

**ST 15-15**

**Tax Type: Sales Tax**

**Tax Issue: Interstate Commerce (Exemption Issue)**

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

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

v.

**ABC BUSINESS INC.,**

**Taxpayer**

**No. XXXX  
Account ID XXXX  
Letter ID XXXX  
XXXX  
XXXX  
XXXX  
XXXX  
XXXX**

**Period 1/08-6/10**

**Ted Sherrod  
Administrative Law Judge**

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**RECOMMENDATION FOR DISPOSITION PURSUANT  
TO CROSS-MOTIONS FOR SUMMARY JUDGMENT**

**Appearances:** Special Assistant Attorney General Matthew Crain on behalf of the Illinois Department of Revenue; John Simpson, Esq. of Sorling Northrup on behalf of ABC Business Inc.

**Synopsis:**

The Department of Revenue (“Department”) conducted an audit of ABC Business Inc. (“taxpayer”) for the period January 1, 2008 through June 30, 2010. At the conclusion of this audit, the Department issued to the taxpayer Notices of Tax Liability numbered XXXX, XXXX, XXXX, XXXX, and XXXX which the taxpayer timely protested. Prior to the commencement of an evidentiary hearing in this matter, the taxpayer waived its right to an evidentiary hearing and the parties agreed to have this case

decided on the basis of agreed stipulations of fact indicated below and cross motions for summary judgment.

The parties' respective motions for summary judgment identify the issues to be decided as whether the taxpayer is entitled to the sale for resale, farm machinery and equipment and interstate commerce exemptions, and whether receipts shown on invoices evidencing that sales were never concluded should be excluded from the taxpayer's taxable gross receipts. Subsequent to the submission of these motions, the Department conceded all issues except the taxpayer's entitlement to the interstate commerce exemption. Consequently, the parties are contesting only the following issue: whether certain sales made during the audit period at issue were exempt from taxation as interstate commerce.

After a review of the record in this matter, consisting of Motions for Summary Judgment, stipulations and exhibits attached thereto, submitted during these proceedings, it is recommended that the taxpayer be granted sale for resale and farm machinery and equipment exemptions, and that receipts shown on invoices evidencing that sales were not concluded be excluded from the taxpayer's gross receipts, since these issues have been conceded by the Department. It is further recommended that the only remaining contested issue in this matter, as noted above, be resolved in favor of the Department.

**FACTS NOT IN DISPUTE:**

I find the facts to be as stipulated between the parties in the Stipulation of Facts ("Stip.") and Amended Stipulation of Facts ("Amended Stip.") filed in connection with the parties' cross-motions for summary judgment submitted in this case, as supplemented

by the Department and Taxpayer's Stipulation of Reaudit Findings ("Stip. of Reaudit Findings") dated September 1, 2015, which are as follows:

1. The taxpayer is a retailer in Illinois selling tractors, lawnmowers, farm implements and similar items. Stip. 1.
2. The Department's Criminal Investigation Division conducted two criminal investigations of the taxpayer's activities related to listing out-of-state delivery/shipping invoices claiming out-of-state sales exemptions during the years 2008 through 2010. Stip. 2.
3. The Criminal Investigation Division referred the matter to audit, and an audit of the taxpayer was conducted for the period January 1, 2008 through June 30, 2010. *Id.* Five assessments (Notices of Tax Liability) were issued and timely protested. *Id.*
4. Audit deficiencies ("exceptions") were determined during the Department's audit. Stip. 3. These audit exceptions resulted from various exemption claims of non-taxable uses which were disallowed. *Id.*
5. The exemptions for non-taxable uses involved 1) out-of-state delivery and use; 2) farm machinery and equipment; 3) sales for resale; and 4) incomplete invoices which were not included in taxable sales. Stip. 4.
6. Subsequent to the Department's initial audit noted above, the Department's auditor was provided copies of certificates of resale, agricultural use and signed delivery acknowledgements, that were not available during the Department's initial audit, and the Department agreed that this documentation would likely have resulted in an adjustment to the audit exceptions and final audit results had they been provided during the initial audit. Stip. of Reaudit Findings 1.

7. The Department's auditor was provided copies of certificates of resale, agricultural use and signed delivery acknowledgments based upon which she prepared reaudit calculations. Stip. of Reaudit Findings 3.
8. After changes to audit exceptions determined during the Department's initial audit to account for certificates of resale, agricultural use and signed delivery acknowledgments that were not available during the Department's initial audit, the remaining total additional tax due determined by the Department's auditor was \$XXXX. Stip. of Reaudit Findings 5-8.
9. The parties have expressly stipulated that the only remaining issue in controversy is the taxpayer's claim of interstate commerce exemption. Stip. of Reaudit Findings 9.

