UT 97-6
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

DEPARTMENT OF REVENUE	)	
STATE OF ILLINOIS	)	
	)	
v.	)	NTL
	)	
TAXPAYER	)	Mimi Brin
	)	Administrative Law Judge

RECOMMENDATION FOR DISPOSITION

Appearances: Gary A. Goodman of Winston & Strawn, for TAXPAYER; Mark Dyckman, Special Assistant Attorney General, for the Illinois Department of Revenue

Synopsis:

This matter comes on for hearing pursuant to TAXPAYER's (hereinafter referred to as the "Taxpayer" or "TAXPAYER") protest of Notice of Tax Liability XXXXX (hereinafter referred to as the "NTL") issued by the Illinois Department of Revenue (hereinafter referred to as the "Department") for Use Tax on purchases pursuant to a customs declaration. At hearing,[1] taxpayer raised the following issues: 1) whether pursuant to taxpayer's motion, this matter should be dismissed as the Department failed to appear at the initial status conference; 2) whether the Department's Correction and/or Determination of Tax Due (hereinafter referred to as the "Correction") should not be given *prima facie* correctness as the Department employee that prepared it did not appear at hearing and, therefore, the taxpayer could not cross examine her; and 3) whether the assessment does not reflect the customs declaration and, therefore, should not be finalized. A hearing in this matter was held on August 6, 1997.

---

[1]. TAXPAYER did not appear at the hearing, nor did any other person appear as a witness on her behalf. Her appearance at the hearing was through counsel.

Following the submission of all evidence and a review of the record, it is recommended that this matter be resolved in favor of the Department on all issues.[2]

Findings of Fact:

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, was established by the admission into evidence of the Correction and/or Determination of Tax Due, showing a total liability due and owing in the amount of $420.00. Department Ex. No. 1

2. The basis of the determination was taxpayer's U.S. Customs Declaration. Department Ex. No. 1

3. Taxpayer failed to set for hearing its "motion" to dismiss this matter based upon the purported failure of the Department to appear at the initial status conference. Tr. pp. 5-9

4. Administrative Law Judge Daniel Mangiamele was present at the initial status conference. Tr. pp. 4, 6

5. Taxpayer failed to file any notice to appear at hearing, as provided by Supreme Court Rule 237, requiring the appearance at hearing of the Department employee responsible for the Correction at issue herein. Tr. p. 12

Conclusions of Law:

On examination of the record established, this taxpayer has failed to demonstrate by the presentation of testimony or through exhibits, evidence sufficient to overcome the Department's *prima facie* case of tax liability under the assessment in question. Accordingly, by such failure, and under the reasoning given below, the determination by the Department that TAXPAYER is subject to the imposition of the Use Tax in the amount assessed must stand as a matter of law. In support thereof, the following conclusions are made:

[2]. Following the hearing, taxpayer filed a post-trial brief, to which the Department filed a response followed by a taxpayer reply.

At hearing, prior to opening statements, taxpayer, through counsel, advised that there was a motion pending that had not been ruled on. Tr. p. 3 Taxpayer referred to an untitled document filed either on June 4 or 5, 1997, the first paragraph of which stated that whereas Dr. TAXPAYER appeared, through counsel, at the status hearing scheduled for June 2, 1997, "the Department had no representative other than the administrative law judge." Therefore, taxpayer stated that she was entitled to have the action dismissed for failure of the taxpayer to appear. The first instance that any request was made to hear this matter was at the hearing on August 6, 1997.

Taxpayer's request to dismiss the action fails for several reasons. Initially, Department regulations detail motion practice in these administrative proceedings. Pursuant to same, motions are to be "clearly designated as such" and shall "bear evidence of a certification of service and notice to the appropriate parties." 86 Ill. Admin Code, ch. I, sec. 200.185 (c) Further, "[i]t shall be the duty and responsibility of the person submitting the motion to bring it before the presiding officer of the case to which it pertains, after proper notice has been served, for hearing and disposition." *Id*. at sec. 200.185 (b) "Any motion filed in any matter before the Department which is not caused to be heard on its merits (unless otherwise extended by written order) within 10 day after service of the motion or notice thereof shall be deemed to have been waived and thereby stricken from the record." *Id*.

