

ST 08-11

Tax Type: Sales Tax

Issue: Exemption From Tax (Charitable or Other Exempt Types)

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

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

v.

ABC ELEMENTARY SCHOOL

Taxpayer

Docket # 07-ST-0000

Claim for Exemption Number

RECOMMENDATION FOR DISPOSITION

Appearances: Robin Gill, Special Assistant Attorney General, for the Department of Revenue of the State of Illinois; Jane Doe ABC, *pro se*, for ABC Elementary School

Synopsis:

ABC Elementary School (“taxpayer”) applied to the Department of Revenue (“Department”) for an exemption identification number in order to purchase tangible personal property at retail free from the imposition of retailers’ occupation taxes and use taxes. The Department denied the application, and the taxpayer timely protested the denial. An evidentiary hearing was held during which the sole issue presented was whether the taxpayer is organized and operated exclusively for educational purposes under section 3-5(4) of the Use Tax Act (35 ILCS 105/3-5(4)) and section 2-5(11) of the Retailers’ Occupation Tax Act (35 ILCS 120/2-5(11)). The taxpayer contends that it is

an elementary school for children in grade levels kindergarten through fourth grade and that it qualifies for an exemption as a private school. After reviewing the record, it is recommended that the taxpayer has not met its burden of establishing by clear and convincing evidence that it is operated for educational purposes.

FINDINGS OF FACT:

1. The taxpayer is an Illinois not-for-profit corporation that was organized on May 23, 2005. (Dept. Ex. #1, pp. 9-10)
2. The articles of incorporation indicate the purposes for which taxpayer was organized are as follows: “to provide standard and creative education for grades K-6.”¹ (Dept. Ex. #1, p. 10)
3. The bylaws indicate the purpose of the taxpayer is “to establish a private school under Illinois School Statutes and to pursue related educational endeavors.” (Dept. Ex. #1, p. 11)
4. The taxpayer printed a flyer that indicates it is a school for grades K-4 and provides the following classes: Social Studies, African American History, Science, Mathematics, Choice Reading, and English/Swahili/Zulu. It also provides the following: “Specials: Creative Arts, Special Skills, Matter of Respect, and Street Talk.” (Dept. Ex. #1, p. 20; Tr. p. 12)
5. The taxpayer has class descriptions for each of the classes that it offers. (Dept. Ex. #1, pp. 23-28; Tr. p. 13)
6. The taxpayer provided a tentative daily schedule for each of the grade levels, kindergarten through fourth grade. (Dept. Ex. #1, pp. 29-32; Tr. p. 13)

¹ The taxpayer’s representative explained during the hearing that because of the space it has in its facility, the grade levels are now kindergarten through fourth grade. (Tr. p. 10)

7. The taxpayer installed exit and emergency lighting as required by the Fire Code. The taxpayer also installed a new door to comply with the Fire Code and purchased fire extinguishers. (Dept. Ex. #1, p. 33; Taxpayer Ex. #1; Tr. pp. 13-14, 20-22)
8. The taxpayer incurred additional expenses for the purchase of desks and chairs. (Taxpayer Ex. #1)
9. The school is located at Avenue in Anywhere, and the building is zoned residential/commercial. The Anywhere Fire Department's Fire Safety Division indicated that only the first floor of the building may be used for school activities. The taxpayer's principal lives upstairs. The kitchen on the first floor will be used as a classroom for first and second grade, but it will not be used as a cafeteria for the children. (Dept. Ex. #1; Tr. pp. 24-29)
10. The taxpayer had a flyer that advertised an open house for November 15, 2007 from 6:30 p.m. to 8:30 p.m. (Dept. Ex. #1, p. 48; Tr. pp. 15-16)
11. In addition to flyers, the taxpayer seeks students through the media and word of mouth. The taxpayer's school year is November to July. (Tr. pp. 32-33; 36-37)
12. The taxpayer did not have any students enrolled as of the date of the hearing and has not had students enrolled prior to that date. (Tr. p. 30)
13. The taxpayer's teachers are "on hold" until students are enrolled. The teachers currently are not receiving a salary. (Tr. pp. 30-32)

CONCLUSIONS OF LAW:

The Use Tax Act ("Act") (35 ILCS 105/1 *et seq.*) imposes a tax upon the privilege of using in Illinois tangible personal property purchased at retail from a retailer. 35 ILCS

105/3. Section 3-5(4) of the Act provides a list of tangible personal property that is exempt from the tax, and includes the following:

Personal property purchased by a governmental body, by a corporation, society, association, foundation, or institution organized and operated exclusively for charitable, religious, or educational purposes On and after July 1, 1987, however, no entity otherwise eligible for this exemption shall make tax-free purchases unless it has an active exemption identification number issued by the Department. 35 ILCS 105/3-5(4).

