

UT 13-01

Tax Type: Use Tax

Tax Issue: Use Tax Collected On Out-of-State Retailers

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

THE DEPARTMENT OF REVENUE	)	Docket No.	XXXX
OF THE STATE OF ILLINOIS	)	IBT No.	XXXX
	)	Tax Periods	7/07 - 12/09
v.	)	NTL Nos.	XXXX,
	)		XXXX, XXXX
ABC BUSINESS,	)	John E. White,	
Taxpayer	)	Administrative Law Judge	

RECOMMENDATION FOR DISPOSITION

Appearances: Jeremy Bell, Bell Law, LLC, appeared for *ABC Business*; John Alshuler, Special Assistant Attorney General, appeared for the Illinois Department of Revenue.

Synopsis: This matter involves *ABC Business's* (Taxpayer's) protest of three Notices of Tax Liability (NTLs) the Illinois Department of Revenue (Department) issued to it to assess tax regarding the period from July 2007 through and including December 2009. In a pre-hearing order, the parties agreed that the issue was whether Taxpayer had sufficient contacts with Illinois to require it to collect use tax from its Illinois customers and remit it to the Department. Put another way, the issue is whether Taxpayer was a retailer maintaining a place of business in Illinois, as that phrase is defined in § 2 of the Illinois Use Tax Act.

The hearing was held at the Department's offices in Chicago. Taxpayer offered documents into evidence regarding an affirmative defense. After considering the

evidence and the parties' arguments, I am including in this recommendation findings of fact and conclusions of law. I recommend that the Director finalize the NTLs as issued.

Statements of Fact Not In Dispute:

1. The Department conducted an audit of Taxpayer that was completed on or about February 2011. Department Ex. 1, p. 1 (copy of form titled, Corrections of Returns/Determination of Tax Due (Determination of Tax Due form), regarding the period from July 2007 through and including December 2009).
2. The Determination of Tax Due form provides that tax was due in the following amounts, for the following periods: \$XXXX for the period from July 2007 through June 2009; \$XXXX for the period from July 2009 through November 2009, and \$XXXX for the month of December 2009. Department Ex. 1, p. 1.
3. After the audit was completed, the Department issued three NTLs to Taxpayer. Department Ex. 1, pp. 2, 4, 6. All of the NTLs are dated March 3, 2011. *Id.*
4. The NTLs assessed tax, penalties and interest in the following amounts:

NTL Nos.	L 11026 67808	L 20590 34656	L 11866 19424
Periods	7/2007 – 6/2009	7/2009 – 11/2009	12/2009
Tax	XXX	XXX	XXX
Late Payment Penalty	XXX	XXX	XXX
Interest	XXX	XXX	XXX
Assessment Totals	XXX	XXX	XXX

Department Ex. 1, pp. 2, 4, 6.

5. During the audit, a Department form titled, Statute of Limitations Waiver (Waiver) was prepared and signed. Taxpayer Ex. 2 (copy of completed and signed Waiver). That Waiver identifies the taxpayer as *John Doe*, with an address in *Anywhere, United States. Id.*

6. The signature portion of the Waiver reflects that *John Doe* signed as having a title of “owner.” Taxpayer Ex. 2. The face of the Waiver shows that *John Doe* signed it on November 3, 2010, and a Department representative signed it on November 5, 2010.

Id.

7. The Waiver further provides, in pertinent part:

I, the taxpayer, agree to waive the benefit of the statute of limitations and permit the Illinois Department of Revenue (IDOR) to issue a notice of tax liability on or before 03/31/2011, so that the IDOR can complete its audit of my books and records or I may have additional time to obtain information necessary for the audit’s completion. ***

I understand that I am waiving the benefit of the statute of limitations that would otherwise prevent the IDOR from issuing a notice of tax liability (including penalty and interest) after 12/31/2010, with respect to any tax, penalties, and interest I incurred from 07/01/2007, through 12/31/2009, under the following tax acts and laws: ***

Taxpayer Ex. 2.

