

ST 98-20

Tax Type: SALES TAX

**Issue: Unreported/Underreported Receipts (Fraud Application)
Books And Records Insufficient**

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

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

v.

TAXPAYER

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RECOMMENDATION FOR DECISION

APPEARANCES: Alan Osheff, Esq., Special Assistant Attorney General, FOR THE ILLINOIS DEPARTMENT OF REVENUE; TONY L. BRASEL, ESQ. FOR JOHN DOE D/B/A TAXPAYER.

Synopsis:

This matter came on for hearing pursuant to the taxpayer's timely protest of three Notices of Tax Liability ("NTLs") ISSUED TO TAXPAYER (TAXPAYER) BY THE DEPARTMENT ON JUNE 14, 1996. NTL #1 IS FOR THE PERIOD JULY 1, 1989 TO OCTOBER 31, 1992; NTL #2 IS FOR THE PERIOD NOVEMBER 1, 1992 TO NOVEMBER 30, 1993; NTL #3 IS FOR THE PERIOD DECEMBER 1, 1993 TO SEPTEMBER 30, 1995. A PRE-TRIAL ORDER WAS ENTERED ON APRIL 21, 1998 SETTING FORTH THE ISSUES IN THE CASE AS FOLLOWS:

1. WHETHER THE TAXPAYER UNDERREPORTED HIS RECEIPTS AND FAILED TO REMIT THE CORRECT AMOUNT OF RETAILER OCCUPATION TAX.

2. **WHETHER THE DEPARTMENT OF REVENUE CAN SUSTAIN ITS BURDEN TO IMPOSE A FRAUD PENALTY.**

Fraud penalties were not assessed on the NTLs, so the second issue is moot. Late filing and late payment penalties were assessed, but the taxpayer did not contest them at the hearing. An evidentiary hearing was held on June 2, 1998. Both parties waived their right to file post hearing briefs.

I recommend that the NTL assessments be made final.

Findings of Fact:

1. The Department audited the books and records of the taxpayer for the periods July 1, 1989 to September 30, 1995. (Dept. Ex. Nos. (1 through 6).

2. At the conclusion of the audit, the Department issued NTL #1 FOR THE PERIOD JULY 1, 1989 TO OCTOBER 31, 1992, NTL #2 FOR THE PERIOD NOVEMBER 1, 1992 TO NOVEMBER 30, 1993 AND NTL #3 FOR THE PERIOD DECEMBER 1, 1993 TO SEPTEMBER 30, 1995. (Dept. Ex. Nos. (2, 4, 6)

3. DURING THE AUDIT PERIOD, JOHN DOE (DOE) CONDUCTED BUSINESS AS A SOLE PROPRIETOR UNDER THE NAME TAXPAYER (ABC, INC.) IN FICTITIOUS CITY, ILLINOIS. (TR. PP. 28, 48, 51, 78)

4. Prior to the audit period, ABC, INC. was in the car repair business. (Tr. p. 51)

5. After having a second heart attack DOE gave up the auto repair business and opened a hot dog business in FICTITIOUS CITY, Illinois on June 22, 1989, as a franchisee under a franchise agreement with XYZ, INC., in FICTITIOUS CITY, Illinois. (Tr. p. 52, Taxpayer Group Ex. No. 1)

6. Later DOE opened additional hot dog businesses as a franchisee under agreements with XYZ, INC., in FICTITIOUS CITY, Illinois and FICTITIOUS CITY, Illinois. (Tr. p. 49)

7. In May of 1994, DOE opened a Dairy Queen restaurant in FICTITIOUS CITY, Illinois as franchisee under a franchise agreement with PDQ, INC. of FICTITIOUS CITY, Wisconsin. (Tr. p. 49, Taxpayer Group Ex. No.1)

