

UT 14-02

Tax Type: Use Tax

Tax Issue: Use Tax On Watercraft Purchase

**Illinois Department of Revenue
OFFICE OF ADMINISTRATIVE HEARINGS**

James R. Thompson Center
100 West Randolph Street, Level 7-900
Chicago, Illinois 60601
(312) 814-6114

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

v.

ABC BUSINESS,

TAXPAYER

)
) **No. XXXX**
) **Letter ID: XXXX**
) **NTL Account ID: XXXX**
)
) **Kenneth J. Galvin,**
) **Administrative Law Judge**

RECOMMENDATION FOR DISPOSITION

Appearances: Mr. Kevin Wolfberg and Mr. Patrick McGuire, Schain, Burney, Banks & Kenny, on behalf of ABC BUSINESS; Mr. John Alshuler, Special Assistant Attorney General, on behalf of the Department of Revenue of the State of Illinois.

Synopsis:

This matter comes on for hearing pursuant to ABC BUSINESS’s (hereinafter “ABC BUSINESS”) protest of the Notice of Tax Liability (hereinafter “NTL”), captioned above, issued December 9, 2011. The basis of the assessment was the Department’s determination that ABC BUSINESS had not paid use tax due to the Department for a boat purchased outside of Illinois in 2009. ABC BUSINESS protested the assessment claiming that the boat was exempt from use tax. An evidentiary hearing was held in this matter on November 5, 2013 with Mr. John Doe testifying. Following a review of the testimony and the evidence submitted by the taxpayer, it is recommended that the Notice of Tax Liability be cancelled. In support thereof, the following “Findings of Fact” and “Conclusions of Law” are made.

Findings of Fact:

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, is established by the admission into evidence of the Notice of Tax Liability issued December 9, 2011, which shows use tax due of \$XXXX plus penalty and interest. The NTL states that the boat was brought into Illinois on February 4, 2009. Tr. p. 6; Dept. Ex. No. 1.
2. An invoice from "XYZ Business" in Happyville, dated March 11, 2009, shows service on ABC BUSINESS's refrigeration units. Tr. pp. 27-28; Taxpayer's Ex. No. 4.
3. On June 2, 2009, the Florida Department of Revenue sent Mr. John Doe a letter, at his address, stating that he had purchased a boat on February 4, 2009. In order to avoid Florida sales/use tax, Mr. John Doe had to submit proof that the boat was removed from Florida within 90 days of purchase. On July 6, 2009, the Florida Department of Revenue sent Mr. John Doe a letter stating that based on the information provided by Mr. John Doe "regarding the tax-exempt purchase of your boat in Florida," "we are closing your file at this time." Tr. pp. 37-43; Dept. Ex. No. 2 and 3.
4. Trudy Blue was the "Marina Director of Operations" at DEF Business in Somewhere since March, 2005. She stated in a letter that Mr. John Doe "berthed his boat in the marina for several months" in 2009. The Marina was foreclosed in September, 2010 and no documentation of the exact dockage dates exists. Tr. pp. 29-30; App. Ex. No. 7.
5. An account statement from "GHI Business" located in Florida shows that the boat was docked in the Marina from January 1, 2011 through December 5, 2012. Tr. pp. 26-27; Taxpayer's Ex. No. 2.

Conclusions of Law:

The Use Tax Act, 35 ILCS 105/1 *et seq.* (hereinafter referred to as the “UTA”) imposes a tax upon the privilege of using in this State tangible personal property purchased at retail from a retailer...” *Id.* at 105/3. The UTA was passed to complement and prevent evasion of the Retailers’ Occupation Tax Act. Needle Co. v. Department of Revenue, 45 Ill. 2d 484 (1970). On December 9, 2011, the Department issued a Notice of Tax Liability (“NTL”) assessing use tax upon ABC BUSINESS. Section 12 of the UTA (35 ILCS 105/12) incorporates by reference Section 4 of the Retailers’ Occupation Tax Act (35 ILCS 120/1 *et seq.*), which provides that the NTL issued by the Department is *prima facie* correct and is *prima facie* evidence of the correctness of the amount of tax due. *Id.* at 120/4. Once the Department has established its *prima facie* case by submitting the NTL into evidence, the burden shifts to the taxpayer to overcome the presumption of validity. Clark Oil & Refining v. Johnson, 154 Ill. App. 3d 773 (1st Dist. 1987).

