**UT 98-2**
**Tax Type: USE TAX**
**Issue: Taxpayer Claims He Is Not A Retailer**

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

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| **THE DEPARTMENT OF REVENUE** | **)** | |
| **OF THE STATE OF ILLINOIS** | **)** | |
| | **)** | **Docket No. 98-ST-0000** |
| **v.** | **)** | **Acct. #** |
| | **)** | **NTL #** |
| **JOHN DOE AND** | **)** | |
| **JOHN DOE III** **)** | | |
| **Taxpayers** | **)** | |

## RECOMMENDATION FOR DISPOSITION

Appearances: Charles Hickman, Special Assistant Attorney General, for the Department of Revenue of the State of Illinois; JOHN DOE for JOHN DOE and JOHN DOE III.

Synopsis:

JOHN DOE and JOHN DOE III ("taxpayers") bought an airplane from TAXPAYER of California. The Department of Revenue ("Department") sent the taxpayers a Notice of Tax Liability for Illinois Use Tax and Metro East Mass Transit District Use Tax based on information supplied by the Federal Aviation Administration ("FAA"). The taxpayers timely protested that the entire transaction was entitled to an exemption from Use Tax as an occasional sale and that they did not live in an area that was subject to the Metro East Use Tax. After reviewing the record it is recommended that the Illinois Use Tax be upheld but that the Metro East Use Tax be abated.

FINDINGS OF FACT:

1. Based on information obtained from the FAA that the taxpayers had purchased an aircraft, the Department proposed a Use Tax liability for the taxpayers, plus penalties for late filing and late payment. This was documented in an SC-10-K Corrected Return. (Dept. Ex. # 1).

2. The Use Tax proposed by the Department was 6.5% of the purchase price, reflecting 6.25% Illinois Use Tax and .25% Metro East Mass Transit District Use Tax. (Tr. p. 14).

3. The taxpayers purchased an aircraft, with registration number XXXXX, from TAXPAYER. (Tr. p. 27).

4. The taxpayers' address is listed as FICTITIOUS CITY, Illinois on the registration application for Aircraft #XXXXX. (Dept. Ex. #2, p. 3, Tr. p. 11).

5. The Aircraft Bill of Sale provided by the FAA to the Department indicated that the taxpayers were the purchasers of an aircraft with United States Registration Number XXXXX and that the seller was TAXPAYER of AIRPLANE SALES, Dealer Number XXXXX. The taxpayers' address is listed on this form as FICTITIOUS CITY, Illinois. (Dept. Ex. #2, p. 2).

6. A Dealer Number indicates that an entity is registered as an aircraft dealer with the FAA. (Tr. p. 11).

7. The Aircraft Bill of Sale for the transaction in which TAXPAYER came into possession of Aircraft #XXXXX shows that it was sold by RON AND MARY DOE to TAXPAYER DBA AIRPLANE SALES. This Bill of Sale also indicates that TAXPAYER was a dealer at the time of purchase. (Dept. Ex. #2, p. 5).

8. The contract for the sale of the aircraft between the taxpayers and TAXPAYER was signed by TAXPAYER/AIRPLANE SALES. (Taxpayer Ex. #3).

CONCLUSIONS OF LAW:

Illinois imposes a tax on the privilege of using tangible personal property purchased at retail from a retailer. 35 ILCS 105/3 (West 1996). An exception to this tax is provided when the purchase is made from an individual who only engages in isolated or occasional sales of such property. 35 ILCS 105/2 (West 1996). This exception is available when the selling individual does not hold himself out as being engaged or does not habitually engage in selling such tangible personal property at retail. Id. The parties disagree as to whether both conditions must be absent in order to qualify for the exemption.

The taxpayers argue that the purchase of Aircraft #XXXXX is covered by the above exception to the Use Tax. The Department has established its *prima facie* case that the taxpayer is subject to the Illinois Use Tax by submitting the SC-10-K Corrected Return. 35 ILCS 105/12 incorporating 35 ILCS 120/5 (West 1996). Even if the taxpayer produces sufficient evidence to overcome the *prima facie* case, a taxpayer claiming to be exempt from a tax has the burden of proving by clear and conclusive evidence that he is entitled to such an exemption. Telco Leasing, Inc. v. Allphin, 63 Ill. 2d 305, 310 (1976).

