ST 98-4
Tax Type: SALES TAX
Issue: Rolling Stock (Purchase/Sale Claimed To Be Exempt)

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

THE DEPARTMENT OF REVENUE	**)**	
OF THE STATE OF ILLINOIS	**)**	
	)	**Docket No.**
v.	**)**	**IBT #**
	)	**NTL #**
JOHN DOE d/b/a	**)**	**NTL #**
XYZ CORPORATION	**)**	**Claim for Refund for**
Taxpayer	**)**	**7/88 to 12/93**

RECOMMENDATION FOR DISPOSITION

Appearances: Charles Hickman, Special Assistant Attorney General, for the Department of Revenue of the State of Illinois; Joseph E. McMenamin of Dunn & McMenamin for JOHN DOE d/b/a XYZ CORPORATION.

Synopsis:

The Department of Revenue ("Department") conducted an audit of JOHN DOE d/b/a XYZ CORPORATION ("taxpayer") for the period of July 1988 to December 1993. At the conclusion of the audit, the Department determined that the taxpayer owed additional use tax, plus penalties and interest, for various items that were purchased during the audit period. The taxpayer paid the tax, and the Department issued two Notices of Tax Liability ("NTLs") to the taxpayer for the penalties and interest. The taxpayer timely protested the NTLs and filed claims for credit or refund of the tax that was paid. The Department issued a Notice of Tentative Denial of Claim. The taxpayer's

protest of the Notice of Tentative Denial of Claim was consolidated with the protests of the NTLs. An evidentiary hearing was held during which the only issue presented was whether several tractors, trailers, repair parts, and forklifts qualify for the rolling stock exemption under the Use Tax Act (35 ILCS 105/1 *et seq.*). The taxpayer conceded that two automobiles and various miscellaneous assets acquired during the audit period do not qualify for the exemption. After reviewing the record, it is recommended that the penalties be abated and the tax liability be upheld.

FINDINGS OF FACT:

1. The Department audited the taxpayer for the period of July 1, 1988 to December 31, 1993. (Dept. Group Ex. #1)

2. At the conclusion of the audit, the Department determined that the taxpayer owed use tax on the following items:

Item	Tax
1987 Freightliner	$ 1,125
1988 White tractor, #1WUDCCFXJN124394	$ 1,359
White tractor, #4VIWOBCEXJN6032	$ 1,313
1989 Freightliner	$ 1,844
1990 Freightliner	$ 2,130
1990 Freightliner, #1FUYDSYB4LP367772	$ 2,125
1990 Freightliner, #1FUYDSYB2LP367771	$ 2,031
Various trailers	$ 8,290
Repair parts	$15,924
11 Forklifts	$ 8,013
2 automobiles	$ 2,707
Miscellaneous assets	$ 183
Total	$47,044

(Taxpayer Ex. #3, 11, 24)

3. In February of 1996, the taxpayer paid $47,044 to the Department for the use tax that the Department determined was owed as a result of the audit. (Taxpayer Ex. #25)

4. In March of 1996, the Department prepared corrected tax returns for the taxpayer for the audit period in question. The first two corrected returns cover the period of July 1, 1988 to November 30, 1993 and show a total tax due in the amount of $46,789, plus a penalty of $4,679. The third corrected return covers the period of December 1, 1993 to December 31, 1993 and shows a total tax due in the amount of $255, plus a penalty of $13. The returns show that the taxes were paid in full. A copy of the corrected returns was admitted into evidence under the certificate of the Director of the Department. (Dept. Group Ex. #1)

5. On June 4, 1997, the taxpayer filed two claims for credit or refund. The first claim requests a credit of $46,803 for the tax paid relating to the audit period of July 1988 to November 1993. The second claim requests a credit of $241 for the tax paid relating to the audit period of December 1993. (Taxpayer Group Ex. #24, 25)

6. On June 25, 1997, the Department issued a Notice of Tentative Denial of Claim, which denied the taxpayer's total claim in the amount of $47,044 for the audit period of July 1988 to December 1993. A copy of the Notice of Tentative Denial of Claim was admitted into evidence under the certificate of the Director of the Department. (Dept. Group Ex. #4)

7. The taxpayer conceded that the two automobiles and the miscellaneous assets that were included in the corrected returns do not qualify for the rolling stock exemption. The use tax on these items totals $2,890. (Taxpayer's brief, p. 2)

8. During the audit period, the taxpayer held a permit from the Interstate Commerce Commission ("ICC") to engage in transportation as a contract carrier. (Taxpayer Ex. #1)

9. On April 18, 1993, the taxpayer's office was damaged by fire. The taxpayer's witnesses testified that nearly all of the taxpayer's books and records were destroyed in the fire. (Taxpayer Ex. #2; Tr. pp. 16, 110-111)