Taxpayer complied with none of these requirements. Her "motion" is, therefore, stricken from the record.

However, at hearing, the Department addressed the merits of the motion, and, although it raised the motion's above related fatal infirmities, the Department appears to have waived its objection on that ground. But, as related by the Department, the motion also fails on its merits.

The taxpayer complains that since the Administrative Law Judge was the only Department employee present at the status conference, the Department did not appear as required of a party, and, therefore, the matter must be decided against

the Department as it would have been had the taxpayer failed to appear. To begin, there is no requirement that a litigator be assigned to each case in the hearings office. In fact, the law recognizes that in administrative proceedings, the hearing officer may also present the case for the agency. Scott v. Department of Commerce & Community Affairs, 84 Ill.2d 2, 54-56 (1984) As the court in Puleo v. Department of Revenue, 117 Ill. App.3d 260 (4th Dist. 1983) stated when it addressed this same issue, "[t]here is no prohibition against this." *Id*. at 269 Therefore, since both parties appeared at the status conference, taxpayer's motion is without merit.

As to her second issue, TAXPAYER complains that the Department did not offer its employee who prepared the Correction for cross examination at hearing. Therefore, TAXPAYER argues, the Correction cannot be given *prima facie* correctness.[3] In support of her position, TAXPAYER cites Scott v. Department of Commerce and Community Affairs, *supra*, and Grand Liquor Co., Inc. v. Department of Revenue, 67 Ill.2d 195 (1977).

The Department has correctly distinguished the Scott case from the instant matter. In Scott, the agency asking for the removal of commissioners from the East St. Louis Housing Authority averred that the commissioners had the total burden of showing that they were not responsible for the acts of incompetence and negligence of duty or malfeasance as charged. The Court determined that there was imposed upon the agency the obligation to establish, "in the first instance, a prima facie case " (*id*. at 53) and thereby afford the commissioners the right to cross examine witnesses and testimony.

[3]. At hearing, taxpayer's counsel objected to the admission into evidence of the Correction, stating that he had asked for all documents in the Department's possession. Tr. p. 13 It was determined that taxpayer's request was made in her protest and request for hearing letter. Department regulation specifically provides that "[n]o discovery may be initiated by any party until such time as the case upon which the protest is based has been docketed by the hearings section, given an identifying docket number and a notice of automatic status conference issued." 86 Ill. Admin. Code, ch. I, sec. 200.125 That regulation also requires discovery requests to be in writing in order for an ALJ to enforce same. *Id*.

In the instant matter, by statute, the legislature provides that the Department's determination of the amount of tax due "shall be prima facie correct and shall be prima facie evidence of the correctness of the amount of tax due, as shown in such determination." 35 **ILCS** 120/4 (examination and correction of return); 35 **ILCS** 120/5 (failure to make return)[4] The statute further provides, in pertinent part:

> Proof of such determination by the Department may be made at any hearing before the Department or in any legal proceeding by a reproduced copy or computer print-out of the Department's record relating thereto in the name of the Department under the certificate of the Director of Revenue. ...Such certified reproduced copy or certified computer print-out 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. ...

Id.

These very provisions affording the Department's Correction or Determination of Tax Due *prima facie* correctness and *prima facie* evidence of the amount of tax due, without further proof, distinguish and make inapplicable, the Scott determination that the administrative agency has the burden to present a *prima facie* case of witnesses and testimony for the charged party to cross-examine.

