

UT 97-3

Tax Type: USE TAX

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

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

THE DEPARTMENT OF REVENUE)	
OF THE STATE OF ILLINOIS)	
)	No.
v.)	IBT No.
)	NTL
TAXPAYER,)	
)	Charles E. McClellan
Taxpayer)	Administrative Law Judge
)	

RECOMMENDATION FOR DISPOSITION

APPEARANCES: Alan Osheff and Jim Dickett, Special Assistant Attorney Generals, for the Department of Revenue; Philip S. Wolin and Mark E. Burt, Wolin & Rosen, Ltd., for TAXPAYER.

Synopsis:

This matter came on for hearing pursuant to a timely protest filed by TAXPAYER ("taxpayer") to a Notice of Liability ("NTL") issued by the Department on March 15, 1994 for Illinois Use Tax plus penalties and interest. The period involved is December 1, 1989 through June 20, 1992. The Department and taxpayer entered into a stipulation of facts ("Stip.") and a stipulation of documents. ("Stip Ex.") An evidentiary hearing was held on April 12, 1996 at 100 West Randolph, Chicago, Illinois. However, neither party called any witnesses to testify at the hearing. The issue is whether the

taxpayer is liable for Illinois Use Tax in connection with the purchase of a boat for use in its business. Taxpayer contends: 1) that the boat is exempt rolling stock used in interstate commerce; 2) that the boat is exempt because it was used outside of Illinois for a period in excess of three months before it was brought into Illinois; and 3) that taxpayer had no nexus with Illinois. Based on the record consisting of stipulations of facts and documents, I recommend that NTL SF **XXXXXX** be canceled.

Findings of Fact:

1. The Department issued NTL SF **XXXXXX** to the taxpayer assessing Illinois Use Tax, penalty and interest due of \$216,169 on March 15, 1994. Taxpayer filed a timely protest. (Tr. pp. 2 and 3; Dept. Ex. Nos. 1 and 2)

2. Taxpayer is a corporation duly organized and existing under the laws of the State of North Carolina the primary business of which is providing boats for the use of third parties for purposes of travel in interstate and international commerce. (Stip. ¶ 1)

3. The boat *Reality* ("boat") was built for taxpayer in Saugatuck, Michigan by Broward Marine, Inc., and was completed on or about December 21 1989. (Stip. ¶ 2, Stip. Ex. A)

4. The boat has an aluminum hull, is 91 feet long, has a breadth of 10 feet 3 inches, a depth of 10 feet 6 inches and is self-propelled. (Stip. Ex. A)

5. Broward Marine, Inc., delivered the boat to taxpayer beyond the territorial waters of the United States off the coast of Fort Lauderdale, Florida. (Stip. ¶ 3, Stip. Ex. C)

6. The boat was issued a Certificate of Documentation on June 12, 1990 by the United States of America, Department of Transportation, United States Coast Guard and given the official Coast Guard registration number of 959738. (Stip. ¶ 4, Stip. Ex. B)

7. From the time the boat was purchased until the time it was sold, taxpayer made the boat available to third parties for the purpose of transporting people in interstate and international commerce. (Stip. ¶ 5)

8. The boat was chartered by third parties for trips from and to: Newport, Rhode Island; Boston, Massachusetts; Antigua; Mustique, West Indies; Grenadines, West Indies; St. Martin, West Indies; St. Thomas, U.S. Virgin Islands; Fort Lauderdale, Florida; and Nassau, Bahamas. (Stip. ¶ 5)

9. Advantage Services, Inc., d/b/a The Sacks Group ("Sacks"), is a Florida corporation with its principal place of business at 1600 S.E. 17th Street, Fort Lauderdale, Florida 33316. (Stip. ¶ 6)

10. The primary business of Sacks is the management of yachts for use in interstate and international commerce for their owners, including negotiating and entering into agreements for the use of yachts, arranging for the staffing of yachts, collecting revenues and paying the expenses of the subject yacht. (Stip. ¶ 6)

11. From December 1, 1990 to May 22, 1991, pursuant to a management agreement, Sacks was in charge of the management of the boat for taxpayer. (Stip. ¶ 7)

12. The responsibilities of Sacks under the management agreement included entering into agreements for the use of the boat, staffing the boat with a captain and full crew, obtaining all

supplies for each third party user, collecting revenues, maintaining full insurance, making repairs and other necessary maintenance of the boat and paying the expenses of the boat. (Stip. ¶ 7)

13. After May 22, 1991, Sacks continued to enter into agreements for the use of the boat for taxpayer until it was sold. (Stip. ¶ 7)

14. Sacks negotiated and executed numerous agreements for the use of the boat on behalf of taxpayer, for travel to and from Florida, the Bahamas and the Caribbean. (Stip. ¶ 8)

15. The boat was available for use by any third party subject to prior agreements. (Stip. ¶ 9)

16. These agreements involved traveling between states of the United States and to other nations. (Stip. ¶ 9)

17. Taxpayer did not use the boat for its own employees or invitees other than the use thereof by the captain and staff while serving third parties. (Stip. ¶ 9)

