

UT 15-07

Tax Type: Use Tax

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

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

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

v.

**ABC BUSINESS INC.,
Taxpayer**

**No. XXXX
Account ID XXXX
Letter ID XXXX
Period 6/17/11**

**Ted Sherrod
Administrative Law Judge**

RECOMMENDATION FOR DISPOSITION

Appearances: Special Assistant Attorney General Daniel Edelstein on behalf of the Illinois Department of Revenue; Jane Doe, *pro se* on behalf of ABC Business Inc.

Synopsis:

This matter involves an audit determination issued by the Illinois Department of Revenue (“Department”) to ABC Business Inc. (“taxpayer”) to assess use tax regarding the taxpayer’s use in Illinois of a 2012 Timpte Hopper trailer (“Hopper”) it purchased on June 17, 2011. The taxpayer, at the time it purchased the Hopper, claimed that the Hopper was exempt from Illinois use tax as rolling stock used in interstate commerce. The Department determined that the Hopper was not rolling stock used in interstate commerce and assessed use tax. The taxpayer protested this audit determination and requested a hearing, which was held on September 9, 2015. During the hearing, a representative of the taxpayer presented testimony and the Department and the taxpayer introduced numerous documents into the record. After considering the record and the parties’ arguments, I am including in this recommendation findings of fact and conclusions of

law. I recommend that the Director finalize the Department's Notice of Tax Liability for Form EDA-95, Auditor-prepared Motor Vehicle Use Tax Report, as issued pursuant to statute.

Findings of Fact:

1. The *prima facie* case of the Department, inclusive of all jurisdictional elements, was established by the admission into evidence of the Department's Notice of Tax Liability for Form EDA-95, Auditor-prepared Motor Vehicle Use Tax Report. Department Exhibit ("Ex.") 13.
2. The Department issued an EDA-95, Auditor-prepared Motor Vehicle Use Tax Report and a Notice of Tax Liability for tax, penalties and interest for the liability date June 17, 2011 in the amount of \$XXXX. *Id.*; Department Ex. 11. The Department's determination of liability arose from an office audit performed by the Department with respect to the taxpayer's purchase of a 2012 Timpte Hopper ("Hopper") trailer on June 17, 2011. Transcript of Hearing September 9, 2015 ("Tr.") pp. 11-13; Department Ex. 2, 3, 5, 9.
3. The tax and penalties that the Department proposed against the taxpayer are attributable to the Department's denial of a rolling stock exemption under the Illinois Use Tax Act claimed by the taxpayer when it purchased the Hopper. *Id.*
4. Subsequent to its purchase, during the period June, 2011 through June, 2012 examined by the auditor, the Hopper at issue was used exclusively to transport commodities between points in Illinois. Tr. pp. 15, 22, 23, 26; Department Ex. 4, 8.
5. The taxpayer's trip log (Ex. 8) contains information concerning all of its vehicles. Tr. pp. 21, 22. The taxpayer highlighted trips shown in its log taken by the Hopper and the Department's auditor determined that all of these trips were for hire. Tr. pp. 15, 17, 25. The trip log indicates that all of the trips taken by the Hopper during 2011 and 2012,

which are highlighted in the taxpayer's trip log, originated and terminated in Illinois. Department Ex. 8.

6. The Department's auditor performed an analysis with regard to the taxpayer's Hopper to determine whether it qualified for the rolling stock exemption. Tr. pp. 11, 12. The auditor's analysis compared the Hopper's total miles traveled on trips involving the transport of shipments in interstate commerce for hire during the period June 17, 2011 through June 1, 2012 with the Hopper's total miles travelled during that period. Tr. pp. 17, 18; Department Ex. 10. Based upon this analysis, the auditor determined that interstate travel by the Hopper involving trips for hire constituted only 11 percent of the vehicle's total miles travelled during that period. *Id.*¹
7. Based upon the foregoing analysis, the auditor determined that the use of the Hopper in interstate commerce was insufficient for the vehicle to qualify for the rolling stock exemption. *Id.*
8. The Hopper was used exclusively to haul grain from farms in Illinois to grain terminals in this state. Tr. pp. 15, 22, 23; Department Ex. 4, 5, 8. In the auditor's analysis to determine the taxpayer's eligibility for the rolling stock exemption, the auditor did not treat as trips in interstate commerce the taxpayer's trips for hire transporting grain that originated in Illinois and terminated at grain terminals in Illinois because the documents provided by the taxpayer were insufficient to show that this grain was shipped outside of Illinois after delivery by the taxpayer to these grain terminals. Tr. p. 23.
9. The grain the taxpayer delivered to grain terminals in Illinois was accumulated with grain deliveries from other transporters for distribution to ultimate destinations that could not