Section 2-5(11) of the Retailers' Occupation Tax Act ("ROTA") (35 ILCS 120/1 *et seq.*) contains a similar provision. See 35 ILCS 120/2-5(11). Section 2c of the Act provides additional guidance regarding entities organized for educational purposes and provides in part as follows:

For purposes of this Act, a corporation, limited liability company, society, association, foundation or institution organized and operated exclusively for educational purposes shall include: all tax-supported public schools; private schools which offer systematic instruction in useful branches of learning by methods common to public schools and which compare favorably in their scope and intensity with the course of study presented in tax-supported schools; 35 ILCS 105/2c.

Whether an institution has been organized and is operating exclusively for an exempt purpose is determined from its charter, bylaws and the actual facts relating to its method of operation. Du Page County Board of Review v. Joint Commission on Accreditation of Healthcare Organizations, 274 Ill. App. 3d 461, 468-469 (2nd Dist. 1995).

The Department's denial of the taxpayer's claim for an exemption identification number is presumed to be correct, and the taxpayer has the burden of proving by clear and convincing evidence that it is entitled to the exemption. See Wyndemere Retirement Community v. Department of Revenue, 274 Ill. App. 3d 455, 459 (2nd Dist. 1995); Gas Research Institute v. Department of Revenue, 154 Ill. App. 3d 430, 436 (1st Dist. 1987).

It is well-settled that tax exemption provisions are strictly construed in favor of taxation.

Id.; Heller v. Fergus Ford, Inc., 59 Ill. 2d 576, 579 (1975). All facts are construed and all doubts are resolved in favor of taxation. *Id.* To prove its case, a taxpayer must present more than its testimony denying the Department's determination. Sprague v. Johnson, 195 Ill. App. 3d 798, 804 (4th Dist. 1990). The taxpayer must present sufficient documentary evidence to support its claim. *Id.*

The taxpayer contends that it meets the Act's definition of a private school because it provides instruction in the subjects that are required to be offered in an elementary school. The taxpayer argues that it does not have to be incorporated or registered with the State Board of Education. It claims, however, that it has to meet the State of Illinois requirements to be identified as a private school, such as provide instruction in various subjects. (Tr. p. 16; Dept. Ex. #1, p. 50) The taxpayer maintains that it has met the State's requirements. (Tr. p. 16) In addition, the taxpayer argues that an article that was published on December 9, 2007 in the Anywhere newspaper, The State Journal Register, damaged the reputation of the school and is one of the reasons why it does not yet have any students. The taxpayer contends that the article contained lies that affected the school's reputation. (Tr. pp. 17-18) The taxpayer has filed a lawsuit against the person who wrote the article. (Taxpayer Ex. #2, 3)

The Illinois State Board of Education ("Board") has provided Policy and Guidelines for Registration and Recognition of Nonpublic Elementary and Secondary Schools ("Policy and Guidelines") in order to insure the integrity of nonpublic schools. (Dept. Ex. #1, pp. 36-45) As the taxpayer has indicated, the Policy and Guidelines are advisory, and the registration and recognition of nonpublic elementary schools is voluntary. The policy includes having all nonpublic elementary schools register on an

annual basis. The registration includes assurances of compliance with federal and state laws regarding health examination and immunization, attendance, length of term, nondiscrimination, and fire and health safety requirements. (Dept. Ex. #1, p. 38) Nonpublic elementary schools may voluntarily seek the status of “Nonpublic School Recognition,” which may be obtained by compliance with administrative guidelines and review procedures as prescribed by the Board. The Board’s intent is that nonpublic schools that receive the “Certificate of Nonpublic School Recognition” shall be viewed by all educational institutions as having state-approved educational programs. *Id.*

As previously stated, the taxpayer must prove its entitlement to the exemption identification number by clear and convincing evidence. See Wyndemere, supra; Rogy’s New Generation, Inc. v. Department of Revenue, 318 Ill. App. 3d 765, 771 (1st Dist. 2000). Although the taxpayer is not required to obtain a Certificate of Nonpublic School Recognition, having one would be clear and convincing evidence that it is the type of private school anticipated by the exemption statute.

In order to receive the exemption identification number, the statute requires a taxpayer to be both “organized and operated” exclusively for educational purposes. See 86 Ill. Admin. Code §130.2005(j)(3). This must be determined from its charter, bylaws and the actual facts relating to its method of operation. See Du Page County Board of Review, supra. Although the taxpayer’s articles of incorporation and bylaws indicate that it is organized for the purpose of providing elementary education, the actual facts relating to its method of operation do not support a finding that it is operated as an elementary school because the taxpayer has not actually provided education. The evidence is not clear and convincing that the taxpayer actually operated for educational

purposes because the taxpayer, at the time of the hearing, did not have students and has not provided instruction or education of any nature to children in the elementary grade levels. Anticipatory use or intention to use is not the equivalent of actual use. See Skil Corporation v. Korzen, 32 Ill. 2d 249, 252 (1965). Therefore, there was no actual operation for educational purposes as required by the statute. Because the taxpayer has not established clearly and convincingly that it is operated for educational purposes, the exemption must be denied.

Recommendation:

For the foregoing reasons, it is recommended that the taxpayer's request for an exemption identification number be denied.

Linda Olivero
Administrative Law Judge

Enter: July 18, 2008