. 3d 798 (4<sup>th</sup> Dist. 1990).

In the instant case, John Doe, the taxpayer's Vice President of Domestic Taxes testified that, during the entire calendar year 2008, the taxpayer was an inactive corporation having as its sole function holding intangible assets of its parent company, Global Sleepy, and that it engaged in no activity of any kind during that year. Tr. pp. 31-34. Mr. John Doe's testimony was consistent with testimony given earlier during the hearing proceedings in this matter by Mary Black, an employee of the taxpayer. Tr. pp. 13-19. Ms. Mary Black also testified that the taxpayer engaged in no activities of any kind during 2008 and was essentially a shell corporation. Id.

I find the testimony of both Mr. John Doe and Ms. Mary Black to be credible. Moreover, this testimony is supported by Mr. John Doe's affidavit, included in the record in this case without objection, in which he avers that the taxpayer "was inactive in 2008" and "had no assets, income, operations or activity in 2008...[.]". Taxpayer's Ex. 2. However, this testimony and testimonial evidence in the form of Mr. John Doe's affidavit is insufficient, in and of itself, to rebut the Department's determination of liability. Mel-Park Drugs, supra; Sprague, supra.

During the hearing in this case, the taxpayer also introduced documentary evidence from its books and records that completely corroborate the taxpayer's claim that Sleepy Hotels was an inactive corporation during 2008. This documentary evidence consist of the taxpayer's balance sheet filed with its 2008 *pro forma* federal income tax return showing that the taxpayer had no assets during calendar year 2008, and that it made no purchases or sales during that year.

Taxpayer's Ex. 3. This documentation also shows that it generated no financial resources either through sales or by borrowing funds during this period. *Id.*

I find that the taxpayer's documentary evidence showing the absence of any assets on the taxpayer's balance sheet, and the absence of any means of acquiring assets during the entire 2008 calendar year corroborated the taxpayer's claim that it was an inactive corporation during 2008 and engaged in no activities of any kind during that year. The absence of any assets and any means to acquire assets during 2008 strongly supports the taxpayer's claim that it could not have made the purchase of fabrics alleged by the Department that is the basis for the Department's assessment determination. Consequently, I find that the testimony given by the witnesses that testified on the taxpayer's behalf is supported by consistent and probable evidence identified with its books and records in the form of the taxpayer's *pro forma* federal income tax return for 2008. Since this testimony is supported by competent and persuasive documentary evidence, I find that the evidence the taxpayer has presented meets the prerequisites required by Illinois law to rebut the Department's *prima facie* case. Copilevitz, supra; Central Furniture Mart, supra; Mel-Park Drugs, supra; Sprague, supra.

Once a taxpayer successfully rebuts the Department's *prima facie* case through the introduction of documentary evidence showing that the Department's determination is not correct, the burden shifts to the Department to prove its case by a preponderance of the competent evidence. Goldfarb v. Department of Revenue, 411 Ill. 573, 580 (1992). During the Department's rebuttal case, the Department introduced evidence it contends is sufficient to carry its burden to rebut the taxpayer's evidence. However, for the reasons enumerated below, I find that the Department's evidence was insufficient to carry its burden on rebuttal.

The Department contends that the taxpayer's proof is rebutted by a summary of customs documentation introduced into the record under the Certificate of the Director. Department Ex. 2. The aforementioned documentation indicates that on June 1, 2008, Business A ("Business A") imported property described as "[W]oven fabrics of artificial staple fibers nesoi, dyed, nesoi" having an estimated value of \$XXXXXX. *Id.* The summary of customs documentation also indicates that the taxpayer (identified by its FEIN number on this documentation) is designated as the "consignee" of the property that was imported by Business A. *Id.* The Department contends that this documentation shows the purchase and importation of the property in controversy into the United States by the taxpayer and establishes that it was shipped and delivered to the taxpayer in Illinois. Tr. pp. 39-49. Consequently, it contends, this documentation constitutes an evidentiary basis for the Department's assessment determination of liability.

A review of the documentation provided by the Department (Department Ex. 2) indicates that it contains no information regarding the delivery of the fabrics in controversy. The only address related to the importation of the property at issue indicated in the customs documentation is the home address of Business A, the importer shown in the customs documentation. *Id.* This delivery is in New York rather than Illinois. *Id.* Absent indicia of delivery to the taxpayer in the documentation the Department has produced, the record in this case is completely devoid of any proof that the property at issue was shipped or delivered to Illinois. Moreover, nowhere in the summary of customs documentation the Department seeks to rely upon is there any indication that the taxpayer was the purchaser of the fabrics in controversy. In this state of the record, I find that the customs documentation is far from dispositive evidence establishing that the

taxpayer purchased the fabrics in controversy or showing that the fabrics were shipped or delivered to the taxpayer for use in Illinois.