8. The record contains no waiver form that was prepared for, or signed by, Taxpayer.
9. The record contains no evidence that Taxpayer had previously filed Illinois returns to report the amount of use tax the auditor determined Taxpayer should have collected from its Illinois purchasers.

Conclusions of Law:

The Illinois Use Tax Act (UTA) imposes a tax “upon the privilege of using in this State tangible personal property purchased at retail from a retailer” 35 ILCS 105/3. The Illinois General Assembly incorporated into the UTA certain provisions of the complementary Retailers’ Occupation Tax Act (ROTA). 35 ILCS 105/12. Among them

is § 5 of the ROTA, which provides that, in the event a required return is not filed, the Department shall determine the amount of tax due using its best judgment and information. 35 ILCS 120/5. It also provides that, under such circumstances, the Department's determination of tax due constitutes prima facie proof that tax is due in the amount determined by the Department. 35 ILCS 120/5.

The Department introduced the NTLs it issued to Taxpayer into evidence under the certificate of the Director. Department Ex. 1. Those NTLs constitute the Department's prima facie case in this matter. 35 ILCS 105/12; 35 ILCS 120/5, 7. The Department's prima facie case is a rebuttable presumption. 35 ILCS 120/7; Copilevitz v. Department of Revenue, 41 Ill. 2d 154, 157, 242 N.E.2d 205, 207 (1968).

A taxpayer cannot overcome the statutory presumption merely by denying the accuracy of the Department's assessment. A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3d 826, 833, 527 N.E.2d 1048, 1053 (1st Dist. 1988). Instead, a taxpayer has the burden to present evidence that is consistent, probable and closely identified with its books and records, to show that the Department's determinations are not correct. Filichio v. Department of Revenue, 15 Ill. 2d 327, 333, 155 N.E.2d 3, 7 (1958); A.R. Barnes & Co., 173 Ill. App. 3d at 833-34, 527 N.E.2d at 1053.

Issues and Arguments

Issue 1

The substantive issue, which was set forth in the pre-hearing order, is whether Taxpayer has sufficient contacts with Illinois to require it to collect Illinois use tax from its Illinois customers and to remit such taxes to the Department. Pre-hearing Order. On this issue, Department counsel asserted that the auditor determined that Taxpayer had

sales representatives that regularly appeared at trade shows in Illinois for the purpose of introducing and taking orders for a type of skin cream that Taxpayer manufactured. Tr. pp. 9-10 (Department's opening statement). Counsel expressed the Department's position that Illinois use tax regulation § 801(c)(2) provided authority for the conclusion that, based on such facts, Taxpayer was obliged to collect Illinois use tax from its customers, and to remit it to the Department. *Id.*; 86 Ill. Admin Code § 150.801(c)(2).

Taxpayer, on the other hand, argues that it was not required to collect and remit Illinois use tax from its customers, because it was not a retailer maintaining a place of business in Illinois. Tr. pp. 11-15 (Taxpayer's opening statement). More specifically, Taxpayer's counsel stated:

Here, in this case, [Taxpayer] maintains no office, distribution house or warehouse in this state, and I think that's not disputed. It has no retail outlet within the state, and that is also not disputed.

There is no order solicitor or order taker stationed here in Illinois at any time, nor has [Taxpayer] actively or passively solicited Illinois purchasers, either presently or in the past.

There's never been anybody standing in the state of Illinois that has pointed to the [Taxpayer's] web site, distributed pamphlets or other advertising material to point would be purchasers to [Taxpayer's] items.

Finally, no agent or other representative of [Taxpayer's] operates within the state of Illinois under [Taxpayer's] authority.

All products sold in ... [Illinois] were conducted at trade shows by independent contractors working on consignment, and that is the basis of the Department's hook here in trying to find my client liable for the use tax.