In addition to the foregoing facts, based upon the evidence contained in the aforementioned stipulations and accompanying documentary evidence, I make further findings of fact pertaining to the taxpayer's claim that it is entitled to the interstate commerce exemption, as follows:

10. The Department audited the taxpayer's books and records for the period from January 1, 2008 through June 30, 2010. Stip. of Facts Ex. 4. Subsequent to this initial audit, the Department reaudited the taxpayer. Stip. of Reaudit Findings 4.
11. The taxpayer's books and records that were reaudited included invoices indicating sales that were made to customers having billing addresses outside of Illinois, and that no tax was collected or paid on these sales. Amended Stip. of Facts, Ex. A-2, A-

3, A-10, A-11, A-12, A-13, B-46, C-2, C-10, C-12, C-14, C-15, C-16, C-19, C-20, C-22, C-23.<sup>1</sup>

12. The books and records made available to the Department's auditor during the Department's reaudit did not include any UPS, United States Post Office or other similar documentation typically used to evidence the shipment of merchandise for delivery to out of state residents. Amended Stip. of Facts Ex. A-1 through C-23.

13. The taxpayer is contesting the Department's determination, upon completion of its reaudit, that the aforementioned sales to out-of-state customers were not exempt from Retailers' Occupation Tax and related taxes. Stip. of Reaudit Findings 9.

**Conclusions of Law:**

Summary Judgment is appropriate when the case hinges on a question of law. First America Bank, Rockford N.A. v. Netsch, 166 Ill. 2d 165 (1995); Kirk v. Village of Buffalo Grove, 248 Ill. App. 3d 1077 (1<sup>st</sup> Dist. 1993). Summary judgment is also appropriate when the parties dispute the correct construction of an applicable statute. Bezan v. Chrysler Motors Corp., 263 Ill. App. 3d 858 (2d Dist. 1994). When both parties file motions for summary judgment, as is the case here, only a question of law is raised. Lake Co. Stormwater Management Comm. v. Fox Waterway Agency, 326 Ill. App. 3d 100 (2d Dist. 2001). Based upon the foregoing, I find that summary judgment is appropriate in the instant case because both parties have filed motions for summary judgment.

The Retailers' Occupation Tax Act ("ROTA"), 35 ILCS 120/1 *et seq.*, imposes a tax upon persons engaged in the business of selling at retail tangible personal property.

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<sup>1</sup> Each of these invoices contains a statement that the transactions they pertain to involve interstate commerce and that no tax is due.

35 ILCS 120/2. With respect to exemptions from the obligation to pay tax prescribed by the foregoing section, section 7 of the ROTA provides as follows:

It shall be presumed that all sales of tangible personal property are subject to tax under this Act until the contrary is established, and the burden of proving that a transaction is not taxable hereunder shall be upon the person who would be required to remit the tax to the Department if such transaction is taxable.

35 ILCS 120/7

Sections 4 and 5 of the ROTA provide that the certified copy of the corrected return issued by the Department "shall be prima facie proof of the correctness of the amount of tax due, as shown therein." 35 ILCS 120/4; 35 ILCS 120/5. Once the Department has established its *prima facie* case by submitting the corrected return into evidence, the burden shifts to the taxpayer to overcome this presumption of validity. A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3d 826, 832 (1<sup>st</sup> Dist. 1988).

The last paragraph of the parties' Stipulation of Reaudit Findings sets forth their agreement that "the only remaining issue in controversy is the taxpayer's claim of interstate commerce exemption." Stip. of Reaudit Findings 9. Because this matter involves the parties' cross-motions for summary judgment regarding an issue on which the taxpayer bears the burden of proof, the taxpayer bears the burden of showing, as a matter of law, that it has a clear right to the interstate commerce exemption it has claimed. The taxpayer must present sufficient documentary evidence to support its claim. A.R. Barnes, *supra*.

In the instant case, the taxpayer argues that it does not owe Retailers' Occupation Tax on various sales of merchandise that were determined to be taxable by the Department, because they were tax-exempt sales. Specifically, the issue presented in this

case is whether the Department properly disallowed the taxpayer's claim that it is entitled to treat these sales as tax exempt interstate commerce pursuant to section 2-60 of the ROTA, 35 ILCS 120/2-60. Section 2-60 provides as follows:

Interstate commerce exemption. No tax is imposed under this Act upon the privilege of engaging in a business in interstate commerce or otherwise, when the business may not, under the Constitution and statutes of the United States, be made the subject of taxation by this State.

