

UT 06-2

Tax Type: Use Tax

Issue: Construction Contractor – Retail Sale or Perm. Affix.

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

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

v.

**ABC COMPANY, INC.,
Taxpayer**

**No. 00-ST-0000
IBT 0000-0000
NTL No. 00 00000000000000**

**Kenneth J. Galvin,
Administrative Law Judge**

RECOMMENDATION FOR DISPOSITION

Appearances: Ms. Lynne M. Mueller, on behalf of ABC Company, Inc.; Mr. John Alshuler, Special Assistant Attorney General, on behalf of the Department of Revenue of the State of Illinois.

Synopsis:

This matter comes on for hearing pursuant to ABC Company’s (hereinafter “ABC”) protest of Notice of Tax Liability No. 00 00000000000000 issued November 4, 2004, covering the audit period December, 2000 through December, 2001, and assessing use tax due. ABC, located in Menomonee Falls, Wisconsin, builds cabinets and interior and ornamental woodwork. At issue in this proceeding is whether a job performed by ABC during the audit period for the hotel in Chicago was a furnish only job completed without installation or a furnish and install job. The Department of Revenue determined during an audit that the contested job was for the furnishing of materials only and did not involve installation services and assessed use tax on the nontaxed portion of the job. ABC protested the assessment claiming that it was responsible for both the furnishing of materials and the installation of millwork and architectural woodwork at the job site.

An evidentiary hearing was held in this matter on October 5, 2005 with Mr. John Doe, President of ABC, testifying for ABC, and Ms. Denise Konicki, testifying for the Department of Revenue. Following a review of the testimony and the evidence, it is recommended that the Notice of Tax Liability, as adjusted by the SC-10-K, "Audit Correction and/or Determination of Tax Due" be finalized. In support thereof, the following "Findings of Fact" and "Conclusions of Law" are made.

Findings of Fact:

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, is established by the admission into evidence of Notice of Tax Liability No. 00 0000000000000, issued November 4, 2004, covering the audit period December, 2000, through December, 2001 as adjusted by the SC 10-K, "Audit Correction and/or Determination of Tax Due." Tr. pp. 7-8; Dept. Ex. No. 1.
2. Joe Blow was an estimator who worked for ABC. A "Quotation" dated November 3, 2000, signed by Joe Blow and addressed to XX International, Inc. regarding "Project: Hotel" states that "The ABC Co., Inc. respectively proposes to furnish only the ARCHITECTURAL WOODWORK as specifically listed and qualified herein." Included under the "Scope" section of the Quotation is No. "6. Delivery to jobsite, unloading, distribution and installation." Tr. pp. 15-19; Dept. Ex. No. 2.

Conclusions of Law:

The Use Tax Act, 35 ILCS 105/1 *et seq.* (hereinafter referred to as the "UTA") imposes a tax upon the privilege of using in this State tangible personal property purchased at retail from a retailer..." *Id.* at 105/3. The UTA was passed to complement and prevent evasion of the Retailers' Occupation Tax Act. Needle Co. v. Department of Revenue, 45 Ill. 2d 484 (1970). On November 4, 2004, the Department issued Notice of Tax Liability ("NTL") No. SF 0429585426001, to ABC

covering the audit period December, 2000, through December, 2001, and assessing use tax due on the non-taxed portion of a job. Tr. pp. 7-8; Dept. Ex. Nos. 1 and 3. Section 12 of the UTA (35 ILCS 105/12) incorporates by reference Section 4 of the Retailers' Occupation Tax Act (35 ILCS 120/1 *et seq.*), which provides that the NTL issued by the Department is *prima facie* correct and is *prima facie* evidence of the correctness of the amount of tax due. *Id.* at 120/4. Once the Department has established its *prima facie* case by submitting the NTL into evidence, the burden shifts to the taxpayer to overcome the presumption of validity. Clark Oil & Refining v. Johnson, 154 Ill. App. 3d 773 (1st Dist. 1987).