At said trade shows, as I said before, these were independent contractors working on a consignment, not only with regard to [Taxpayer's] products, but also many other products.

None of the independent contractors were disseminating literature or promoting, soliciting [Taxpayer's] products by the internet web site or otherwise.

As a result of the forgoing, [Taxpayer] should be classified as an out of state retailer that does not have a sufficient nexus with Illinois to be required to submit to Illinois tax laws.

Tr. pp. 12-13 (opening statement).

To resolve the substantive issue, the parties' assertions must be considered with the applicable sections of the UTA. I start with § 2 of the UTA, which defines the phrase, "Retailer maintaining a place of business in this State," and provides, in pertinent part:

"Retailer maintaining a place of business in this State", or any like term, means and includes any of the following retailers:

1. A retailer having or maintaining within this State, directly or by a subsidiary, an office, distribution house, sales house, warehouse or other place of business, or any agent or other representative operating within this State under the authority of the retailer or its subsidiary, irrespective of whether such place of business or agent or other representative is located here permanently or temporarily, or whether such retailer or subsidiary is licensed to do business in this State. However, the ownership of property that is located at the premises of a printer with which the retailer has contracted for printing and that consists of the final printed product, property that becomes a part of the final printed product, or copy from which the printed product is produced shall not result in the retailer being deemed to have or maintain an office, distribution house, sales house, warehouse, or other place of business within this State.

35 ILCS 105/2.

The reason why a determination that a retailer is maintaining a place of business in Illinois is important is because such retailers are required to collect, from their purchasers, the amount of use tax that is imposed on such purchasers by the UTA. 35 ILCS 105/3-45 ("The tax imposed by this Act shall be collected from the purchaser by a retailer maintaining a place of business in this State or a retailer authorized by the Department under Section 6 of this Act, and shall be remitted to the Department as provided in Section 9 of this Act"); Hagerty v. General Motors Corp., 59 Ill. 2d 52,

54-55, 319 N.E.2d 5, 6 (1974) (“In the usual situation the [use] tax is collected from the purchaser by the retailer”).

The Department has the statutory authority to make reasonable rules and regulations that may be necessary to effectively enforce the powers granted to it under the tax statutes it administers. 20 ILCS 2505/2505-795. Pursuant to that authority, the Department adopted Illinois Use Tax regulation § 150.801, which provides, in pertinent part, as follows:

Section 150.801 When Out-of-State Retailers Must Register and Collect Use Tax

(c) Every retailer maintaining a place of business in this State must act as a Use Tax collector for this State. Examples of cases in which a retailer will be required to collect and remit the Use Tax though not incurring any Retailers' Occupation Tax liability with respect to the transaction are these:

- 1) Retailers who have Illinois retail outlets which are subject to the Retailers' Occupation Tax Act are required to collect and remit the Use Tax, as such, when shipping tangible personal property to the purchasers in Illinois from outside Illinois, in interstate mail transactions which have no connection with such Illinois outlets, even though such completely interstate mail transactions would not be subject to the Retailers' Occupation Tax.
- 2) Out-of-State retailers, who have any kind of place of business in Illinois or any kind of order-soliciting or order-taking representative either stationed in Illinois or coming into Illinois from time to time, must collect and remit the Use Tax, as such, from Illinois purchasers for use even though the seller is not required to pay Retailers' Occupation Tax when he does nothing in Illinois except to solicit orders.

86 Ill. Admin. Code § 150.801(c); 24 Ill. Reg. 10728 (effective July 7, 2000). This is the regulation that Department counsel cited as authorizing the assessment made here. Tr. p.