The documentation at issue also designates the taxpayer as the “consignee” of the property in controversy. *Id.* The Department infers from this designation that the taxpayer was the purchaser of the property at issue. Tr. pp. 40, 41, 44-46. However, Illinois case law addressing the legal effect of a consignment of property does not support the inference the Department has drawn from the taxpayer’s status as “consignee.”

A review of the voluminous case law in Illinois addressing the legal effects of a consignment of property indicates that the hallmark of a consignment is the absence of a transfer of title by the consignor of property to the consignee. Anywhere Budget Rent-A-Car Corp. v. Maj, 5 Ill. App. 3d 265 (2d Dist. 1972); Country Mutual Insurance Co. v. Waldman Mercantile Co., 103 Ill. App. 3d 39 (5<sup>th</sup> Dist. 1981); Mori v. Anywhere National Bank, 3 Ill. App. 2d 49 (1<sup>st</sup> dist. 1954); F.F. Ide Manufacturing Co. v. Sager Manufacturing Co., 82 Ill. App. 685 (2d Dist. 1898); W.O. Dean Company v. Lombard, 61 Ill. App. 94 (3d Dist. 1895); Lewis v. Springville Banking Co., 166 Ill. 311 (1897); Berry v. W.D. Allen & Co., 59 Ill. App. 149 (2d Dist. 1894). As a consequence of this absence of a transfer of title, a consignment is also characterized by the non-existence of any absolute obligation on the part of the consignee to pay for the goods being transferred. Pease v. Rand & Leopold Desk Co., 100 Ill. App. 244 (1<sup>st</sup> Dist. 1902); W.O. Dean Company, *supra*. The case law firmly establishes that the consignee is not a buyer, but only an agent for the buyer. F.F. Ide Manufacturing Co., *supra* at 687. (“Consign ... is to send goods to an agent commission merchant, correspondent or factor to be sold, stored.”).

Where a consignment involves a title transfer, title does not pass to the consignee or through it. W.D. Allen & Co., *supra*. Accordingly, “a consignment of goods for sale does not

pass title at any time, nor does it contemplate that it should be passed.” Hawkland, Consignment Under the Uniform Commercial Code, 67 Commercial L.J. 146, 147 (1962). Rather, “[T]he very term implies an agency, and that title is in the consignor, the consignee being his agent.” *Id.* The foregoing authority clearly indicates that, under Illinois case law, the essence of the status of “consignee” is that of one who is given custody or possession for some limited purpose while title itself is withheld and remains with the consignor.

The foregoing authorities establish general rules governing the legal effects of consignment transactions. These general rules have been recognized by the Department as controlling the tax consequences of transactions that are subject to Illinois sales and use tax. See Department of Revenue General Information Letter No. ST 08-0143-GIL, wherein the Department states the following:

Under common law, a consignment is a special type of bailment in which property is transferred by the consignor to the consignee ...[.] The initial transfer to the consignee ... generally is not considered a sale for sales tax purposes. The transaction is more in the nature of a transfer to an agent or bailee to act on behalf of the principal or bailor for the purpose of transferring title to a purchaser.

For the foregoing reasons, I find that the designation of the taxpayer as “consignee” in the summary of customs documentation upon which the Department relies is insufficient to establish that the taxpayer was indeed the purchaser of the property at issue. Since a consignment to a “consignee” does not connote a right of ownership or “ipso facto” make the consignee an owner or purchaser of the consigned property, it cannot be inferred from the designation of the taxpayer as “consignee” on the documentation the Department has submitted that the taxpayer was the purchaser and owner of the property in controversy.

Given the introduction of testimony and corroborating documentation into the record in this case indicating that the taxpayer was not the owner or purchaser of the fabrics constituting

the property in controversy, and the Department's failure to offer rebuttal evidence sufficient to refute the taxpayer's evidence, I find that the taxpayer has presented sufficient proof to negate the correctness of the Department's determination.<sup>2</sup>

**WHEREFORE**, for the reasons stated above, it is recommended that the Department's Notice of Tax Liability at issue in this case be cancelled.

**Ted Sherrod**  
**Administrative Law Judge**

**Date: August 20, 2012**

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<sup>2</sup> During the hearing, the Department's litigator theorized that the purchaser of the fabrics at issue may have been an operating affiliate of the taxpayer and that the designation of the taxpayer in the customs documentation the Department produced may have resulted from an error made by one of the taxpayer's affiliates. Tr. pp. 42, 43. It contends that its assessment should be sustained because the record should have shown that the purchaser was a member of the Sleepy group of companies, even if it was not necessarily the taxpayer. *Id.* The Department's theory, while plausible, is not supported by evidence of any kind contained in the record and, therefore, must be rejected as a basis for sustaining the Department's assessment determination.