¹ The record indicates that, during the period analyzed by the auditor, the Hopper was used exclusively for transport between points in Illinois. It is unclear from the record how the auditor determined which of these trips constituted trips involving interstate commerce qualifying for exemption because involving the transport of shipments having their origin or destination outside of Illinois.

be identified by grain terminal operators, and the grain terminal operators did not know whether these ultimate destinations were inside of, or outside of Illinois. Tr. pp. 26-33; Taxpayer's Ex. 1-3.

10. The taxpayer has been issued authority number XXXX from the Interstate Commerce Commission as evidence of the taxpayer's authority to engage in interstate transportation by motor vehicle. Department Ex. 4. This authority was in effect on the date the taxpayer purchased the Hopper. Department Ex. 9.²

Conclusions of Law:

The Department prepared a corrected return for use tax liabilities for ABC Business Inc. ("taxpayer") pursuant to section 4 of the Retailers' Occupation Tax Act (the "ROTA"), 35 ILCS 120/4. Said section is incorporated into the Use Tax Act (the "UTA") by section 12 of the UTA, 35 ILCS 105/12. Section 4 of the ROTA provides in pertinent part as follows:

As soon as practicable after any return is filed, the Department shall examine such return and shall, if necessary, correct such return according to its best judgment and information ... [which return] ... shall be prima facie correct and shall be prima facie evidence of the correctness of the amount of tax due, as shown therein.

Proof of such correction by the Department may be made at any hearing before the Department or any legal proceeding by reproduced copy in the name of the Director of Revenue. ... Such certified reproduced copy ... shall without further proof, be admitted into evidence before the Department or in any legal proceeding and shall be prima facie proof of the correctness of the amount of tax due, as shown therein.
35 ILCS 120/4.

In the case at issue the taxpayer has challenged the assessment by the Department of use tax, penalty and interest on the purchase of a 2012 Timpte Hopper trailer which is exclusively

² At the time the taxpayer purchased the Hopper, the taxpayer's Interstate Commerce Commission authority number was XXXX. Tr. p. 14; Department Ex. 9.

used to haul grain between points in Illinois. Tr. pp. 15, 22, 23; Department Ex. 4, 5, 8. The taxpayer avers that the Hopper was exempt from use tax based upon the rolling stock exemption as set forth in sections 3-55, 3-60 and section 3-61 of the UTA, 35 **ILCS** 105/3-55, 35 **ILCS** 105/60 and 35 **ILCS** 105/3-61. These statutory provisions state as follows:

§ 3-55. 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 ...

(c) The use, in this State, by owners, lessors, or shippers of tangible personal property that is utilized by interstate carriers for hire for use as rolling stock moving in interstate commerce as long as so used by the interstate carrier for hire ...[.]

35 **ILCS** 105/3-55(b), (c)

§ 3-60. Rolling stock exemption. Except as provided in Section 3-61 of this Act, the rolling stock exemption applies to rolling stock used by an interstate carrier for hire, even just between points in Illinois, if the rolling stock transports, for hire, persons whose journeys or property whose shipments originate or terminate outside of Illinois.

35 **ILCS** 105/3-60

§ 3-61. (d) Beginning July 1, 2004, “used as rolling stock moving in interstate commerce” in paragraphs (b) and (c) of Section 3-55 occurs for trailers, as defined in Section 1-209 of the Illinois Vehicle Code, semitrailers as defined in Section 1-187 of the Illinois Vehicle Code, and pole trailers as defined in Section 1-161 of the Illinois Vehicle Code, when during a 12-month period the rolling stock has carried persons or property for hire in interstate commerce for greater than 50% of its total trips for that period or for greater than 50% of its total miles for that period. ... If no election is made under this subsection to use the trips or mileage method, the person shall be deemed to have chosen the mileage method.

35 **ILCS** 105/3-61(d)

The Department has promulgated a regulation that addresses the aforementioned statutory measures at 86 Ill. Admin. Code, ch. I, Section 130.340. This regulation provides, in part, as follows:

- a) Notwithstanding the fact that the sale is at retail, the Retailers' Occupation Tax does not apply to sales of tangible personal property to interstate carriers for hire for use as rolling stock moving in interstate commerce ...[.]
- b) The term "Rolling Stock" includes the transportation of vehicles of any kind of interstate transportation company for hire (railroad, bus line, air line, trucking company, etc.) ...[.]