9. Taxpayer has not challenged the validity of this regulation.

Again, when the Department introduced the NTLs it issued to Taxpayer under the certificate of the Director, it established its prima facie case. 35 ILCS 105/12; 35 ILCS

120/5. The presumption of correctness that attaches to the Department's prima facie case extends to all elements of taxability. See Branson v. Department of Revenue, 68 Ill. 2d 247, 258, 659 N.E.2d 961, 966-67 (1995) (Department's Notice establishes prima facie proof that taxpayer acted willfully); Soho Club, Inc. v. Department of Revenue, 269 Ill. App. 3d 220, 232, 645 N.E.2d 1060, 1068 (1st Dist. 1995) (Department's Notice establishes prima facie proof that taxpayer is engaged in the occupation that is subject to taxation). Here, therefore, once the Department introduced the NTLs under the Director's certificate, that evidence constitutes presumptive evidence that Taxpayer was a retailer maintaining a business in Illinois. 35 ILCS 105/12; 35 ILCS 120/5; Soho Club, Inc., 269 Ill. App. 3d at 232, 645 N.E.2d at 1068. To rebut the statutory presumption of correctness, Taxpayer had to offer competent and credible evidence, closely identified with its books and records, to show that the Department's determination was not correct. Branson, 168 Ill. 2d at 260, 659 N.E.2d at 968 ("If the taxpayer offers no countervailing evidence, the Department's prima facie case stands un rebutted and becomes conclusive.").

Under the plain text of the statutory definition, for a retailer to be considered to be maintaining a place of business in Illinois, it is not necessary for it to have an office, distribution house, sales house, warehouse or other place of business within Illinois. 35 ILCS 105/2. Nor must the retailer be licensed to do business in Illinois. *Id.* Rather, it is enough for it to have "any agent or other representative operating within this State under the authority of the retailer or its subsidiary, irrespective of whether such place of business or agent or other representative is located here permanently or temporarily" *Id.* So long as Taxpayer had such a person operating in Illinois, the Department's determination was authorized by statute. *Id.*; 86 Ill. Admin. Code § 150.801(c)(2). And

again, the Department's determination that Taxpayer *did* have such a person operating in Illinois is presumed to be correct. Soho Club, Inc., 269 Ill. App. 3d at 232, 645 N.E.2d at 1068.

On the other hand, to show that Taxpayer did not have such a person operating in Illinois on its behalf, Taxpayer had to offer evidence. But Taxpayer failed to offer any competent or credible evidence on this point. An attorney's opening statement is not evidence (*see* Taake v. WHGK, Inc., 228 Ill. App. 3d 692, 700, 592 N.E.2d 1159, 1165 (5th Dist. 1992)), nor was counsel a sworn witness offering testimony based on his personal knowledge. Moreover, even if Taxpayer's counsel had been a sworn witness, mere testimony is not sufficient to rebut the Department's prima facie case. A.R. Barnes & Co., 173 Ill. App. 3d at 833-34, 527 N.E.2d at 1053.

Counsel's assertions in its opening statement, for example, that Taxpayer's products were sold in Illinois by independent contractors, as opposed to agents, that such contractors worked on consignment, and that they sold Taxpayer's products and other products, are all assertions of fact. But without being supported by actual evidence, counsel's assertions amount to no more than an argument that the Department's determination was wrong. Since Taxpayer presented no evidence at all regarding the substantive issue, it did not rebut the statutory presumption of correctness that attaches to the Department's determination that tax was due. Branson, 168 Ill. 2d at 260, 659 N.E.2d at 968.

Issue 2

Taxpayer also asserted that the NTLs were invalid because they were issued after the statute of limitations had run. Tr. pp. 15-17. Regarding this issue, Taxpayer offered

two items of documentary evidence. The first is a copy of a death certificate of a *John Doe*, of Clearwater Florida, who died on January 3, 2008. Taxpayer Ex. 1. The second is a copy of a Waiver form that was signed by *John Doe*. Taxpayer Ex. 2.