In order to overcome the presumption of validity attached to the NTL, the taxpayer must produce competent evidence, identified with its book and records showing that the NTL is incorrect. Copilevitz v. Department of Revenue, 41 Ill. 2d 154 (1968). Testimony alone is not enough. Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill. App. 3d 203 (1st Dist. 1991). Documentary proof is required to prevail against an assessment of tax by the Department. Sprague v. Johnson, 195 Ill. App. 3d 798 (4th Dist. 1990). On examination of the record in this case, I find that the taxpayer has failed to demonstrate by testimony, through exhibits or through argument, evidence sufficient to overcome the Department's determination that the Hotel job was a furnish only job done without installation and that use tax was due.

The Department established its *prima facie* by admitting the NTL into evidence. The Department found, through its audit of the taxpayer, that the Hotel job was a furnish only job completed without installation. The Department admitted into evidence a "Quotation" dated November 3, 2000, signed by Joe Blow and addressed to XX International, Inc. regarding "Project: Hotel" which states that "The ABC Co., Inc. respectively proposes to furnish only the ARCHITECTURAL WOODWORK as specifically listed and qualified herein." Included under

the “Scope” section of the Quotation is No. “6. Delivery to jobsite, unloading, distribution and installation.” Tr. pp. 15-19; Dept. Ex. No. 2. The “Quotation” is obviously ambiguous. It says that the job is “furnish only” and in the “Scope” section, it says that the job includes installation. The burden then shifted to ABC to prove that the job at the Hotel was for both the furnishing of materials and installation at the job site. Clark Oil & Refining v. Johnson, 154 Ill. App. 3d 773 (1st Dist. 1987).

ABC admitted into evidence a “Supplier Agreement [Purchase Order]” between XX International, Inc. (“Contractor”) and ABC (“Supplier”) dated November 14, 2000 for “Project: Hotel.” ABC’s name, as “Supplier,” only appears on the cover page of this document. Under “Scope of Work,” it states “Subcontractor agrees to commence Subcontractor’s work herein described...” There is no identification of ABC as the “Subcontractor” and there was no testimony at the hearing as to who the Subcontractor was. Attached to the cover page is “Exhibit B,” pages 1 through 10, with the name of “Lend Lease” on the upper right corner of each of the pages. Exhibit B lists “start installation” dates for the subcontractor but no subcontractor is identified. It is unclear from Exhibit B what parties were involved. Exhibit B refers to “the Contract Documents as listed in Exhibit A attached hereto” but no Exhibit A is attached. This “Supplier Agreement” is the only document admitted by ABC at the hearing. It identifies ABC as the “Supplier.” It does not confirm that ABC was hired to supply the millwork and to install it. ABC did not call Joe Blow to explain the ambiguity in the “Quotation” and did not call any worker who could attest to having done the installation work at the Hotel for ABC. The “Supplier Agreement,” and the attached Exhibit B, which do not identify ABC as the installer of the millwork, are not sufficient to overcome the Department’s *prima facie* case that the Hotel job was a furnish only job without installation.

Since the Hotel job was completed without installation, ABC must be considered a retailer under the UTA. According to the UTA, a retailer is a person who hold himself out as being engaged in selling tangible personal property at retail, “notwithstanding the fact that such person designs and produces such tangible personal property on special order for the purchaser and in such a way as to render the property of value only to such purchaser.” 35 ILCS 105/2. Out-of-state retailers, such as ABC, must collect and remit Use Tax to the State on behalf of its Illinois customers even though the retailer does not incur any Retailers Occupation Tax liability. An out-of-state retailer who has “any kind of place of business in Illinois or any kind of order-soliciting or order-taking representative either stationed in Illinois or coming into Illinois from time to time, must collect and remit the Use Tax, as such, from Illinois purchasers for use even though the seller is not required to pay Retailers’ Occupation Tax when he does nothing in Illinois except to solicit orders.” 86 Ill. Adm. Code § 150.801 (c)(2).

WHEREFORE, for the reasons stated above, it is my recommendation that NTL 0 0 00000000000000 as amended by the SC-10 K be finalized.

March 20, 2006

Kenneth J. Galvin
Administrative Law Judge