In order to overcome the presumption of validity attached to the NTL, the taxpayer must produce competent evidence, identified with its books and records showing that the NTL is incorrect. Copilevitz v. Department of Revenue, 41 Ill. 2d 154 (1968). Testimony alone is not enough. Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill. App. 3d 203 (1st Dist. 1991). Documentary proof of tax-exempt status is required to prevail against an assessment of tax by the Department. Sprague v. Johnson, 195 Ill. App. 3d 798 (4th Dist. 1990). On examination of the record in this case, I find that the taxpayer has demonstrated, through testimony, exhibits and argument, evidence sufficient to overcome the Department’s determination that use tax is due.

John Doe lives in Anywhere, Illinois. He and his wife are the only members of ABC BUSINESS. Mr. John Doe manages and keeps the records for ABC BUSINESS and is familiar with day-to-day operations. ABC BUSINESS is incorporated in Delaware. Tr. pp. 9-11. Mr. John

Doe testified that ABC BUSINESS purchased the boat at issue, named “ABC BUSINESS” in February, 2009. The purchase occurred in Florida. The boat was a 2008, fiberglass, 64-foot long, 25 feet-wide, enclosed bridge “Viking.” The boat was primarily used for sport fishing. It weighed 105,000 pounds and was 22-25 feet high out of the water. The enclosed bridge could not be removed from the boat. ABC BUSINESS resold the boat in Florida in November, 2012. Tr. pp. 11-16, 24, 31; Taxpayer’s Ex. No. 11.

The Department’s NTL states that ABC BUSINESS was brought into Illinois on February 4, 2009. Dept. Ex. No. 1. According to Mr. John Doe’s testimony, ABC BUSINESS was too wide and too tall to trailer it on ordinary roads. At 25 feet high, it was too tall for bridges on the highway system. Mr. John Doe testified that he never paid anyone to trailer the boat to Illinois by way of roadways. The boat could have been sailed to Illinois, up the Mississippi River and through the locks to Lake Michigan, a one-week trip, or it could be sailed up the East Coast through New York and the Great Lakes, a two-week trip. However, Mr. John Doe testified that the boat could not be sailed in Illinois in February because the water in Illinois lakes and rivers is frozen. The boat’s hull was fiberglass and frozen waters would have cracked and destroyed the fiberglass. “It’s absolutely impossible to sail a fiberglass vessel in Illinois waters at that time of year.” Mr. John Doe testified that, in February, ABC BUSINESS would first have encountered ice in Missouri in the Mississippi River or, alternatively, in New York or New Jersey if the boat had been sailed up the East Coast. Tr. pp. 19-20, 24-25, 31-32, 35. No lock or harbor passage receipts or storage receipts along the waterways into Illinois, either on the Mississippi River or through the East Coast, were admitted into evidence by the Department.

Testimony that ABC BUSINESS was not brought into Illinois in February, 2009, was backed up by documentary evidence. An invoice from “XYZ Business” in Happyville, dated March

11, 2009, shows service on ABC BUSINESS's refrigeration units. Tr. pp. 27-28; Taxpayer's Ex. No. 4. So in March, 2009, the month after purchase, ABC BUSINESS was in Happyville. Trudy Blue was the "Marina Director of Operations" at DEF Business in Alabama since March, 2005. She stated in a letter offered into evidence by the taxpayer and not objected to by the Department, that Mr. John Doe "berthed his boat in the marina for several months" in 2009. The DEF Business was foreclosed in September, 2010, and no documentation of the exact dockage date exists. Tr. pp. 29-30; App. Ex. No. 7.

