

UT 01-6

Tax Type: Use Tax

Issue: Occasional Sales – Non-Retail Transactions (Exemption)

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

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

v.

**"PREFERENTIAL FLIGHT, INC.",
Taxpayer**

No. 99-ST-0000
IBT # 0000-0000
NTL # SF-9900000000000

Charles E. McClellan
Administrative Law Judge

RECOMMENDATION FOR DECISION

John D. Alshuler for the Illinois Department of Revenue; Lawrence H. Jacobson of Schiff, Hardin & Waite for "Preferential Flight, Inc."

Synopsis:

This matter involves a Notice of Tax Liability ("NTL") issued to "Preferential Flight, Inc." ("taxpayer") by the Department on March 15, 1999 for the month of February 1996. The NTL was issued as the result of a sale of an aircraft by "Hoosier Aviation Co." ("Hoosier") to the taxpayer for which no Illinois Retailers' Occupation Tax or Illinois Use Tax was paid.

A pre-trial order was entered on August 9, 2000 setting forth the issues, as agreed to by the parties. An evidentiary hearing was held on February 6, 2001. Both parties filed post-hearing briefs. The issue is whether the sale of the aircraft by "Hoosier" to the

taxpayer on February 16, 1996 was a taxable sale at retail by a retailer or a non-taxable occasional sale.

My recommendation is that the NTL be cancelled.

Findings of Fact:

1. The Department conducted an audit of taxpayer at the conclusion of which it prepared a Form SC-10-K Audit Correction and/or Determination of Tax Due (12/93 to present) on the basis of which it issued Notice of Tax Liability SF 9900000000000 on March 15, 1999 for Illinois Use Tax due on the purchase of an aircraft from "Hoosier" during the month of February 1996. Tr. p. 8; Dept. Group Ex. No.¶ 1.
2. "Hoosier" was originally incorporated in Delaware on September 16, 1991 as "O'Brien, Inc." Tr. p. 9; Taxpayer Group Ex. No. 3.
3. "O'Brien Inc." changed its name to "Hoosier" Aviation Co. on October 8, 1993. *Id.*
4. "Hoosier's" place of business was in the city of (Someplace), Iowa. Tr. p. 36.
5. Taxpayer maintains its place of business [in] Chicago, Illinois. Tr. p. 2; Taxpayer Ex. No. 3.
6. From 1973 to July 31, 1994, Mr. "Edward Rickenbacher" owned a number of companies engaged in the business of selling fuel, flight instruction, aircraft sales and maintenance and providing aircraft charter service. Tr. pp. 12-15.
7. On July 31, 1994, Mr. "Rickenbacher" sold his businesses to a company named "Acme Aviation Acquisition, LLC" owned principally by "Leslie Gore", the owner of "Hoosier". Tr. pp. 15-16.

8. During the 1993 through 1996 period, the only aircraft owned by "Hoosier" were the four aircraft that it registered with the FAA on October 8, 1993, one of which is the aircraft involved in this case. Tr. pp. 18-19; Taxpayer Ex. No. 4.
9. From August 1994, through July 1996, "Hoosier" conducted no business activity other than making its aircraft available to "Adirondack Flight Services, LLC" for charter services. Tr. pp. 19-22, 26.
10. "Acme Aviation Acquisition, LLC" and "Hoosier" had no relationship with each other. Tr. p. 16.
11. On or about August 1, 1994, "Acme Aviation Acquisition, LLC" changed its name to "Adirondack Flight Services, LLC" ("Adirondack"). Tr. p. 21.
12. "Adirondack Flight Services, LLC" then conducted an aircraft charter service using the four aircraft owned by "Hoosier". Tr. p. 22; Taxpayer Ex. No. 4.
13. In 1996, "Hoosier" and "Adirondack Flight Services, LLC" decided to cease business operations and sell the four aircraft owned by "Hoosier", one of which is the aircraft involved in this matter. Tr. pp. 23-25.
14. The four aircraft were advertised for sale in various trade publications and Mr. "Rickenbacher" negotiated their sales, including the sale to taxpayer. Tr. pp. 23-24.
15. On February 15, 1996 "Hoosier" sold an aircraft, a Dessault-Sud FanJet Falcon Ser. F, serial number 325, to the taxpayer. Tr. p. 24; Taxpayer Exs. No. 1, 2.
16. Following the sale of the four aircraft, "Hoosier" became a dormant corporation. Tr. pp. 15-26.
17. The Iowa Department of Revenue and Finance has no record of "Hoosier" being registered as an aircraft dealer. Dept. Group Ex. No. 2.