18. The boat was used for at least three months outside Illinois before it was brought to Illinois in 1992 pursuant to an agreement between taxpayer and Capital Development Corp. (Stip. ¶ 10)

19. Capital Development Corp. is a corporation duly organized and existing under the laws of Illinois for the primary business purpose of the ownership, development and management of real estate. (Stip. ¶ 11)

20. On February 10, 1992, taxpayer entered into an agreement ("Capital agreement") for the use of the boat by Capital Development Corporation, to transport passengers. (Stip. ¶ 12)

21. The Capital agreement called for travel from Fort Lauderdale, Florida to the Great Lakes and back again to Fort Lauderdale. (Stip. ¶ 12)

22. The Capital agreement's term began on May 1, 1992 and ended on August 31, 1992. (Stip. ¶ 12; Stip. Ex. F)

23. The Charterer, Capital Development Corporation, agreed to pay a charter fee of \$160,000 to taxpayer. (Stip. Ex. F)

24. Pursuant to the Capital agreement, the boat left Ft. Lauderdale, Florida, traveled up the east coast of the United States, through the St. Lawrence Seaway and to the Great Lakes.

25. Upon arrival in the Great Lakes, the Boat traveled from, between and to Canada, New York, Pennsylvania, Ohio, Illinois, Michigan, Indiana, Wisconsin and Minnesota. (Stip. ¶ 13)

26. At the end of the term of the Capital agreement, the boat returned back through the St. Lawrence Seaway, through the aforesaid states and Canada, then back down the east coast of the United States to Ft. Lauderdale, Florida. (Stip. ¶ 13)

27. During the term of the Capital agreement, the boat continued to travel to and between the states bordering the Great Lakes and Canada when it was not temporarily docked at Waukegan Harbor, Illinois. (Stip. ¶ 14)

28. During the term of the Capital agreement, taxpayer, through its management company, Sacks, provided a captain, crew, full staffing and supplies, maintained full insurance, provided for the repair and maintenance of all systems on the boat and paid all amounts associated with the operation of the boat. (Stip. ¶ 15)

29. During the Capital agreement, Capital Development Corporation had no control over the operation of the boat and could only use the boat where designated by the agreement. (Stip. ¶ 15)

30. While in Illinois, the boat was always subject to the Capital agreement. (Stip. ¶ 16.)

Conclusions of Law:

The Department's *prima facie* case was established by the admission into evidence of the Notice of Tax Liability dated March 15, 1994 and the determination of tax due dated December 22, 1993¹. (Tr. p. 4; Dept. Exs. No. 1 and 2) Once the Department introduced the determination of tax due, its *prima facie* case was made and the burden of proof shifted to the taxpayer. Central Furniture Mart v. Johnson, 157 Ill. App.3d 907 (1st Dist. 1987) The evidence on record in this case, consisting of the stipulations and the hearing transcript, establishes that the taxpayer has overcome the Department's *prima facie* case of tax liability under the assessment in question. Accordingly, XXXXX should be canceled.

The issues in this case, as set forth in an order entered at a pre-trial hearing, are as follows:

1. Whether the boat complies with the Illinois rolling stock exemption.
2. Whether taxpayer complied with 35 ILCS § 105/3-70.
3. Whether nexus has been established between Illinois and the taxpayer.

¹. 35 ILCS § 120/4 and § 120/8, made applicable to the Illinois Use Tax Act by 35 ILCS § 105.12.

Since, under the following analysis, I have concluded that the boat qualifies for the rolling stock exemption, the last two issues need not be decided.

There are three statutory provisions that are relevant to the first issue of whether the boat qualifies for the interstate commerce rolling stock exemption. First, § 3 of the Illinois Use Tax Act² ("Act") imposes a tax on the privilege of using in Illinois tangible personal property purchased at retail. Second, § 3-55(b) of the Act exempts tangible personal property used in Illinois by an interstate carrier for hire as rolling stock moving in interstate commerce. The exemption, insofar as it is relevant to this case, reads as follows:

(b) The use, in this State, of tangible personal property by an interstate carrier for-hire as rolling stock moving in interstate commerce . . . as long as so used by the interstate carrier for-hire.

(35 ILCS 105/3-55(b)).

Third, § 3-60 of the Act makes it clear that an interstate carrier for hire is entitled to the exemption for rolling stock used just between points in Illinois if the interstate carrier is using the property in connection with an interstate shipment of property or persons. That section provides:

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 Illinois.

². 35 ILCS 105/3.

(35 ILCS 105/3-60)

In applying these statutory provisions to the facts of this case, two principals of statutory construction are governing. First, the Use Tax Act unambiguously was intended to tax all tangible personal property purchased at retail for use in Illinois unless specifically exempt. Square D Co. v. Johnson, 233 Ill. App.3d 1070 (1st Dist. 1992). Second, a statutory exemption must be strictly construed against the taxpayer and in favor of the Department. Burlington Northern, Inc. v. Department of Revenue, 32 Ill. App.3d 166. (1st Dist. 1975).