Taxpayer made alternative arguments regarding these exhibits. First, counsel argued that there was no extension of the statute of limitations signed by the Taxpayer, *ABC Business*. Tr. pp. 25, 32. Next, he contended that “the statute of limitations as to the applicable periods, which are July 1, 2007 through December 31, 2009, ran on December 31, 2009, and there is no extension of that statute as to the Taxpayer, *ABC Business* against which the Department seeks a judgment.” Tr. pp. 26, 31 (“The applicable statute of limitations ran on December 31, 2009, as to periods July 1, 2007 through December 2009.”). Finally, he claimed that the death certificate of *John Doe* proves that “*John Doe* could not have possibly signed the extension of statute of limitations.” Tr. p. 31.

In response to Taxpayer’s arguments, the Department contended, after the exhibits were admitted, that Taxpayer’s procedural arguments went beyond the issue set forth in the pre-trial order. Tr. pp. 26-27. Counsel also argued that Taxpayer had not established that the *John Doe* who died in 2008 was the same person that was identified on the Waiver. Tr. p. 29.

To state the obvious, unless there was some fraud involved with the death certificate, the *John Doe* who died in 2008 could not have signed the Waiver in 2010. A signature of *John Doe* does appear on the Waiver (Taxpayer Ex. 2), but I cannot presume, nor could I possibly conclude, that the person who signed the Waiver was the deceased.

Further, a statute of limitations is an affirmative defense. Hood v. Commonwealth Trust & Savings Bank, 376 Ill. 413, 420, 34 N.E.2d 414, 419 (1941). A party who claims

the benefit of a statute of limitations has the burden of proving that the action is barred by the limitations period set by statute. *Id.*; 25 Ill. Law and Prac. *Limitations of Actions* § 136 (2012). Thus, Taxpayer had the burden to show that a particular statute of limitations applied to it, and had expired.

When making its arguments, however, Taxpayer did not cite or refer to any statute that sets forth a period that limits the Department's authority to issue notices of tax liability, such as the NTLs issued to Taxpayer. *See Tr. passim*. Rather, counsel cited to the period set forth on the Waiver signed by *John Doe*, and repeatedly asserted that the same limitations period applied to Taxpayer. *Tr.* pp. 26, 31. Although Taxpayer failed to cite to an actual statute, I do not consider that failure as waiving its argument. The UTA's statute of limitations is part of a public law, of which I may take notice. 5 ILCS 100/10-40(c); 735 ILCS 5/8-1001.

The UTA adopts, with revisions, the statutes of limitations provided by the complementary Retailers' Occupation Tax Act (ROTA). 35 ILCS 105/12; Square D Co. v. Johnson, 233 Ill. App. 3d 1070, 1086-87, 599 N.E.2d 1235, 1245 (1st Dist. 1992). Where a taxpayer has filed a return required by the ROTA, § 4 of that act provides:

Except in case of a fraudulent return, or in the case of an amended return (where a notice of tax liability may be issued on or after each January 1 and July 1 for an amended return filed not more than 3 years prior to such January 1 or July 1, respectively), no notice of tax liability shall be issued on and after each January 1 and July 1 covering gross receipts received during any month or period of time more than 3 years prior to such January 1 and July 1, respectively. ***

35 ILCS 120/4 (emphasis added). However, where a taxpayer has failed to file a return required by the ROTA, § 5 provides that there is no statute of limitations on the

Department's authority to issue an NTL. 35 ILCS 120/5; Square D Co., 233 Ill. App. 3d at 1086-87, 599 N.E.2d at 1245.