10. The taxpayer is located in FICTITIOUS CITY, Illinois. The majority of the taxpayer's business involves hauling paper for various customers to paper mills. The taxpayer sometimes hauls other items such as styrofoam and steel. (Tr. pp. 24, 133-134, 137)

11. The taxpayer hauls the paper to mills in states such as Indiana, Kentucky, Missouri, Tennessee, and Iowa. (Taxpayer Group Ex. #11; Tr. p. 150)

12. During the audit period, most of the agreements governing the hauling of paper by the taxpayer for his customers were unwritten. (Tr. pp. 122-123)

13. In 1994, the taxpayer executed written service agreements with certain customers. The agreements state that the taxpayer will haul commodities for those customers and charge for the freight. The agreements contain a clause that states that the agreement is executed "with the intent of ratifying earlier agreements not inconsistent herewith." (Taxpayer Group Ex. #8; Tr. pp. 67, 83-87)

14. The taxpayer picks up the paper at the customer's location. Sometimes the taxpayer uses his forklifts to load the paper onto the taxpayer's trailers. These forklifts are transported in the taxpayer's trailers. (Tr. pp. 25-26, 58, 124)

15. Sometimes the taxpayer will leave one of his trailers at the customer's location, and the customer will load the paper on the trailer. The taxpayer will later pick up the trailer and leave another one in its place. (Tr. pp. 23, 88, 130)

16. When the taxpayer picks up paper from one of his customers, the taxpayer gives the customer an invoice that indicates how many bales of paper that the taxpayer picked up. The taxpayer did not offer into evidence any invoices that were issued during the audit period. (Tr. pp. 26-30, 47-48)

17. The taxpayer takes the paper to mill, and usually the mill purchases the paper. The price that the mill pays for the paper depends on the "market price." The mill later issues a check to the taxpayer for the paper. (Tr. pp. 32, 84)

18. When the paper is dropped off at the mill, the taxpayer gives the mill a bill of lading. One copy of the bill of lading is left with the mill, and another is retained by the taxpayer. No bills of lading were offered into evidence. (Tr. pp. 88, 120)

19. After the taxpayer receives a check from the mill, the taxpayer deposits the money into his checking account. (Tr. p. 84)

20. The taxpayer subtracts his fee from the amount received from the mill and puts the remaining amount into an escrow account for his customers. The taxpayer later issues a check to his customer. The taxpayer did not offer into evidence any checks that were issued to his customers during the audit period. (Taxpayer Ex. #13; Tr. pp. 49-50, 84, 135-136)

21. During the audit period, the taxpayer included the amount of money received from the mills on line 1 of Schedule C, "Gross receipts or sales," as part of the taxpayer's federal income tax return. The payments made to the taxpayer's customers were included on the line entitled "Cost of goods sold." (Tr. pp. 65-66, 71-73)

22. The taxpayer hauled commodities other than paper for customers who paid freight charges directly to the taxpayer. The taxpayer's office manager testified that these

hauls were not the taxpayer's "specialty." The taxpayer submitted documentary evidence for these hauls from April of 1993 to December of 1993. (Taxpayer Ex #14; Tr. p. 137)

23. The taxpayer provided trip tickets for a 1987 Freightliner with the last four digits of its identification number being 2335 for the months of March of 1993 through December 1993. The trip tickets show that the 1987 Freightliner traveled 21,868 miles in Indiana and Kentucky. The vehicle traveled a total of 48,933 miles. The percentage of interstate miles was 45%. (Taxpayer Group Ex. #11)

24. The taxpayer presented trip tickets for a 1989 Freightliner with the last four digits of its identification number being 7847 for the months of April 1993 to December 1993. The trip tickets show that the 1989 Freightliner traveled 46,502 miles in Indiana, Kentucky, and Tennessee. The vehicle traveled a total of 53,308 miles. The percentage of interstate miles was 87%. (Taxpayer Group Ex. #11)

25. The taxpayer presented trip tickets for the 1990 Freightliner with the last four digits of its identification number being 7772 for the months of March, April, May, August, and September of 1993. The taxpayer did not provide trip tickets for this tractor for the months of June, July, October, November, and December of 1993. (Taxpayer Group Ex. #11)

26. The taxpayer did not submit documentary evidence showing that the following tractors were used in interstate travel: the 1988 White tractor #1WUDCCFXJN124394, the White tractor #4VIWOBCEXJN6032, the 1990 Freightliner #1FUYDSYB2LP367771, and the 1990 Freightliner for which tax was assessed in the amount of $2,130.

27. The taxpayer did not submit documentary evidence indicating that the specific trailers and forklifts for which tax was assessed were used in interstate travel.