18. No Illinois Retailers' Occupation Tax was collected or Illinois Use Tax paid with respect to this transaction. Tr. p. 5.
19. An Iowa Business Tax Registration form signed by "Leslie Gore" and dated February 5, 1997 was filed with the Iowa Department of Revenue and Finance identifying the registrant as "Hoosier" Aviation, Inc., a corporation "established" in Iowa on September 16, 1991. Dept. Group Ex. No. 2.

Conclusions of Law:

The issue in this case is whether the sale of the aircraft by "Hoosier" to the taxpayer was a taxable sale at retail by a retailer or a non-taxable occasional sale.

The Illinois Use Tax Act (35 ILCS 105/1 *et seq.*) imposes a tax upon the privilege of using in Illinois tangible personal property purchased at retail from a retailer. 35 ILCS 105/3. A "retailer" is defined as a person "engaged in the business of making sales at retail as defined in this Section." 35 ILCS 105/2. A "sale at retail" is defined as "any transfer of the ownership or title to tangible personal property to a purchaser, for the purpose of use, and not for resale . . ." *Id.* An isolated or occasional sale of tangible personal property at retail by someone who does not hold himself out as a retailer or who does not habitually sell such property at retail does not make such a person a retailer under the statute. *Id.*

The Department's regulations state that an occasional or isolated sale of tangible personal property by persons who are not engaged in the business of selling tangible personal property is not subject to the tax. 86 Admin Code ch. I, § 130.110 (a). The regulation goes on to provide that the tax is not incurred if a retailer sells tangible personal property, such as capital assets that it has used in its business but no longer needs and that it does not otherwise engage in selling. *Id.* at § 130.110(b).

Under these rules, if "Hoosier" was regularly engaged in the business of selling aircraft at retail, then the purchase of the aircraft in question by the taxpayer was subject to the Illinois Use Tax. If "Hoosier" was not so engaged then, the sale was an occasional sale not subject to the tax. The record in this case establishes that "Hoosier" was not engaged in selling aircraft at retail.

The admission into evidence of the records of the Department under the certification of the Director at a hearing before the Department or any legal proceeding establishes the Department's *prima facie* case. 35 ILCS 120/4,¹ 120/8; Copilevitz v. Department of Revenue, 41 Ill.2d 154, 242 N.E.2d 205 (1968); Central Furniture Mart v. Johnson, 157 Ill.App. 3d 97 (1st Dist. 1987).

In this case, when the Department introduced into evidence the Notice of Liability and the corrected return (Dept. Group Ex. No.1) the Department's *prima facie* case was established. To overcome the Department's *prima facie* case the taxpayer must present consistent, probable evidence identified with its books and records. Copilevitz v. Department of Revenue, *supra*; Central Furniture Mart v. Johnson, *supra*. Testimony alone is not enough. Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill.App.3d 203 (1st Dist. 1991), A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3d 826, 833-34 (1st Dist. 1988); 86 Admin. Code ch. I, § 130.1405 (a).

The taxpayer relies on the testimony of Mr. "Edward Rickenbacher", "Hoosier's" certificate of incorporation and related documents (Taxpayer Ex. No. 3), the two bills of sale of the aircraft in question to the taxpayer (Taxpayer Ex. Nos. 1, 2), and the registration

¹ The Use Tax Act makes a number of sections of the Retailers' Occupation Tax Act (120 ILCS 120/1 *et seq.*) applicable to the Use Tax, including Section 4. 35 ILCS 105/12.

form that "Hoosier" filed with the FAA in 1993 that lists the four aircraft that "Hoosier" sold in 1996 Taxpayer Ex. No. 4).

In rebuttal, the Department entered two documents marked as Dept. Group Ex. No. 2. The first document is a copy of a letter signed by Donald R. Cooper, Co-Administrator, Compliance Division, of the Iowa Department of Revenue and Finance. The letter is dated May 27, 1998 and it is addressed to Janet Calhoun, Assistant to the Disclosure Officer, Office Programs Section, Illinois Department of Revenue in Springfield, Illinois. It is a transmittal letter for the second document which is a copy of an Iowa Business Tax Registration form for a registrant identified as "Hoosier" Aviation, Inc., a corporation "established" in Iowa on September 16, 1991. The form is signed by "Leslie Gore" and dated February 5, 1997.