The Department argues that taxpayer's boat does not qualify for the rolling stock exemption because the boat is not used to transport property or persons for hire. (Dept. brief p. 3) The Department bases that argument on a provision in taxpayer's chartering agreement which states that the boat "shall not transport merchandise or carry passengers for pay" and "shall be employed exclusively as a pleasure vessel." (*Id.*) In addition, the Department argues that taxpayer's boat is not used in interstate commerce because it does not have an ICC number. (*Id.*)

Taxpayer argues that the boat is exempt from use tax for three reasons: 1) taxpayer uses it in interstate commerce as an interstate water carrier for hire (Taxpayer brief p. 3); 2) the boat is not used as the taxpayer's pleasure boat (Taxpayer brief p. 4); and 3) the boat is used by the taxpayer in its business of chartering the boat for use by other parties to transport persons. (*Id.*) Taxpayer points out that it's customers, rather than taxpayer,

are the parties who use the boat for pleasure or to entertain their current and prospective customers. (*Id.*)

The Department's assertion that taxpayer's boat is not used to transport property or persons for hire is not supported by the record. First, the parties stipulated that "from the time the boat was purchased, until the time it was sold, [taxpayer] made the boat available to third parties for the purpose of transporting people in interstate and international commerce." [Emphasis added] (Stip. ¶ 5) In addition, the record shows that taxpayer was in the business of chartering the boat to unrelated parties for interstate and international trips. The parties stipulated that the boat was held out for hire and was chartered by Sacks, as taxpayer's agent, to third parties for cruises from and to: Newport, Rhode Island; Boston, Massachusetts; Antigua; Mustique, West Indies; Grenadines, West Indies; St. Martin, West Indies; St. Thomas, U.S. Virgin Islands; Fort Lauderdale, Florida; and Nassau, Bahamas. (Stip. ¶¶ 5 - 8) The chartering agreements in the record (Stip. Exs. E and F) are additional evidence of the interstate and international nature of the trips made by the boat and that the boat was "for hire" within the meaning of the statute.

The Department's argument that the boat did not transport persons or property for hire is based on a provision in taxpayer's chartering agreement that states that the boat "shall not transport merchandise or carry passengers for pay" and "shall be employed exclusively as a pleasure vessel." (Dept. brief p. 3) In context, however, it is clear that this restriction applies to the persons who are chartering taxpayer's boat. It does not apply to or restrict the

taxpayer, the owner of the boat, in any way. The Department cites two letter rulings issued by the Department in support of the proposition "that pleasure boats do not constitute rolling stock moving in interstate commerce." (Dept. brief p. 3) Letter rulings, however, are not precedent. Union Electric v. Department of Revenue, 136 Ill.2d 362 (1990).

In any case, the factual situations in those letter rulings are distinguishable from the facts of this case. Both rulings involve fishing boats purchased by Illinois residents who were charter boat captains on Lake Michigan. Their primary business was providing customers fishing opportunities on Lake Michigan rather than transporting persons or property for hire in interstate commerce. They picked their customers up in Illinois and proceeded to go fishing on Lake Michigan. Because the borders of Wisconsin, Illinois and Michigan extend out into Lake Michigan, they might occasionally cross state lines during these fishing trips. However, they returned their customers to the same ports in Illinois at the end of the trips. The principal purpose of the fishing boat customers in chartering the boats was not to be transported in interstate commerce but, rather, to go fishing for pleasure on Lake Michigan. Neither ruling letter indicated that the fishing boat customers intended to be transported across state lines, and the passenger's intent is controlling in determining whether the passenger is about to travel interstate. Burlington Northern, Inc., *supra*, at p. 176. Accordingly, the Department ruled that charter boat fishing on Lake Michigan is not interstate commerce and denied the exemption for the fishing boats. (PLR Nos. 88-0086 and 89058)

Finally, the Department makes a point of the fact that the boat does not have an ICC number. (Dept. brief p. 3) The statute does not make registration with the ICC a condition for qualification as rolling stock used by an interstate carrier for hire. Therefore, lack of registration with the ICC does not mean that the boat is not an interstate carrier for hire. In any case, as the taxpayer points out in its brief, the boat was registered with the United States Coast Guard, not with the ICC. (Taxpayer brief p. 6)

In the case *sub judice*, the record indicates that the boat was docked primarily in Ft. Lauderdale, Florida, and that it was chartered (i.e., hired) by third parties to cruise in numerous state and foreign waters. The record shows that the cruise that brought the boat to Illinois started in Ft. Lauderdale, Florida. The boat cruised up the east coast of the United States, went through the St. Lawrence Seaway into the Great Lakes. Upon arrival in the Great Lakes the boat traveled to Canada, New York, Pennsylvania, Ohio, Michigan, Indiana, Illinois, Wisconsin and Minnesota. It docked in Waukegan Harbor, Illinois temporarily during the summer of 1992. When it docked in Waukegan it was still under charter by taxpayer to Capital Development Corporation on a charter that began in Florida. Therefore, the boat was exempt because it was rolling stock being used in interstate commerce by an interstate carrier for hire.

WHEREFORE, for the reasons stated above, it is my recommendation that NTL XXXXX be canceled.

Date: _____
June 12, 1997

Charles E. McClellan
Administrative Law Judge