With respect to the Department's denial of the taxpayer's claim to the interstate commerce exemption, the Department, in its Motion, avers as follows:

The taxpayer failed to provide any documentation related to shipments of equipment outside of Illinois. The taxpayer provided no bills of lading, common carrier receipts, delivery trip logs signed by the purchaser, or other evidence that the equipment was in fact delivered outside of Illinois. ...Based on the foregoing, the Department disallowed the out of state exemptions where no documentation was provided verifying delivery. ... The taxpayer has provided no new documentation, bills of lading, airborne receipts or trip sheet(s) signed by the person making delivery for the seller and showing the name, address and signature of the person to whom the goods were delivered outside this State; or, in lieu thereof, an affidavit signed by the purchaser or his representative in its exhibits to show that the amounts it claimed on its sales tax returns to be exempt pursuant to section 2-60 of the ROTA qualified for the interstate commerce exemption. ... The Departmental regulations require that the taxpayer be able to associate each invoice having an out of state addressee with a shipping document showing an out of state shipment in order to claim the interstate commerce exemption. Pursuant to Department regulation 130.605, a waybill or bill of lading is "the most acceptable proof" that a sale of tangible personal property shipped by common carrier is exempt interstate commerce. While a bill of lading ...is not the only proof that is acceptable, the taxpayer must maintain records that conclusively demonstrate that an out of state delivery did in fact occur. ... In support of its claim of exemption, the taxpayer only maintained copies of invoices for sales that the Department's auditor reviewed on which the interstate exemption is being claimed. Each invoice bears the name of the customer and the address to which the taxpayer claims shipment was made. However, none of the invoices contain any indication that the items were in fact shipped. The invoices do not include a shipping

charge, an acknowledgement by the customer of interstate delivery by return receipt, or other documentation of delivery. ... Having failed to identify shipping records corresponding to the deductions taken on the taxpayer's sales tax returns for out-of-state shipments for shipments the taxpayer contends it made to customers shown as having out of state addresses on copies of its invoices, the Department's disallowance of such exemption is proper and the imposition of taxes should be upheld.

The taxpayer claims that it has provided sufficient documentation to show that the amounts it claimed on its sales tax returns to be exempt pursuant to the interstate commerce exemption prescribed by section 2-60 of the ROTA qualified for this exemption, stating as follows:

As to sales delivered outside Illinois and therefore exempt from sales tax under the Commerce Clause of the U.S. Constitution (provided in [35 ILCS 120/2-60] and 86 Ill. Admin, Code 130.605 (c)) ... ABC Business has submitted documents which show delivery outside the State of Illinois. No particular form is required by statute [or] regulation ...[.] The invoices submitted by ABC Business demonstrate a delivery point outside Illinois to be accomplished by ABC Business or common carrier.

Invoices included in the record as Amended Stip. of Facts, Ex. A-2, A-3, A-10, A-11, A-12, A-13, B-46, C-2, C-10, C-12, C-14, C-15, C-16, C-19, C-20, C-22 and C-23 indicate that merchandise sold by the taxpayer identified in these invoices was billed to customers having billing addresses in Missouri, Louisiana, Michigan, Iowa and Kentucky. The taxpayer argues that it does not owe retailers occupation tax on sales identified in these invoices because they evidence interstate transactions that qualify for the interstate commerce exemption.

The Department's regulation concerning sales of property to out-of-state customers provides, in part as follows:

The (retailers' occupation) tax does not extend to gross receipts from sales in which the seller is obligated, under the terms of his agreement

with the purchaser, to make physical delivery of the goods from a point in this State to a point outside of this State, ... provided that such delivery is actually made.

86 Ill. Admin. Code, ch. I, section 130.605(c) ...

To establish that the gross receipts from any given sale are exempt because the tangible personal property is delivered by the seller from a point within this State to a point outside this State under the terms of an agreement with the purchaser, the seller will be required to retain... records, to support deductions taken on his or her tax returns proof which satisfies the Department that there was an agreement and a bona fide delivery outside this State of the property that is sold. The most acceptable proof of this fact will be:

- 1) If shipped by common carrier, a waybill or bill of lading requiring delivery outside this State;
- 2) if sent by mail, an authorized receipt from the United States Post Office Department for articles sent by registered mail, parcel post, ordinary mail or otherwise, showing the name of the addressee, the point outside Illinois to which the property is mailed and the date of such mailing; if the receipt does not comply with these requirements, other supporting evidence will be required;
- 3) If sent by seller's own transportation equipment, a trip sheet signed by the person making delivery for the seller and showing the name, address and signature of the person to whom the goods were delivered outside this State; or, in lieu thereof, an affidavit signed by the purchaser or his representative, showing the name and address of the seller, the name and address of the purchaser and the time and place of the delivery outside Illinois by the seller, together with other supporting data ... [.]