Mr. John Doe testified that he did not own the boat on February 4, 2009 and first took possession on February 20, 2009. Tr. p. 33. "I think we initially wrote up the contract but we didn't wind up closing I think because I wanted to put the boat in an LLC, and so I wound up getting that LLC on February the 9th of 2009, and so it delayed us closing on the boat." Tr. p. 37. On June 2, 2009, the Florida Department of Revenue sent Mr. John Doe a letter, at his Anywhere address, stating that he had purchased a boat on February 4, 2009. In order to avoid Florida sales/use tax, Mr. John Doe had to submit proof that the boat was removed from Florida within 90 days of purchase. On July 6, 2009, the Florida Department of Revenue sent Mr. John Doe a letter stating that, based on the information provided by him, "regarding the tax-exempt purchase of your boat in Florida," "we are closing your file at this time." Tr. pp. 37-43; Dept. Ex. No. 2 and 3.

Mr. John Doe testified that ABC BUSINESS was removed from Florida within 90 days of its purchase but was never taken to Illinois. Tr. p. 42. The Department's attorney opined that the State of Illinois got the date of February 4, 2009 as the "date brought into IL" on the NTL from the State of Florida's letter, described above. The State of Illinois knew that ABC BUSINESS had to leave Florida at a certain date in order to avoid Florida tax "and that's the date that the State reads that it came into Illinois." Tr. pp. 40-41.

According to Mr. John Doe, he made all decisions concerning the boat. He sailed the boat 20 to 30 times, paid all expenses for the boat, hired Captain Gene Green to operate the boat and approved all uses of the boat. Mr. John Doe testified that he never sailed the boat to Illinois and the boat was never serviced, maintained or stored in Illinois. Tr. pp. 18-19. Mr. John Doe sailed ABC BUSINESS to the Gulf of Mexico, the U.S. Virgin Islands and the Bahamas. According to his testimony, the northernmost place that the boat was operated was the Gulf of Mexico, near Alabama. Tr. pp. 17-18, 21. An account statement from GHI Business located in Florida shows that the boat was docked in the Marina from January 1, 2011 through December 5, 2012. Tr. pp. 26-27; Taxpayer's Ex. No. 2

ABC BUSINESS also offered Captain Gene Green's Affidavit into evidence, which was not objected to by the Department. The Affidavit stated that, if called as a witness, Captain Gene Green would testify that he was the sole captain of ABC BUSINESS since May, 2009, that he did not sail the boat in or around the waters of Illinois and that to the best of his knowledge, no other person sailed ABC BUSINESS in or around the waters of Illinois. Tr. pp. 21-23; Taxpayer's Ex. No. 6. Mr. John Doe testified that he knew "100 percent" that Captain Gene Green had never brought the boat into Illinois waters. Mr. John Doe approved all usage of ABC BUSINESS and nobody used the boat without his permission. Tr. p. 23.

To begin the determination of whether use tax was properly assessed in this case, it must first be determined whether the taxpayer used the items purchased in Illinois as the term "use" is defined in the UTA. Section 2 of the UTA (35 ILCS 105/2) defines "use" broadly as "the exercise by any person of any right or power over tangible personal property incident to the ownership of that property..." The use tax is not a tax which arises out of the use or operation of tangible personal property, but rather it is a tax placed upon the exercise of powers or rights incident to

ownership. Time, Inc. v. Dept. of Revenue, 11 Ill. App. 3d 282 (1st Dist. 1973). I conclude that ABC BUSINESS has rebutted the Department's *prima facie* case. I find Mr. John Doe's testimony to be credible. The Department offered no evidence that the boat was brought into Illinois. Accordingly, I am unable to conclude from the testimony and evidence that ABC BUSINESS was brought into Illinois on February 4, 2009 or any other date. Furthermore, I am unable to conclude that Mr. John Doe exercised any incidents of ownership over ABC BUSINESS in Illinois, which would constitute a taxable "use" under the UTA, and trigger the application of use tax.

WHEREFORE, for the reasons stated above, it is my recommendation that the Notice of Tax Liability, captioned above, issued to ABC BUSINESS LLC/Fred John Doe on December 9, 2011 be cancelled.

May 15, 2014

Kenneth J. Galvin
Administrative Law Judge