8. The hot dog business in FICTITIOUS CITY, Illinois ceased doing business in September of 1993. (Tr. p. 29)

9. The hot dog business in FICTITIOUS CITY, Illinois ceased doing business in August of 1995. (Tr. p. 49)

10. The Dairy Queen restaurant and the hot dog businesses in FICTITIOUS CITY, Illinois are still operating. (Tr. p. 49)

11. DOE ran these businesses out of his ABC, INC. shop in FICTITIOUS CITY. (TR. PP. 28, 51)

12. In conducting the audit of DOE'S businesses, the Department's auditor was not supplied with any cash register tapes or other books and records because DOE did not maintain sales journals, cash register tapes, purchase invoices or journals or a general ledger. (Tr. pp. 39, 43, 50, 63)

13. The Department's auditor prepared the corrections of returns on the basis of sales figures reported by DOE to his franchisors which the auditor determined to be the best information available. (Tr. pp. 10, 11, 33, 43, 44)

Conclusions of Law:

The first issue is whether the taxpayer underreported his receipts and failed to remit the correct amount of retailers' occupation tax. The Department is required to correct Retailers' Occupation Tax returns according to its best judgment and information. 35 ILCS 120/4, Central Furniture Mart v. Johnson, 157 Ill.App. 3d 907 (1st Dist. 1987). The admission into evidence of the corrected return at a hearing before the Department or any legal proceeding establishes the Department's *prima facie* case. *Id.* To overcome the Department's *prima facie* case the taxpayer

must present consistent, probable evidence identified with his books and records Central Furniture Mart v. Johnson, *supra*. Testimony alone is not enough. Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill.App.3d 203, (1st Dist. 1991); A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3d 826, 833-34 (1st Dist. 1988)

In this case, the Department's *prima facie* case was established when the audit correction schedules (Dept. Group Exs. No. 1, 3, 5) and the NTLs (Dept. Group Ex. No. 2, 4, 6) were admitted into evidence under the Director's Certificate of Records. DOE testified that he did not maintain sales journals, general journals, or a general ledger, (Tr. p. 50) nor did he retain cash register tapes from his restaurants (Tr. p. 51) as required by the statute. 35 ILCS 120/7. He testified that he inflated the sales figures that he reported to the two franchisors to show them that his business was good. (Tr. p. 55) However, no documentation was introduced in support of that allegation.

The Department corrected DOE' tax liability using the best information available as it is required to do by statute. DOE introduced no documentary evidence to rebut the Department's *prima facie* case that the he underreported his receipts and failed to remit the correct amount of retailers' occupation tax.

THE SECOND ISSUE IN THIS CASE AS SET FORTH IN THE PRE-TRIAL ORDER IS WHETHER THE DEPARTMENT OF REVENUE CAN SUSTAIN ITS BURDEN TO IMPOSE A FRAUD PENALTY. THE DEPARTMENT DID NOT ASSESS FRAUD PENALTIES IN THE NTLs, SO THIS ISSUE IS MOOT. OTHER PENALTIES WERE ASSESSED, HOWEVER. NTL #1 ASSESSED A 10% LATE PAYMENT PENALTY. ILL. REV. STAT. 1991, CH. 120 ¶ 444. NTL #2 ASSESSED A 30% FAILURE TO FILE PENALTY. ILL. REV. STAT. 1991, CH. 120 ¶ 444, AS AMENDED BY P.A. 83-1428. NTL #3 ASSESSED A 5% LATE PAYMENT PENALTY. 35 ILCS 735/3-3(A). DOE INTRODUCED NO EVIDENCE OF REASONABLE CAUSE THAT WOULD BE GROUNDS TO ABATE THE PENALTY ASSESSMENTS, NOR

DID HE MAKE ANY ARGUMENT ON THAT ISSUE. THEREFORE, THE PENALTY ASSESSMENTS MUST STAND.

WHEREFORE, for the reasons stated above, it is my recommendation that the NTLs be made final as issued.

JUNE 15, 1998

ENTER:

ADMINISTRATIVE LAW JUDGE