- d) Except as provided in subsection (h) of this Section, the exemption applies to vehicles used by an interstate carrier for hire, even just between points in Illinois, in transporting, for hire, persons whose journeys or property whose shipments, originate or terminate outside Illinois on other carriers. The exemption cannot be claimed for an interstate carrier's use of vehicles solely between points in Illinois where the journeys of the passengers or the shipments of property neither originate nor terminate in Illinois.

86 Ill. Admin. code, ch. I, section 130.340(a), (b), (d)

In order to qualify for exemption from the UTA and the ROTA, case law is clear that the burden is always on the taxpayer to show that it is entitled to the exemption. Statutes that exempt property, a transaction, or an entity from taxation must be strictly construed in favor of taxation and against exemption. Wyndemere Retirement Community v. Department of Revenue, 274 Ill. App. 3d 455 (2d Dist. 1995). Moreover, the party claiming the exemption has the burden of clearly proving that it is entitled to the exemption, with all doubts being resolved in favor of taxation. Heller v. Fergus Ford, 59 Ill. 2d 576 (1975).

In order to qualify for the rolling stock exemption, a claimant must fulfill three distinct requirements. First, to be considered an interstate carrier for hire, the taxpayer must either possess an Interstate Commerce Commission Certificate of Authority, an Illinois Commerce Commission Certificate of Authority or a comparable certificate certifying that it is a type of interstate carrier for hire not required by law to have an Illinois Commerce Commission

Certificate of Authority. See 86 Ill. Admin. Code, ch. I, section 130.340(g). The taxpayer has produced to the Department's auditor evidence that it possesses an Interstate Commerce Commission certificate of authority. Tr. pp. 13, 14; Department Ex. 4, 9. Consequently, this requirement has been fulfilled.

The second requirement needed to qualify for exemption is that the interstate carrier be "for hire" when providing transportation services. 35 ILCS 105/3-55(b). During the hearing, the auditor testified that he found that all trips taken by the Hopper during the period June 17, 2011 through June 1, 2012 were for hire, and all of these trips were used by the auditor to determine the taxpayer's eligibility for the rolling stock exemption. Tr. pp. 15, 17, 25.

The third requirement necessary to qualify for exemption is that the taxpayer transport persons or property for hire moving in interstate commerce. 35 ILCS 105/3-55(b). As previously noted, with respect to this requirement, section 3-60 of the UTA, 35 ILCS 105/3-60, provides as follows:

§ 3-60. Rolling stock exemption. Except as provided in Section 3-61 of this Act, the rolling stock exemption applies to rolling stock used by an interstate carrier for hire, even just between points in Illinois, if the rolling stock transports, for hire, persons whose journeys or property whose shipments originate or terminate outside of Illinois.
35 ILCS 105/3-60

During the evidentiary hearing in this case, the taxpayer argued that, even though its Hopper is used exclusively in Illinois to transport grain between points within this state, it nevertheless qualifies for the rolling stock exemption pursuant to section 3-60 of the UTA. Tr. pp. 37-42.

As is evident from the provisions of section 3-60 indicated above, the trips or mileage of a vehicle carrying persons or property for hire just between points in Illinois may be used to qualify for the rolling stock exemption, if the journey of the passengers or the shipment of the property either originates or terminates outside of Illinois. Consequently, the taxpayer is correct in asserting that trailers used to carry property for hire just between points in Illinois, and that

never leave the state, can nevertheless qualify for the rolling stock exemption when transporting shipments that originate or terminate outside of Illinois.

The record in this case indicates that the taxpayer's only basis for its conclusion that the shipments carried by the Hopper qualify the Hopper for exemption are statements purportedly made by grain terminal operators that a high percentage of grain delivered to grain terminals using the Hopper would be reshipped outside of Illinois. See letter from John and Jane Doe dated August 24, 2015 admitted into the record in lieu of the taxpayer's closing argument at tr. pp. 34-36. These grain terminal operators purportedly admitted that they kept no records to document these statements. *Id.*

The Illinois courts have expressly stated that uncorroborated oral assertions like those purportedly provided to the taxpayer are insufficient to support a rolling stock exemption claim. See First National Leasing & Financial Corporation v. Zage1, 80 Ill. App. 3d 358, 359 (4th Dist. 1980) ("The Department's audit ... resulted in a notice or use tax liability being issued against the taxpayer [...] The taxpayer's claim to the rolling stock exemption ... was denied because the taxpayer had no records showing that each vehicle had been used as an interstate carrier for hire [...] ... The hearing officer upheld the Department and denied the rolling stock exemption [...] ... The trial court reversed the decision of the hearing officer... [...] The [trial] court indicated that oral testimony was sufficient competent evidence ... [...] ... We conclude that the trial court's decision was erroneous since the taxpayer did not present sufficient evidence to rebut the Department's *prima facie* case of tax liability.").