More specifically, the UTA's revisions to the ROTA's statutory periods are set forth in § 12, which provides:

Sec. 12. Applicability of Retailers' Occupation Tax Act and Uniform Penalty and Interest Act. All of the provisions of Sections 1d, 1e, 1f, 1i, 1j, 1j.1, 1k, 1m, 1n, 1o, 2-6, 2-54, 2a, 2b, 2c, 3, **4 (except that the time limitation provisions shall run from the date when the tax is due rather than from the date when gross receipts are received), 5 (except that the time limitation provisions on the issuance of notices of tax liability shall run from the date when the tax is due rather than from the date when gross receipts are received and except that in the case of a failure to file a return required by this Act, no notice of tax liability shall be issued on and after each July 1 and January 1 covering tax due with that return during any month or period more than 6 years before that July 1 or January 1, respectively), 5a, 5b, 5c, 5d, 5e, 5f, 5g, 5h, 5j, 5k, 5l, 7, 8, 9, 10, 11 and 12 of the Retailers' Occupation Tax Act and Section 3-7 of the Uniform Penalty and Interest Act, which are not inconsistent with this Act, shall apply, as far as practicable, to the subject matter of this Act to the same extent as if such provisions were included herein.**

35 ILCS 105/12 (emphasis added).

So, the UTA imposes essentially the same three-year period of limitations that the ROTA sets for the Department to issue an NTL to a taxpayer that has filed a required return. *Id.* The biggest difference between the two acts is for taxpayers who have failed to file a required return. Under the ROTA, the legislature imposed no time limit; under the UTA, the legislature imposed a six year statute of limitations. *Compare* 35 ILCS 120/5 *with* 35 ILCS 105/12. In short, the UTA sets forth two separate statutory periods during which the Department is required to issue an NTL; a three year period for taxpayers who have filed a required return, and a six year period for those who have failed to file such a return. 35 ILCS 105/12.

To show that the UTA's three-year statute of limitations applied to Taxpayer, counsel was required to show that *Taxpayer* had filed returns regarding the period stated on the NTLs. Commonwealth Trust & Savings Bank, 376 Ill. at 420, 34 N.E.2d at 419. Taxpayer made no such showing. And, given the nature of the substantive issue — with Taxpayer claiming that it lacked sufficient nexus with Illinois to require it to file tax returns (*see, e.g.*, Tr. pp. 12-13) — it is only logical to infer that Taxpayer did *not* file the Illinois returns the Department later determined should have been filed by Taxpayer. *See* Department Ex. 1; 86 Ill. Admin. Code § 150.810(c)(2). The NTLs were issued on March 3, 2011, and thus well within the six-year statute of limitations for taxpayers who failed to file returns regarding the periods from July 2007 through December 2009. *See* Department Ex. 1, pp. 1-6; 35 ILCS 105/12.

Finally, and contrary to counsel's arguments (Tr. pp. 26, 31), just because a *John Doe* signed a Waiver that reflected a three-year statute of limitations does not mean that that same period applied to Taxpayer. It is entirely possible that the *John Doe* who signed the Waiver had filed returns reporting sales that he may have personally made to Illinois purchasers.¹ That would at least explain and be consistent with the dates set forth on the Waiver which, I presume, was prepared by the Department and signed by *John Doe*. Taxpayer Ex. 2. Further, *John Doe* and Taxpayer are different persons (*see* JB4 Air LLC v. Department of Revenue, 388 Ill. App. 3d 970, 974, 905 N.E.2d 310, 314 (2d Dist. 2009)), which is a point that Taxpayer appreciates. *See* Tr. pp. 25-26 (“*John Doe* may or may not have extended the statute of limitations as to himself, but he certainly did not

¹ Both counsel referred to sales made in Illinois by persons appearing at trade shows held in Illinois, as well as to sales made by Taxpayer to purchasers in Illinois via the internet (Tr. pp. 9, 13), although the record does not contain a full description of either Taxpayer's or John Doe's activities.

even purport to do so as to the corporation, which is the taxpayer that's really at issue.”).

After considering the evidence, Taxpayer has not shown that the UTA's three-year statute of limitations applied to it. 35 ILCS 105/12. Because it failed to do so, it has not shown that the NTLs were improper.

Conclusion:

I recommend that the NTLs be finalized as issued, with interest to accrue pursuant to statute.

Date: January 24, 2013

John E. White, Administrative Law Judge

