

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, was established by the admission into evidence of the NTL reflecting \$32,385 in Retailers' Occupation Tax, \$648 in late filing penalty, \$6,477 in late payment penalty, \$16,192 in negligence or fraud penalty and \$5,366.81 in interest through December 18, 2009, for the audit period July 1, 2006 through December 31, 2006. Dept. Ex. No. 1; Tr. p. 5.
2. Taxpayer presented no documentary or testimonial evidence.
3. This matter was twice continued. The first continuance was at the Department's request (August 16, 2010 Order) and the second continuance was at Taxpayer's request (October 6, 2010).
4. At Hearing, Taxpayer's counsel stated he would not be able to proceed or respond to the Department's case because his client was not present; however, counsel gave no reason as to why his client was absent from the proceedings. Tr. pp. 4, 6-8.
5. Taxpayer's counsel was informed that if he was requesting a continuance, such request was denied because there had been two (2) prior continuances and counsel was, in fact, present to represent Taxpayer. Tr. pp. 4, 6.

Conclusions of Law:

Section 4 of the Retailers' Occupation Tax Act ("ROTA") (35 ILCS 120/1 *et seq.*) provides that a certified copy of the NTL issued by the Department is *prima facie* correct and is *prima facie* evidence of the correctness of the amount of tax due. 35 ILCS 120/4. Once the Department has established its *prima facie* case by submission of a certified copy of the NTL into evidence, the burden shifts to taxpayer to overcome the presumption of validity attached to the established *prima facie* case. Clark Oil & Refining v. Johnson, 154 Ill. App. 3d 773, 783 (1st Dist. 1987).

To overcome the presumption of validity attached to the NTL, 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 is required to prevail against an assessment of tax by the Department. Sprague v. Johnson, 195 Ill. App. 3d 798(4th Dist. 1990).

In order for one to receive a continuance of their hearing a written motion must be filed, 48 hours prior to the scheduled hearing, showing good cause for such request. 86 Ill. Admin. Code sec. 200.160 (b)-(c) (e). Good cause considers factors like the nature and complexity of the legal issues raised; diligence of the party making the request; availability of a party's legal representative or witnesses; and number of previous requests for continuance. 86 Ill. Admin. Code sec. 200.160 (c).

A continuance would have been unwarranted in this matter because: 1) the legal issue raised was rather straightforward -- whether Taxpayer owed tax, penalties and interest, 2) such request was neither timely nor in writing, 3) no reasons for Taxpayer's absence were posited, let alone good cause and 4) two continuances had already been granted.

At hearing, the Department introduced a copy of the NTL under the certificate of the Director. Dept. Ex. 1; Tr. p. 5. This exhibit constituted *prima facie* proof of the correctness of the amount of tax due from Taxpayer. Quincy Trading Post v. Department of Revenue, 12 Ill. App. 3d 725, 729-30 (4th Dist. 1973). Taxpayer neither offered nor attempted to offer evidence, documentary or testimonial, to rebut the Department's *prima facie* case. Hence, the Taxpayer has not overcome the Department's *prima facie* case.

Also at issue is whether Taxpayer had reasonable cause to warrant abatement of the \$648

late filing penalty, \$6,477 late payment penalty and \$16,192 fraud penalty. These penalties were imposed for Taxpayer's failure to timely file monthly returns as well as make timely payments for all the periods in question.

Section 3 of ROTA requires the filing of monthly returns and the accompanying payment of whatever tax is due not later than the twentieth day of the following calendar month for transactions that occurred in the preceding calendar month. 35 ILCS 120/3. Section 5 of the ROTA permits the Department to assess penalties in accordance with Illinois' Uniform Penalty and Interest Act ("UPIA"). 35 ILCS 120/5. Section 3-3(a-10) of UPIA authorizes the assessment of a 2% late filing penalty for failure to file a tax return on or before the prescribed due date. 35 ILCS 735/3-3(a-10). Section 3-3(b-20) of UPIA also authorizes the assessment of a 10% late payment penalty for failure to remit tax on or before the prescribed due date. 35 ILCS 735/3-3(b-20). Section 3-8 of UPIA provides that a penalty imposed by UPIA, Section 3-3, *inter alia*, "shall not apply if the taxpayer shows that his failure to file a return or pay tax at the required time was due to reasonable cause." 35 ILCS 735/3-8. The fifty percent (50%) fraud penalty assessed Taxpayer has no statutory provision that would permit abatement of such penalty due to reasonable cause.

The Department has adopted a regulation regarding reasonable cause which provides that, "[t]he determination of whether a taxpayer acted with reasonable cause shall be made on a case by case basis taking into account all pertinent facts and circumstances. The most important factor to be considered in making a determination to abate a penalty will be the extent to which the taxpayer made a good faith effort to determine his proper tax liability and to file and pay his proper liability in a timely fashion." 86 Ill. Admin. Code Sec. 700.400 (b).

Taxpayer failed to proffer or attempt to proffer any testimony or documentation to support a claim that the penalties assessed be abated. Moreover, Taxpayer posited no argument in support of

penalty relief. Inasmuch as no evidence or argument for penalty relief was presented, no reason for abatement of the penalties assessed Taxpayer exists.

Conclusion:

WHEREFORE, for the reasons stated above, it is recommended that the NTL be finalized as issued.

April 8, 2011

Julie-April Montgomery
Administrative Law Judge