86 Ill. Admin. Code, Ch. I, section 130.605(f)

In the instant case, the taxpayer has failed to provide any waybills, bills of lading, authorized receipts from the United States Post Office for articles shipped by mail or any other comparable supporting evidence of bona fide delivery outside of Illinois that would constitute conclusive proof of an interstate transaction pursuant to regulation 130.605(f) quoted above. In lieu of the foregoing, in support of its claim of exemption, the taxpayer has produced the aforementioned invoices evidencing an agreement to deliver merchandise to persons having billing addresses in Missouri, Louisiana, Michigan, Iowa

and Kentucky. I find that none of these invoices are sufficient to prove that a bona fide out-of-state delivery of the items they pertain to actually took place.

None of these invoices contain any indication that the items being sold were to be shipped to the purchaser by the taxpayer through interstate commerce. Such indication might have included a shipping charge to the taxpayer's customer shown on the invoice, a reference on the invoices to the fact the item is to be shipped by the taxpayer via common carrier or other means, or a request that the customer acknowledge interstate delivery by return receipt. In the absence of such evidence on the taxpayer's invoices, it is impossible for the taxpayer to show that its customers did not assume responsibility for shipping and transportation.

In situations where the customer arranges to act as the shipper and pays for transportation and delivery, the transporter (e.g. UPS, US Postal Service) is deemed to be the agent of the taxpayer's customer. Union Electric Co. v. Department of Revenue, 136 Ill. 2d 385, 400 (1990) ("The purchaser is deemed to be receiving the physical possession of the property in Illinois even when the property is transported out of Illinois by a carrier to the purchaser in another state if the purchaser hires and pays the carrier direct and is shown on the shipping document as the ...shipper...[.]"). See also 86 Ill. Admin. Code, ch. I, section 130.605(d). Accordingly, when transportation is arranged and paid for by the customer, and the customer is shown as the shipper, delivery from the taxpayer to the customer is completed when shipment from the taxpayer's business location commences because delivery to the customer's agent constitutes delivery to the customer. *Id.* Delivery to the taxpayer's customer in Illinois resulting from the transfer of merchandise from the taxpayer to its customer's agent at the taxpayer's business location constitutes

in-state delivery by the taxpayer to the customer that does not qualify for exemption from Illinois tax as interstate commerce.

In the instant case, it is impossible to tell from the taxpayer's invoices whether the taxpayer or the customer acted as shipper. As a consequence, these invoices, standing alone, provide insufficient evidence to rule out the possibility that the transactions they document were not in interstate commerce.

It is well settled that tax exemption provisions are to be strictly construed in favor of taxation. Heller v. Fergus Ford, Inc., 59 Ill. 2d 576, 579 (1975). The party claiming the exemption has the burden of clearly proving that it is entitled to the exemption, and all doubts are to be resolved in favor of taxation. *Id.* To meet this burden in the instant case, the taxpayer had to prove that the interstate commerce exemption applies which, in turn, requires that the taxpayer prove that it acted as the shipper, or, in the alternative, that it effected delivery to the out of-state customer at the customer's out of state location using its own vehicle. Absent such evidence, proof of a bona fide out of state delivery as required by regulation 130.605(f) cannot be sufficiently demonstrated to classify the transaction as one involving interstate commerce.

The invoices the taxpayer has provided constitute the only evidence of transactions the taxpayer claims are exempt as interstate commerce. Because these invoices are not supported by corroborating documentation showing a bona fide out of state delivery and do not otherwise conclusively and irrefutably evidence, on their face, a bona fide delivery by the taxpayer to another state, I find that they are insufficient evidence that the taxpayer's sales at issue were in interstate commerce.

**WHEREFORE**, for the reasons stated above, it is my recommendation that the taxpayer's motion for summary judgment be granted on the issues the parties have agreed are not being contested, and denied with regard to the taxpayer's claim to the interstate commerce exemption, and that the Department's motion for summary judgment be granted concerning its disallowance of the taxpayer's claim to the interstate commerce exemption and denied with respect to all other issues, which are not being contested.<sup>2</sup>

**Ted Sherrod**  
**Administrative Law Judge**

**Date: September 15, 2015**

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<sup>2</sup> The record in this case includes evidence that the taxpayer was determined by the Department's Criminal Investigation Division to have fraudulently prepared invoices to support fallacious claims to the interstate commerce exemption in order to evade Illinois taxes during the tax period in controversy. Stip. 2; Stipulation of Facts Ex. 1. This determination raises the question whether the documentation presented in this case, consisting of invoices showing the names and purported out of state addresses of purchasers, is credible. Because I find that this documentation, even if deemed to be credible, is insufficient to establish that the taxpayer was entitled to the interstate commerce exemption in this case, it is unnecessary to address these credibility issues to reach my determination.