CONCLUSIONS OF LAW:

The Use Tax Act (35 ILCS 105/1 *et seq.*) imposes a tax upon the privilege of using in Illinois tangible personal property purchased at retail from a retailer. 35 ILCS 105/3. Section 12 of the Use Tax Act incorporates by reference section 4 of the Retailers' Occupation Tax Act (35 ILCS 120/1 *et seq.*), which provides that the corrected return issued by the Department is *prima facie* correct and is *prima facie* evidence of the correctness of the amount of tax due, as shown therein. 35 ILCS 105/12; 120/4. Section 12 of the Use Tax Act also incorporates by reference section 6b of the Retailers' Occupation Tax Act, which provides that the Department's Notice of Tentative Denial of Claim constitutes *prima facie* proof of the correctness of the Department's determination, as shown therein. 35 ILCS 105/12; 120/6b.

Once the Department has established its *prima facie* case by submitting a certified copy of the corrected return and Notice of Tentative Denial of Claim into evidence, the burden shifts to the taxpayer to overcome this presumption of validity. Clark Oil & Refining Corp. v. Johnson, 154 Ill.App.3d 773, 783 (1st Dist. 1987). To prove its case, a taxpayer must present more than its testimony denying the Department's assessment. Sprague v. Johnson, 195 Ill.App.3d 798, 804 (4th Dist. 1990). The taxpayer must present sufficient documentary evidence to support its claim for an exemption. Id.

It is well-settled that tax exemption provisions are 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 resolved in favor of taxation. Id.

The term "rolling stock" typically refers to vehicles. Midway Airlines v. Department of Revenue, 234 Ill.App.3d 866, 869 (1st Dist. 1992). The rolling stock exemption under the Use Tax Act provides in relevant part as follows:

> "Multistate exemption. To prevent actual or likely multistate taxation, the tax imposed by this Act does not apply to the use of tangible personal property in this State under the following circumstances:
>
> * * *
>
> (b) The use, in this State, of tangible personal property by an interstate carrier for hire as rolling stock moving in interstate commerce ***" (35 ILCS 105/3-55(b)).

Thus, in order to qualify for the exemption the taxpayer must establish that (1) it is an interstate carrier for hire and (2) the vehicles in question were used in interstate commerce.

The Department argues that the taxpayer is not an interstate carrier “for hire” because he transports his own property, i.e., he transports paper that he purchases from his customers. The Department's regulations state that the term "Rolling Stock" does not include "vehicles which are being used by a person *** to transport property which such person owns or is selling and delivering to customers (even if such transportation crosses State lines)." 86 Ill.Admin.Code §130.340(b). The Department argues that the manner in which payment is made for the paper and the manner in which it is reported on the taxpayer’s income tax returns indicates that the taxpayer is transporting his own property, and therefore the vehicles do not qualify for the exemption.

During the audit period, most of the agreements between the taxpayer and his customers concerning the taxpayer’s services were unwritten. The taxpayer was not able to produce any of the few written agreements that were executed during the audit period because of the fire. The taxpayer’s office manager testified that in 1994, the taxpayer

began executing written service agreements because of a change in the federal law. (Tr. p. 123) The change required contract carriers to enter into written contracts after March 3, 1994. (Taxpayer Ex. #4) The taxpayer provided samples of written service agreements between the taxpayer and his customers that were executed after the audit period. The agreements state that the taxpayer will transport the customer's commodities for a specified fee and contain a clause indicating that they were executed "with the intent of ratifying earlier agreements not inconsistent herewith." (Taxpayer Group Ex. #8)

The taxpayer's witnesses testified that when one of the taxpayer's drivers picks up the paper, he gives the customer an invoice that has only the number of bales on it. The taxpayer submitted into evidence sample invoices, but none of the samples were issued during the audit period; all of them were issued in 1997. (Taxpayer Group Ex. #12, 15) The time period for considering entitlement to the exemption may be limited to the audit period. See Chicago & Illinois Midland Railway Company v. Department of Revenue, 66 Ill.App.3d 397, 399 (1st Dist. 1978). Although the sample invoices support the taxpayer's claim that he did not own the paper he transported, the taxpayer did not explain why he did not provide sample invoices that were issued after the fire during the audit period.

The taxpayer's office manager testified that the taxpayer issues bills of lading when the paper is dropped off at the mill. Generally, a bill of lading is a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting goods. (13 C.J.S. Carriers §390) The Department argues that the bills of lading "are probably the most probative evidence of the ownership of the paper." (Department's brief, p. 5) No bills of lading were offered into evidence.

As previously stated, the taxpayer has the burden of clearly proving that he is entitled to the exemption. Heller, 59 Ill.2d at 579. Testimony from the parties is insufficient, by itself, to establish entitlement to the exemption. Sprague, 195 Ill.App.3d at 804. The taxpayer must submit documentary proof supporting his claim. Id.