The requirement that more than oral statements be offered to support a claim to the rolling stock exemption indicated in First National Leasing & Financial Corporation, *supra* comports with the type of evidence the taxpayer is required to produce in order to rebut the Department's *prima facie* case. The Illinois Appellate Court has clearly and unequivocally held

that mere oral statements are insufficient to rebut the Department's *prima facie* case. Mel-Park Drugs Inc. v. Department of Revenue, 218 Ill. App. 3d 203, 217 (1st Dist. 1991). Rather, the taxpayer must present documentary evidence in order to rebut the statutory presumption of correctness supporting taxation arising from the Department's assessment. Mel-Park Drugs, supra; Sprague v. Johnson, 195 Ill. App. 3d 798 (4th Dist. 1990).

During the hearing, the taxpayer admitted that it is impossible for it to document that the journey of any of the grain shipments it hauled during 2011 and 2012 between points in Illinois terminated outside of Illinois. Tr. pp. 26-31. Letters and information the taxpayer received from grain terminal operators corroborate this conclusion. Taxpayer's Ex. 1-3. Based upon the foregoing evidence I conclude that the taxpayer, by its own admission, cannot document in any manner the ultimate destination of any of the grain it transported between points in Illinois to grain terminals in this state during the period reviewed by the auditor, June 17, 2011 through June 1, 2012. The taxpayer's failure to document use of the Hopper in connection with shipments destined for another state that would constitute use of the Hopper in interstate commerce under section 3-60 of the UTA leaves unproven its exemption claim under this section. Mel-Park Drugs, supra; Sprague, supra.

The documentation contained in the record is also insufficient to show that the taxpayer can meet statutorily prescribed criteria satisfying eligibility for the rolling stock exemption specifically applicable to trailers, based upon interstate miles the Hopper traveled. With respect to these criteria, section 3-61(d) of the UTA, 35 **ILCS** 105/3-61(d) provides, in part, as follows:

§ 3-61. (d) Beginning July 1, 2004, "used as rolling stock moving in interstate commerce" in paragraphs (b) and (c) of Section 3-55 occurs for trailers, as defined in Section 1-209 of the Illinois Vehicle Code, semitrailers as defined in Section 1-187 of the Illinois Vehicle Code, and pole trailers as defined in Section 1-161 of the Illinois Vehicle Code, when during a 12-month period the rolling stock has carried persons or property for hire in interstate commerce for greater than 50% of its total trips for that period or for greater than 50% of its total miles for that period. ... If no election is made under this subsection to

use the trips or mileage method, the person shall be deemed to have chosen the mileage method.
35 ILCS 105/3-61(d)

In accordance with the foregoing, Department regulation section 130.340(i)(2) states that “to qualify for the rolling stock exemption the trailer must, during a 12-month period, carry persons or property for hire in interstate commerce for greater than 50% of its total trips for that period or for greater than 50% of its total miles for that period.”

The only evidence contained in the record pertaining to the taxpayer’s use of the Hopper during the 12 month period examined by the auditor to determine the Hopper’s eligibility for classification as exempt rolling stock is the auditor’s finding that the Hopper’s use in interstate commerce for hire during that period accounted for only 11% of the total mileage for this vehicle during that period. Tr. pp. 17, 18; Department Ex. 10. This level of usage in interstate commerce is far below the minimum required percentage of total mileage used in interstate commerce necessary for the taxpayer’s Hopper trailer to qualify for the rolling stock exemption based upon interstate usage under section 3-61 of the UTA and Department regulation 130.340(i)(2).

In sum, the taxpayer has submitted insufficient proof that its Hopper qualifies for the rolling stock exemption under sections 3-60 or 3-61(d) of the UTA or pursuant regulation 130.340(i)(2). Accordingly, it is recommended that the taxpayer’s rolling stock exemption claim be denied and that the liabilities imposed pursuant to the Department’s Notice of Tax Liability be affirmed in their entirety.

Ted Sherrod
Administrative Law Judge

Date: October 29, 2015