

UT 97-2

Tax Type: USE TAX

Issue: Use Tax On Purchases, Fixed Assets Or Consumables
Use Tax On Purchases (Non-filer) Extended Statute of
Limitations

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

DEPARTMENT OF REVENUE)	
STATE OF ILLINOIS)	
)	
)	v.
)	
TAXPAYER)	Daniel Mangiamele
)	Administrative Law Judge
)	

FINAL ADMINISTRATIVE DECISION

Appearances: Messrs. William S. Shapiro and Joseph L. Fieger, for TAXPAYER; John E. White, Special Assistant Attorney General, for the Illinois Department of Revenue

Synopsis:

This matter presented itself in these administrative hearings following the protest by TAXPAYER hereinafter referred to as "TAXPAYER" or the "Taxpayer") of a Notice of Tax Liability (hereinafter referred to as the "NTL") issued to it by the Illinois Department of Revenue (hereinafter referred to as the "Department") for the taxable period of 7/1/81 through 6/30/92. The Administrative Law Judge identified three main issues in this matter: 1) whether the Department properly assessed Use Tax on specific purchases of tangible personal property; 2) whether taxpayer had reasonable cause to not file Use Tax returns on its purchases prior to June 1, 1987 and, 3) whether the correct penalty amount was assessed. The ALJ

recommended that the matters be resolved in the Department's favor except for that part of the assessment for two of six trench boxes at issue (hereinafter referred to as the "boxes") and two portable trash pumps (hereinafter referred to as the "pumps"), which he recommended be exempt from the application of the Use Tax.

I have reviewed the entire record in this cause as well as the ALJ's Findings of Facts and Conclusions of Law. As a result of that review, I determine that the ALJ's recommendation exempting the boxes and pumps from the application of Use Tax is contrary to Illinois law and I cannot adopt it as the final determination of this matter.

In furtherance of my decision to reject part of the ALJ's recommendation, I adopt his findings of facts and make additional findings based upon the evidence of record. The additional findings concern other matters at issue herein. These findings are made as I have determined that the ALJ's findings are incomplete. As I do not concur with his analysis of the law with respect to the boxes and pumps, the following conclusions of law form the basis of my decision to finalize the Department's assessments as issued, on these items. I have also included in my conclusions, further discussion regarding other matters at issue.

Additional Findings of Fact:

1. Taxpayer, through Mr. TAXPAYER, purchased the Komatsu tractor for the purpose of giving it to Mr. TAXPAYER's son. Tr. pp. 92, 94, 95, 97

2. Taxpayer gave the tractor to Mr. TAXPAYER's son for use on the son's "farm". Id.

3. Taxpayer was not in the business of production agriculture. Tr. pp. 99-100

4. COMPANY is a company owned by Mr. TAXPAYER's son, TAXPAYER, Jr. Tr. pp. 65-67

5. No leases, invoices or other documents purportedly entered into between the taxpayer and COMPANY for the Mack tractor and the Hilbilt trailer are of record to support taxpayer's argument that it leased these items to that company, which in turn transported items, interstate, for taxpayer. Tr. pp. 68-69

6. During these administrative proceedings, taxpayer provided the Department with documentation not produced during the audit, resulting in credit to the taxpayer for items assessed, as well as in an increase to the tax due to the State by the taxpayer. Department Ex. No. 6; Tr. pp. 29, 31, 145, 148

Conclusions of Law:

I adopt the ALJ's conclusion and recommendation that the Department's assessment of Use Tax on the Komatsu tractor be finalized as issued. In addition to his conclusion, I add that the exemption from Use Tax for farm machinery and equipment "certified by the purchaser to be used primarily for production agriculture..." (35 ILCS 105/3-5(11)) does not apply in this case.

First, it is undisputed that the taxpayer, the purchaser of the item, did not use nor did it intend to use this tractor primarily in production agriculture. Rather, it gave the tractor to the son of Mr. TAXPAYER, who, through an affidavit (unnotarized)¹ stated that it

¹. I also do not find Mr. TAXPAYER Jr.'s "affidavit" credible. Highland Park Convalescent Center, Inc. v. Health Facilities Planning Board, 217 Ill. App.3d 1088 (1st Dist. 1991) (Where administrative

was used, *inter alia*, in the production corn and soy beans. Taxpayer Ex. No. 1 The affidavit does not state, as required by statute, that the tractor was used "primarily" for production agriculture purposes. 35 ILCS 105/3-5(11) The record does provide that the tractor was also used to level off property that was hilly and upon which there were horses. Tr. p. 67 Thus, the taxpayer failed to prove that the tractor was used "primarily" for production agriculture as required by statute.