The only documentary evidence presented by the taxpayer to support his claim that he did not own the paper he transported during the audit period were documents that were issued after the audit period. The taxpayer presented certain documents issued during the audit period, such as checks and invoices showing direct payment to the taxpayer for hauling services (Taxpayer Ex. #14) and trip tickets for various vehicles (Taxpayer Ex. #11). Nevertheless, the taxpayer failed to present documentary evidence supporting a finding that the taxpayer hauls property owned by his customers. Although the written agreements after the audit period were executed "with the intent of ratifying earlier agreements not inconsistent herewith," nothing other than unsubstantiated testimony from the taxpayer's witnesses indicates that the terms of the earlier agreements are consistent with the written agreements executed after the audit period. None of the documents used by the taxpayer to operate his business during the audit period were submitted to support his claim that he did not own the paper. While the taxpayer's argument that he transported paper that he never owned is certainly plausible, without sufficient documentary evidence it cannot be found that the taxpayer has overcome the Department's *prima facie* case.

Even assuming the evidence was sufficient to show that the taxpayer did not own the paper, the remaining evidence would only support a finding that two of the vehicles at issue moved in interstate commerce. The items that the Department claims the taxpayer

owes taxes on are listed in the Department's document entitled "Global Taxable Exceptions." The following tractors are listed in the Global Taxable Exceptions:

1987 Freightliner
1988 White tractor, #1WUDCCFXJN124394
White tractor, #4VIWOBCEXJN6032
1989 Freightliner
1990 Freightliner
1990 Freightliner, #1FUYDSYB4LP367772
1990 Freightliner, #1FUYDSYB2LP367771

The taxpayer provided trip tickets for the following tractors:

1985 White tractor
1987 Freightliner #2335
1987 Freightliner #304245
1988 White tractor
1988 tractor #2123
1989 Freightliner #7847
1990 Freightliner #7772
1990 Freightliner

Of all of the trip tickets submitted by the taxpayer, only the tickets for the 1987 Freightliner #2335 and the 1989 Freightliner #7847 were sufficient to show that the tractors moved in interstate commerce. Although the 1987 and 1989 Freightliners listed on the Global Taxable Exceptions do not have identification numbers, it is assumed that these are the vehicles for which the trip tickets were provided. For the 1987 Freightliner #2335, the trip tickets show that the tractor traveled interstate 45% of the time from the period of March 1993 to December 1993. The trip tickets for the 1989 Freightliner #7847 show that the tractor traveled interstate 87% of the time from the period of April 1993 to December 1993.

For the remaining tractors listed on the Global Taxable Exceptions, the taxpayer either did not present any trip tickets at all for the tractors or did not present enough trip tickets, at least for the time period of April 1993 to December 1993. The trip tickets for

the 1990 Freightliner #7772 were for the time period from March to May of 1993, and also from August to September of 1993. No explanation was given as to why trip tickets were not available for the months of June, July, October, November, and December of 1993. Nothing in the record indicates that this tractor or any of the others for which trip tickets were not provided were either sold during that time period or not used during that time period. The taxpayer's office manager admitted during cross-examination that it was difficult to identify which tractors on the list of Global Taxable Exceptions matched the trip tickets. She also admitted that one of the tractors for which trip tickets were provided, the 1985 Freightliner, may not be owned by the taxpayer. (Tr. p. 144) She said that the driver of that vehicle works for an independent contractor who drives his own tractors. (Tr. p. 144) Although the fire understandably made it difficult for the taxpayer to provide documentation for the time period prior to the fire, it does not excuse the taxpayer's failure to submit documentation for the period from April to December of 1993. Because the taxpayer failed to provide trip tickets for five of the seven tractors for the time period after the fire, the evidence is insufficient to meet their burden of proof for these tractors.

The evidence is also insufficient to support a finding that the trailers and forklifts moved in interstate commerce. Although the taxpayer testified that it was difficult to keep track of the trailers because some of them were dropped off at a customer's location and later picked up, the lack of documentation indicating that the specific vehicles moved in interstate commerce requires a denial of the exemption for these items. In addition, forklifts are not rolling stock within the meaning of the exemption. See Mi-Jack Products, Inc. v. Department of Revenue, 136 Ill.App.3d 721 (1st Dist. 1985) (rolling

stock exemption not intended to include vehicles such as cranes). Because the taxpayer is not entitled to the exemption on the vehicles, the repair parts do not qualify as well.

Finally, at the pretrial conference the taxpayer raised the issue of whether he was entitled to an abatement of the penalties due to reasonable cause. Although this relief was not requested in the taxpayer's brief, because the fire destroyed most of the taxpayer's books and records, it is recommended that the penalties be abated.

Recommendation:

For the foregoing reasons, it is recommended that the penalties be abated and the remaining tax liability be upheld.

_____
Linda Olivero
Administrative Law Judge

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