As explained above, once the Department establishes its *prima facie* case, the burden of proof shifts to the taxpayer. In this case, the uncontroverted testimony of taxpayer's witness, Mr. "Rickenbacher", and the documents of record are sufficient to overcome the Department's *prima facie* case.

Mr. "Rickenbacher's" testimony establishes that he has significant experience in the general aircraft business and familiarity with the persons involved with "Adirondack" and "Hoosier". Tr. pp. 11-21. He testified that he acted in a consulting capacity for "Adirondack" after the sale of his companies in 1994. Tr. p. 16. In 1996, when the owners of "Adirondack" and "Hoosier" decided to go out of business, he negotiated the sale of each of the four aircraft, including the aircraft involved in this matter. Tr. pp. 23-24. Mr. "Rickenbacher" testified that, as far as he knew, "Hoosier" never owned any aircraft other than the four it registered with the FAA in 1993. Tr. p. 19. This testimony is supported by

the FAA registration form. Taxpayer's Ex. No. 4. Mr. "Rickenbacher" testified that he was unaware of any business activity conducted by "Hoosier" during the period August 1994 through July 1996 other than making available or leasing its four aircraft to "Adirondack" for chartering during that time. Tr. p. 22-26. No testimony or documentary evidence was introduced to contradict any of the testimony of Mr. "Rickenbacher" and one of the Department's documents admitted into evidence supports the taxpayer's arguments.

The May 27, 1998 letter sent to the Department with the copy of the registration form is significant because it contains the following sentence: "The Iowa Department of Transportation has no record of this company being registered as an aircraft dealer." (Dept. Ex. No. 2). The letter indicates that the phrase "this company" refers to "Hoosier" Aviation Company, which is identified in the "Re" line of the letter and establishes the fact that the Iowa Department of Revenue had no record of "Hoosier" being a retailer. Furthermore, as the letter indicates, the registrant in the Iowa business registration form is identified as "Hoosier Aviation, Inc.", which "is registered for withholding and income taxes." The record is not clear if that is the same corporation as the one that sold the aircraft to the taxpayer. There was some discussion of that by counsel for the taxpayer and the Department. Tr. pp. 31-37. In any case, the Department's litigator did not dispute the assertion of taxpayer's counsel's that there was "one "Hoosier" Aviation Co." Tr. pp. 36-37. Whether there was one or two "Hoosier" entities is irrelevant in any case because there is no evidence in the record that either one sold any tangible personal property at retail.

The Department relies on the responses to two inquiries on the Iowa Business Registration form (Dept. Ex. No. 2) to prove that the sale was a sale by a retailer. However, the registration form is dated in the year following the year in which the sale at issue

occurred so it is irrelevant to the matter at issue because it does not establish that any "Hoosier" entity was a registered retailer at the time of the sale in question.

Even if the registration form were relevant, it would not support the Department's assertion. The first inquiry relied on by the Department asks the taxpayer to identify its primary business activity. The taxpayer printed the word "sales" as its response. The second inquiry asks the "[t]ype of products or services to be sold." The taxpayer printed the word "aircraft" in response. The two responses, "sales" and "aircraft", on "Hoosier's" registration form with the Iowa Department of Revenue and Finance by themselves are not sufficient to overcome the taxpayer's rebuttal of the Department's *prima facie* case when viewed in context with the rest of the registration form and the other documents and testimony of record.

The response "aircraft" did not specify whether the registrant would sell a product (aircraft) or an aircraft service, (chartering aircraft) or the service of leasing aircraft to a charter service provider. Furthermore, the transmittal letter did not indicate that the registrant had registered to collect sales tax, as it did withholding and income tax, and, in a section of the form that requires information for a sales tax permit, all of the inquiries were left unanswered, indicating, that the registrant did not intend to sell aircraft or anything else at retail. Finally, there is no evidence in the record that a "Hoosier" entity, whether incorporated in Delaware or Iowa, ever held itself out as a retailer or that it ever habitually sold any tangible personal property at retail as required by the statute.

In summary, the testimony and the documents in evidence establish the fact that the sale in question was a non-taxable occasional sale. The testimony and documentary evidence of record have overcome the Department's *prima facie* case.

Therefore, I recommend that the NTL and all further proceedings in this matter be cancelled.

ENTER: May 31, 2001

Administrative Law Judge