

ST 13-14
Tax Type: Sales Tax
Tax Issue: "Taxation of Delivery Charges"

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

THE DEPARTMENT OF REVENUE
OF THE STATE OF ILLINOIS

v.

ABC BUSINESS,
Taxpayer

No. XXXX
Account ID XXXX
Letter ID# XXXX
XXXX
Period 1/08 – 6/10

Ted Sherrod
Administrative Law Judge

RECOMMENDATION FOR DISPOSITION

Appearances: Special Assistant Attorney General John Alshuler on behalf of the Illinois Department of Revenue; Joshua Nesser, Esq. of Lavelle Law, Ltd. on behalf of ABC Business

Synopsis:

This matter comes on for hearing upon stipulated facts by agreement of the parties. The Department issued Notices of Tax Liability ("NTLs") number XXXX and number XXXX regarding the taxpayer's retailers' occupation tax ("ROT") and use tax liability for the period January 1, 2008 through June 30, 2010 on December 21, 2011. The taxpayer is contesting these NTLs. The issue to be decided, as agreed to by the parties, is as follows:

The issue to be decided ... is whether or not the Taxpayer, in computing ... Retailers' Occupation Tax liability, may deduct, from ..gross receipts from sales of tangible personal property at retail, amounts charged ..to ..customers for transportation or delivery charges and whether those charges were not just separately stated, but separately contracted for pursuant to 35 **ILCS** 120/1 and 86 Ill. Admin. Code Sec. 415.

After reviewing the stipulated facts agreed to by the parties and other documents of record, I recommend that the issue in controversy be decided in favor of the taxpayer.

Findings of Fact:

1. ABC Business (“ABC BUSINESS”) is an Illinois corporation with its registered address at Anywhere, Illinois and its principal place of business at Happytown, Illinois. It has continuously operated in Illinois at all times since November 28, 1984. Stipulation of Facts (“Stip.”), paragraph (“par.”) 1.
2. ABC BUSINESS provides hauling services to businesses in the Greater Busytown area. The majority of the work done by ABC BUSINESS involves shipping its customers’ construction materials from a vendor’s location to the customers themselves. For instance, if a customer purchases gravel and needs it to be delivered; ABC BUSINESS will pick up the gravel at a quarry and delivery it to the customer’s location. ABC BUSINESS does not maintain an inventory, nor does it have an inventory yard. Stip. par. 2.
3. Throughout the periods in question, ABC BUSINESS was occasionally contracted by customers who desired to purchase gravel directly from ABC BUSINESS. To do so, ABC BUSINESS would purchase the materials from the vendor and re-sell the gravel to its customers. In such cases, ABC BUSINESS provided its customers with an estimate detailing both the purchase price of the materials in question, the Illinois Retailers’ Tax (the “Retailers’ Tax”) rate on such materials, and the cartage fees. The cartage fees were always listed as a separate item from the purchase price of the materials. Par. 3.
4. In response to these estimates, ABC BUSINESS’s customers generally had two options: (1) to purchase the materials from ABC BUSINESS and have ABC BUSINESS haul the materials from the quarry to the customer’s location at an additional cost; or (2) to purchase the materials from ABC BUSINESS and to pick up the materials at ABC BUSINESS’s

location (in these cases, ABC BUSINESS would haul materials to its own location from the quarry). ABC BUSINESS's customers actually exercised both of these options. Stip. par. 4

5. In all of these instances, ABC BUSINESS charged its customers sales tax on the material purchased. In cases where the customer did require ABC BUSINESS to ship the materials, no Retailers' Tax was charged on the cartage fees. In none of the transactions in question did ABC BUSINESS's hauling charges exceed its cost of hauling. Stip. par. 5.

Conclusions of Law:

This case presents the issue whether the taxpayer properly deducted shipping and handling charges from revenues reported on its ST-1 sales tax returns during the tax period in controversy. Shipping charges are part of the taxpayer's gross receipts and are taxable except as provided by Department regulation. Nancy Kean v. Wal-Mart Stores, Inc., 235 Ill. 2d 351 (2009). With respect to shipping charges, 86 Ill. Admin. Code, ch. I, §130.415 provides as follows:

130.415. Transportation and Delivery Charges.

- a) Transportation and delivery charges are considered to be freight, express, mail, truck or other carrier conveyance or delivery expenses. These charges are also many times designated as shipping and handling charges.
- b) The answer to the question of whether or not a seller, in computing his Retailers' Occupation Tax liability, may deduct, from his gross receipts from sales of tangible personal property at retail, amounts charged by him to his customers on account of his payment of transportation or delivery charges in order to secure delivery of the property to such customers, or on account of his incurrance of expenses in making such delivery himself, depends not upon the separate billing of such transportation or delivery charges or expense, but upon whether the transportation or delivery charges are included in the selling price of the property which is sold or whether the seller and the buyer contract separately for such transportation or delivery charges by not including such charges in such selling price. In addition, charges for transportation and delivery must not exceed the costs of transportation or delivery. If those charges do exceed the cost of delivery or transportation, the excess amount is subject to tax.
- c) If such transportation or delivery charges are included in the selling price of the tangible personal property which is sold, the transportation or delivery expense is an element of cost to the seller within the meaning of Section 1 of

the Retailers' Occupation Tax Act, and may not be deducted by the seller in computing his Retailers' Occupation Tax liability.

d) If the seller and the buyer agree upon the transportation or delivery charges separately from the selling price of the tangible personal property which is sold, then the cost of the transportation or delivery charge is not a part of the "selling price" of the tangible personal property which is sold, but instead is a service charge, separately contracted for, and need not be included in the figure upon which the seller computes his Retailers' Occupation Tax liability. Delivery charges are deemed to be agreed upon separately from the selling price of the tangible personal property being sold so long as the seller requires a separate charge for delivery and so long as the charges designated for transportation or delivery or shipping and handling are actually reflective of the costs of such shipping, transportation or delivery. To the extent that such charges exceed the costs of shipping, transportation or delivery, the charges are subject to tax. The best evidence that transportation or delivery charges were agreed to separately and apart from the selling price, is a separate and distinct contract for transportation and delivery. However, documentation which demonstrates that the purchaser had the option of taking delivery of the property, at the seller's location, for the agreed purchase price, or having delivery made by the seller for the agreed purchase price, plus an ascertained or ascertainable delivery charge, will suffice.