It is well established that the Department's Correction or Determination of Tax Due is the Department's *prima facie* case, and the burden then shifts to the taxpayer to overcome that *prima facie* determination. A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App.3d 826 (1st Dist. 1988); Masini v. Department of Revenue, 60 Ill. App.3d 11 (1st Dist. 1978); Rentra Liquor Dealers, Inc. v. Department of Revenue, 9 Ill. App.3d 1063 (1st Dist. 1973) In fact, the court in A.R. Barnes specifically stated that "there is no statutory requirement that the DOR substantiate the basis for its corrected return" (A.R. Barnes, *supra* at 832) and "the DOR is not required to produce the auditor who computed the corrected

---

[4]. The liability herein is pursuant to the Use Tax Act, 35 **ILCS** 105/1 *et seq*. The Use Tax Act incorporates the provisions of the Retailer's Occupation Tax Act (35 **ILCS** 120/1 *et seq*.) concerning the Department's correction of Use tax returns or determination of Use tax due if no return is filed. 35 **ILCS** 105/12

return in order to support its prima facie case." *Id*. (citing Masini v. Department of Revenue, *supra*) See, also, Rentra Liquor Dealers, Inc. v. Department of Revenue, *supra*

This does not run afoul of the decision in Grand Liquor, as professed by the taxpayer. In that 1977 opinion, the Department's *prima facie* case was predicated on a computer printout, with the electronic data processing involved being the exception rather than the rule at that time. Because the technology was developing, there was no statutory provision specifically addressing the evidentiary effect of Corrections based upon computerized data, and, thus, the Court determined that the Department failed to provide the proper evidentiary foundation for its assessment.[5] Grand Liquor, the holding of which is limited to a narrow issue (See, Grand Liquor, *supra*, at 206 (dissent, Mr. Justice Underwood); A.R. Barnes & Co. v. Department of Revenue, *supra*; Puleo v. Department of Revenue, *supra*) is no longer controlling even on that issue, as the pertinent statute was amended in 1984, whereby Corrections based upon computer printouts are given *prima facie* correctness and are *prima facie* evidence of the amount due as long as the Director's certification provides specific foundational language. P.A. 83-1416, eff. September 13, 1984; P.A. 83-1470, eff. September 13, 1984 The Department provided the appropriate certification in this matter. Department Ex. No. 1

There is no question but that if this taxpayer had properly rebutted the Department's *prima facie* case regarding the basis of the assessment, the burden would have been the Department's to prove the reasonableness of its determination of tax due. Taxpayer could have done this in several ways-that is, the taxpayer could have properly introduced into evidence the customs declaration her counsel

[5]. Two Justices wrote dissents in Grand Liquor. Justice Underwood's dissenting comments (Grand Liquor Co. v. Department of Revenue, 67 Ill.2d 195, 205-06 (1977)) educate well on the legal precedent establishing that the Department is not required to produce either the records upon which the Correction is based or the person who prepared the Corrections for cross-examination.

said was inconsistent with the assessment[6] and/or she could have called the Department's employee as a witness pursuant to Department regulation. 86 Ill. Adm. Code, ch. I, sec. 200.145 (taxpayer may require the attendance at hearing of departmental employee by the timely issuance of a notice to appear as in Supreme Court Rule 237) Neither was done.

In fact, the only rebuttal to the Department's Correction, which also is the basis for the third issue raised, are taxpayer's counsel's averments in opening and closing comments that TAXPAYER's customs declaration contained more items than what was assessed by the Department and that there were inaccurate prices for the items that were the basis of the assessment. Tr. pp. 11, 18-19 Counsel was not sworn as a witness and, quite clearly, counsel's opening and closing statements, are not evidence. Nor do counsel's references to the customs declaration place it into evidence.

Even if they were deemed to be so, these oral comments by counsel are not sufficient to rebut the Department's case. Copilevitz v. Department of Revenue, 41 Ill.2d 154 (1968); Masini v. Department of Revenue, *supra*; A.R. Barnes & Co. v. Department of Revenue, *supra* Since oral testimony is not sufficient to overcome the *prima facie* correctness of the Department's determinations, the taxpayer has failed to provide any evidence that the Correction should not be finalized as issued.

Wherefore, for the reasons cited above, it is my recommendation that the Notice of Tax Liability XXXXX be finalized as issued.

_____

Mimi Brin
Administrative Law Judge

[6]. It is apparent that the taxpayer had the customs declaration that is the basis of the assessment.