It is well-settled in Illinois that tax exemption provision are strictly construed against the taxpayer and in favor of the taxing body (Telco Leasing, Inc. v. Allphin (1976), 63 Ill.2d 305) with the exemption claimant having to clearly prove entitlement to the exemption (United Air Lines, Inc. v. Johnson (1981), 84 Ill.2d 446) with all doubts being resolved in favor of taxation. Follett's Illinois Book & Supply Store, Inc. v. Isaacs (1963), 27 Ill.2d 600. With these mandates, taxpayer's claim for tax exemption for this tractor fails.

Further, the taxpayer, by giving the tractor to another entity for the other's use of the item unrelated to taxpayer's business,

agency is responsible for the decision, it makes decision on the evidence of record, including the credibility of witnesses even though the hearing officer observes the witnesses) As noted, it was not a sworn to document and therefore, cannot take the place of testimony at hearing which would be under oath. 735 ILCS 5/2-1103 (Evidence at a hearing may be supplied by affidavit, or the court may require the presentation of that testimony by an oral examination of that witness, subject to cross-examination.) A statement is not an "affidavit" if there is no evidence that the person making the statement was under oath. Manual v. McKissack, 60 Ill. App.3d 654 In addition, Mr. TAXPAYER Jr. has an obvious bias in this matter based upon his connection, personally and professionally, with Mr. TAXPAYER Sr. and with the taxpayer which bought tangible personal property and gave it to him for his own use.

exercised, incident to its ownership, its right and power over the item. This, of course, is the very definition of "use" which triggers the application of the pertinent tax. 35 **ILCS** 105/2 Therefore, the ALJ correctly determined that the Department's assessment of the Komatsu tractor should stand.

In its post hearing Memorandum of Law (Taxpayer Memorandum of Law, pp. 2, 6) taxpayer states that the Illinois dealers filed the appropriate tax returns on the Mack tractor and Hilbilt trailer. However, the evidence of record does not support that statement. Retailers' returns are not in evidence. Rather, taxpayer offered its own rolling stock affidavits for these items, which reference tax reporting forms, but do not attach them, even though the affidavits state that the forms are attached. Taxpayer Ex. No. 2A Because of the lack of evidence going to the issue of whether the appropriate tax forms were filed for these items, taxpayer's argument that the statute of limitations bars the Department's assessment thereof is without merit.

As to the boxes and pumps, the ALJ's findings of facts are clear. The taxpayer purchased the boxes and the pumps from retailers. Findings of Fact Nos. 21, 27 Pursuant to Illinois law, taxpayer is liable for Use Tax on these purchases (35 **ILCS** 105/3) unless there is a statutory exemption thereto, and, if such tax is not paid to the retailer, the purchaser is mandated to report and pay the tax directly to the Department. 35 **ILCS** 105/10 Taxpayer claims that these items were incorporated into real estate owned by governmental entities, and therefore, are exempt from the imposition of the tax. However, taxpayer failed to present evidence sufficient

to rebut the *prima facie* correctness of the Department's determination of taxability.

There is no question that the boxes and pumps were purchased at retail, tax free. Trench boxes are portable, and there is no evidence that they are specialized for particular jobs. See, Tr. p. 126 The ALJ found, based upon uncontroverted evidence at hearing, that the boxes were items that were used by TAXPAYER on construction jobs to hold up soil so that work could be done, and they are moved along on the job for this purpose. Findings of Fact Nos. 22, 23

The only evidence in this case that the specific two boxes at issue were left in the real estate of a job for a governmental entity is the oral testimony of TAXPAYER and TAXPAYER FOREMAN. This evidence is not sufficient, however, to rebut the *prima facie* correctness of the Department's assessment for several reasons.