86 Ill. Admin. Code, ch. I, section 130.415

Pursuant to the aforementioned regulation, transportation and delivery charges, also designated as shipping and handling charges, are not taxable if it can be shown that the charges are agreed to separately from the selling price of the tangible personal property sold and the charges are actually reflective of the costs of shipping. To the extent the transportation and delivery charges exceed the costs of shipping the charges will be subject to tax. See Wal-Mart Stores, *supra* at 366 wherein the court states as follows:

Under section 130.415, the primary inquiry is whether the parties separately contracted for shipping. If the buyer and seller separately contracted for shipping, and the charges do not exceed the costs of transportation and delivery, the shipping charges are not considered part of the retailer's gross receipts or selling price and are not subject to the retailers' occupation tax. If the shipping charges exceed the cost, "the excess amount is subject to tax." (citation omitted). In the absence of a separate agreement for shipping, the charges must be included in the retailers' gross receipts in computing its tax liability.

As noted by subsection (d) of Section 130.415, if the seller and the buyer agree upon the transportation or delivery charges separately from the selling price of the tangible personal

property, then the cost of the transportation or delivery service is not a part of the “selling price” of the tangible personal property which is sold, but instead is a service charge, separately contracted for, and need not be included in the amount upon which the seller computes its Retailers’ Occupation Tax liability. The best evidence that transportation and delivery charges were agreed to separately and apart from the selling price, is a separate and distinct contract for transportation and delivery. *Id.* However, documentation which demonstrates that the purchaser had the option of taking delivery of the property, at the seller’s location, for an agreed purchase price, or having delivery made by the seller for the agreed purchase price, plus and ascertained or ascertainable delivery charge, will suffice. *Id.*

In the instant case, the parties have jointly stipulated as follows:

In response to these estimates, ABC BUSINESS’s customers generally had two options: (1) to purchase the materials from ABC BUSINESS and have ABC BUSINESS haul the materials from the quarry to the customer’s location at an additional cost; or (2) to purchase the materials from ABC BUSINESS and to pick up the materials at ABC BUSINESS’s location (in these cases, ABC BUSINESS would haul materials to its own location from the quarry). ABC BUSINESS’s customers actually exercised both of these options.
Stip. par. 4

As is evident from the foregoing, both parties have stipulated that the taxpayer’s customers were given the option of picking up materials at the taxpayer’s place of business in order to avoid delivery or shipping and handling fees. Accordingly, it appears from the stipulated record that each of the taxpayer’s retail customers was given the option to pick up the customer’s order at the seller’s location or make arrangements for delivery by the taxpayer. As noted above, regulation Section 130.415 provides that where: “documentation ... demonstrates that the purchaser had the option of taking delivery of the property, at the seller’s location, for the agreed purchase price, or having delivery made by the seller for the agreed purchase price, plus an ascertained or ascertainable delivery charge” the requirement that transportation or shipping and handling charges be separately contracted for in order to be exempt from tax is met.

Based upon the foregoing, I find that the stipulation of facts constitutes sufficient documentary evidence to demonstrate “that the purchaser had the option of taking delivery of the property, at the seller’s location ... or having delivery made by the seller ...[.]” 86 Ill. Admin. Code, ch. I, section 130.415(d). Accordingly, I find that the requirement that “the seller and the buyer agree upon the transportation or delivery charges separately from the selling price of the tangible personal property which is sold” in order for transportation or shipping and handling charges to exempt has been met in this case.

Subsection (d) of regulation section 130.415 noted above further provides as follows:

Delivery charges are deemed to be agreed upon separately from the selling price of the tangible personal property being sold so long as the seller requires a separate charge for delivery and so long as the charges designated for transportation or delivery or shipping and handling are actually reflective of the costs of such shipping, transportation or delivery. To the extent that such charges exceed the costs of shipping, transportation or delivery, the charges are subject to tax.

86 Ill. Admin. Code, Ch. I, section 130.415(d)

In the instant case, the parties have also stipulated as follows:

In all of these instances, ABC BUSINESS charged its customers sales tax on the material purchased. In cases where the customer did require ABC BUSINESS to ship the materials, no Retailers’ Tax was charged on the cartage fees. In none of the transactions in question did ABC BUSINESS’s hauling charges exceed its cost of hauling.
Stip. par. 5.

I find that this stipulation constitutes sufficient evidence to support a finding that the taxpayer’s costs of shipping, transportation and delivery to its customers did not exceed the taxpayer’s actual shipping, transportation and delivery costs. Consequently, the evidence contained in the record supports a finding that the taxpayer owes no tax on charges to customers for shipping and handling costs exceeding the actual costs the taxpayer incurred.

WHEREFORE, for the reasons stated above, it is my recommendation that the tax assessed with respect to the taxpayer's charges for shipping and handling be abated.

Ted Sherrod
Administrative Law Judge

Date: September 11, 2013