The taxpayers contend that TAXPAYER did not make known to them that he was a dealer and so did not hold himself out as being engaged in selling aircraft at retail. They do not dispute that TAXPAYER was a registered retailer at the time of the transaction. (Tr. p. 27). For the taxpayers' position to be accepted, the statute must be read as requiring that a seller both habitually engage in retail sales and hold himself out as a retailer to be subject to the tax, that a seller who does only one or the other qualifies for the exemption. However, the language of the

exemption parallels the language used to define a retailer earlier in the same statute. 35 ILCS 105/2 (West 1996). In that section, a person who either holds himself out as a retailer or who habitually engages in sales of tangible personal property is a retailer for purposes of the Use Tax Act. It then follows that to be considered a non-retailer for the purposes of the isolated or occasional sale exemption to the Use Tax Act that a person must neither hold himself out as a retailer nor habitually engage in sales of tangible personal property. This interpretation is supported by case law in which the imposition of Retailers' Occupation Tax (ROT) on a seller who held itself out as a wholesaler and not a retailer was upheld. Franklin County Coal Co. v. Ames, 359 Ill. 178 (1934), cited with approval in Mobil Oil Corp. v. Johnson, 93 Ill. 2d 126 (1982). This leads to the conclusion that an entity that habitually engages in retail sales is subject to ROT even if it does not hold itself out to be a retailer. As Use Tax is intended to protect Illinois merchants by preventing the evasion of ROT, it stands to reason that the exemption provided for Use Tax will not be broader than that provided for ROT. United Air Lines, Inc. v. Mahin, 49 Ill. 2d 45 (1971), vacated and remanded on other grounds 93 S.Ct. 1186, 410 U.S. 623, on remand 54 Ill. 2d 431. The taxpayers' interpretation of the exemption must be rejected. Use Tax applies to a purchase from a retailer even if it does not hold itself out as a retailer.

The taxpayers also argue that the seller, TAXPAYER should not be considered a retailer under Illinois law. They offered testimony regarding conversations between JOHN DOE and TAXPAYER to show that TAXPAYER registered as a dealer for improper purposes. (Tr. p. 23-4). However, this testimony was hearsay and unreliable. JOHN DOE also testified that the number of miles put on the aircraft was inconsistent with ownership by a dealer. (Tr. p. 26). However, Illinois law places no limit on the use that may be made of goods before they are sold

at retail. When a buyer purchases a product for use or consumption from a seller who is in the business of selling that product, the buyer has purchased the product at retail from a retailer for purposes of the Use Tax Act. Mobil Oil Corp. v. Johnson, 93 Ill. 2d 126 (1982). All of the admissible evidence, including the Aircraft Bill of Sale for the transaction between the taxpayers and TAXPAYER (Dept. Ex. #2, p. 2), the Aircraft Bill of Sale for the transaction in which TAXPAYER acquired the aircraft (Dept. Ex. #2, p.5), and the testimony of JOHN DOE (Tr. p. 27) indicate that TAXPAYER was an aircraft dealer registered with the FAA at the time the taxpayers purchased the aircraft. The fact that TAXPAYER was registered as a dealer of aircraft indicates that he was habitually engaged in the sale of aircraft at retail and the taxpayers have offered no credible evidence to the contrary to overcome the Department's *prima facie* case or to satisfy their own burden of proof. Thus any transaction with him is not eligible for an exception to the Use Tax as an occasional sale.

The taxpayers also protest the application of an additional one-quarter percent Use Tax under the Metro East Mass Transit Use Tax. 70 ILCS 3610/5.01(d) (West 1996). The Department imposed this tax because the address listed for the taxpayers on the Aircraft Bill of Sale was in FICTITIOUS CITY, Illinois, which is subject to the tax. (Tr. p. 14). The taxpayers argued that the address was outside of the boundaries of the city of FICTITIOUS CITY and as such should not be subject to the Metro East Tax. The Department has established its *prima facie* case that the taxpayers lived in FICTITIOUS CITY and were subject to the Metro East Use Tax by introducing the SC-10-K Corrected Return marked as Department's Exhibit #1. 70 ILCS 3610/5.01(d) incorporating 35 ILCS 105/12 which incorporates 35 ILCS 120/5 (West 1996). However, the relevant address for determination of whether the Metro East Use Tax is applicable is the address used for titling and registration purposes. 70 ILCS 3610/5.01(d) (West 1996).

The registration application filed by the taxpayers for Aircraft #N6954R shows an address in FICTITIOUS CITY, Illinois. (Dept. Ex. #2, p. 3). According to the Department's own published information, FICTITIOUS CITY Township is not covered by the Metro East Mass Transit District Use Tax. Illinois Sales Tax Rate Reference Manual, p. 95. The registration document, which it is assumed would have been introduced by the taxpayers if the Department had not first offered it, is credible evidence that the taxpayers are not subject to the Metro East Tax, and serves to overcome the Department's *prima facie* case. Once the Department's *prima facie* case is overcome, the burden falls on the Department to prove its allegations by a preponderance of the evidence. Goldfarb v. Department of Revenue, 411 Ill. 573, 580 (1952). Because the Department has offered no evidence beyond the SC-10-K Corrected Return to counter the titling document and show that the taxpayers are subject to the Metro East Tax, the taxpayers should prevail on that issue.

For the foregoing reasons, it is recommended that the Department's Notice of Tax Liability be upheld, with the exception of the .25% added for the Metro East Mass Transit District Use Tax, which should be abated.

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Chris Higgerson
Administrative Law Judge