First, Illinois law on this issue is basic. Oral testimony is not sufficient to overcome the *prima facie* correctness of the Department's determinations. A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App.3d 826 (1st Dist. 1988) Rather, "[i]n order to overcome the presumption of validity attached to the Department's corrected returns" the taxpayer "must produce competent evidence, identified with their books and records and showing that the Department's returns are incorrect." Copilevitz v. Department of Revenue (1968), 41 Ill.2d 154; Masini v. Department of Revenue, 69 Ill. App.3d 11 (1st Dist. 1978)

The taxpayer did not produce any documentary evidence showing a transfer of the items to the governmental bodies, even though it could have. TAXPAYER testified that some of the trench boxes, used

on the DuPage County Water Commission job, were billed directly to DuPage and some "extra quantities" were "plugged into the job" by the taxpayer. Tr. p. 72 Mr. TAXPAYER admitted that in order to get paid for the work, taxpayer had to submit a contractor's sworn statement specifying, *inter alia*, the property transferred. Tr. pp. 103-09; see Taxpayer Exhibit No. 3 This contractor's sworn statement is of the nature of evidence identified with taxpayer's books and records which could rebut the Department's assessment. In this case, this type of documentation was not forthcoming.

Similarly, for the pumps, Mr. TAXPAYER testified that the governmental entity was billed (Tr. p. 74) and the pumps were delivered to taxpayer's yard. Tr. p. 73² Taxpayer did not produce any documentation showing billing or payment evidencing a transfer of these items to the governmental entity.

Rather, for these items, taxpayer provided the testimony of its foreman who testified that the specific items at issue were installed into the real estate. Although TAXPAYER FOREMAN testified that on occasion, he purchased small items on behalf of the taxpayer (Tr. pp. 123-24) nothing in the record connects TAXPAYER FOREMAN with the purchase of the items at issue (see, footnote 2, *infra*; Tr. p. 127) nor to any contract or payment involvement between the taxpayer and

². Mr. TAXPAYER, during direct examination by his counsel, testified that he purchased the trash pumps and had them shipped to his yard "so no one would steal them". Tr. p. 73. During cross examination by the Department, he testified that his president probably purchased the pumps and they were shipped to the public works garage "so people can't steal it...". Tr. p. 111 Taxpayer Exhibit 4, which is the retailer's invoice for these items indicates direction to ship to "public works garage". There is no documentation that these items were incorporated into real estate.

the governmental entities for these or any other items of tangible personal property.³

The most credible evidence regarding the boxes and pumps is not the testimony of Messrs. TAXPAYER and TAXPAYER FOREMAN, but, rather, taxpayer's own documentation which controverts the oral testimony. Despite taxpayer's averments that the items at issue were transferred and sold to exempt entities, the uncontroverted documentation states that the taxpayer depreciated, on its own books and records, the very boxes and pumps purportedly sold by it, and did so after the purported sales dates. Tr. pp. 43-45

Illinois courts have stated that oral testimony in matters such as herein, is not sufficient to overcome the *prima facie* correctness of the Department's assessment. The circumstances of this case do not support a conclusion that taxpayer's oral testimony rises to a superior position over taxpayer's own documentation to the contrary. The simple fact is, that taxpayer's own books and records speak directly to the fact that the taxpayer, itself, did not treat the boxes and pumps as items sold and incorporated by it into the real estate of governmental entities. Taxpayer's own documentation on

³. I also find Mr. TAXPAYER to not be a credible witness. Highland Park Convalescent Center, Inc. v. Health Facilities Planning Board, 217 Ill. App.3d 1088 (1st Dist. 1991) The record is clear that Mr. TAXPAYER made purchases on behalf of the taxpayer, certifying to retailers that taxpayer had a right to make the purchases tax free (i.e. purchase from Herman Behm), yet knowing that it had no resale/sales tax number, depreciating the items on its own books and records, taking advantage of the depreciation on its income tax returns and/or purchasing the item through the taxpayer yet using it for his personal behalf (Komatsu tractor, mobile home) As is clear from the record, either taxpayer's books and records are, at best unreliable, or, at worst fraudulent, or Mr. TAXPAYER's actions on behalf of the taxpayer were contrary to statutory mandates.

this issue clearly prevails over the oral testimony given in this case.

Wherefore, for the reasons recited above, the ALJ's recommendation is accepted, in part, and rejected, in part, resulting in a finalization of the assessment as adjusted by reaudit.

Ken Zehnder, Director
Illinois Department of Revenue