

ST 14-26
Tax Type: Sales Tax
Tax Issue: Propriety of Penalty

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

THE DEPARTMENT OF REVENUE)	Docket No.	XXXX
OF THE STATE OF ILLINOIS)	Account No.	XXXX
v.)	NTL Nos.	XXXX
)		XXXX
ABC BUSINESS,)	John E. White,	
Taxpayer)	Administrative Law Judge	

RECOMMENDATION FOR DISPOSITION

Appearances: Fadi Rafati, Rafati, Ward & Associates, appeared for ABC BUSINESS; Michael Coveny, Special Assistant Attorney General, appeared for the Illinois Department of Revenue.

Synopsis:

This matter arose when ABC BUSINESS (Taxpayer) protested two Notices of Tax Liability (NTLs) the Illinois Department of Revenue (Department) issued to it to assess retailers' occupation tax (ROT), penalties, and interest, following an audit of Taxpayer's business. At hearing, counsel for Taxpayer conceded the amount of tax assessed, and challenged only the amounts of penalties and interest assessed.

The hearing was held at the Department's offices in Chicago. I have reviewed the evidence admitted at hearing, and I am including in this recommendation findings of fact and conclusions of law. I recommend that the NTLs be finalized as issued.

Findings of Fact:

Facts Regarding Taxpayer's Organization & Business

1. Taxpayer is an Illinois S-corporation, which operates a gasoline station and small convenience store in Anywhere, Illinois. Department Ex. 2 (copy of Auditor's Comments report regarding Department's audit of Taxpayer).
2. Taxpayer was registered with the Department as a retailer, and filed monthly returns with the Department. Department Ex. 2, p. 1. Department Ex. 2, p. 5.
3. John Doe (John Doe) was Taxpayer's president, secretary, and sole corporate officer. Department Ex. 4 (copy of Department's Bureau of Criminal Investigations (BCI) Summary Report, dated January 19, 2011, regarding the Department's criminal investigation of Taxpayer), p. 5. John Doe signed all of the returns Taxpayer filed with the Department. *Id.*

Facts Regarding the Department's Audit of Taxpayer

4. The Department conducted an audit of Taxpayer for the period from January 2007 through December 2009. Department Ex. 2, p. 1. Ivette Ponce (Ponce) conducted the audit. *Id.*, p. 4.
5. Taxpayer did not have complete books and records for Ponce to review during the audit. Department Ex, 2, p. 1. The missing books and records included cash register tapes, commonly called z-tapes, showing Taxpayer's actual daily sales. *See id.*; 35 ILCS 120/7; 86 Ill. Admin. Code § 130.805(a).
6. Because Taxpayer lacked the type of records required to be kept by retailers engaged in business in Illinois, Ponce had no way to confirm whether Taxpayer was reporting the correct amounts of total and taxable receipts on the returns it filed regarding the months in the audit period. Department Ex. 2, pp. 1-2.
7. As a result, Ponce was required to seek information regarding Taxpayer's purchases, for

resale, from vendors. Department Ex. 2, pp. 1-2; Department Ex. 4, p. 3.

8. Ponce also reviewed the forms PST-2, which Taxpayer attached to its monthly returns, to report the amounts of tax it pre-paid to its vendors when it purchased motor fuel for resale. Department Ex. 2, pp. 1-2; *see also* <http://tax.illinois.gov/taxforms/Sales/PST-2.pdf> (copy of form PST-2 available to view on the Department's web site) (last viewed October 17, 2014).
9. To estimate the amount of receipts Taxpayer realized from selling gasoline, Ponce multiplied the number of gallons Taxpayer reported having purchased, on PST-2 forms, by the average selling price she obtained from the United States Energy Information Administration's statements of the average prices for gasoline in the area, for the months during the audit period. Department Ex. 2, p. 1.
10. Ponce then compared the best estimate of Taxpayer's gross receipts from selling gasoline with the receipts Taxpayer reported on the returns it filed regarding the months in the audit period. Department Ex. 2, p. 1; Department Ex. 3 (copy of schedule titled, Projected Retail Sales).
11. After comparing her estimate of Taxpayer's gasoline sales with the receipts reported on Taxpayer's returns, Ponce determined that Taxpayer under reported its receipts from selling gasoline by the amount of \$XXXX over the 36 month audit period. Department Ex. 1, p. 1; Department Ex. 3 (column titled, Under Reported High Rate Gas Sales). She also determined that the tax due on such under reported receipts was \$XXX. Department Ex. 1, p. 1; Department Ex. 3 (column titled, Add'l Tax Due on Gas Sales).
12. Because Taxpayer did not keep and produce z-tapes, Taxpayer did not have any documentary evidence to support the receipts it claimed as deductions for receipts from sales of property that were subject to a lower tax rate. Department Ex. 2, p. 2; Department Ex. 3; 35 ILCS

120/2-10 (rate of tax). As a result, Ponce disallowed all such deductions. Department Ex. 2, p. 2; Department Ex. 3.

13. Following audit, the Department issued two NTLs to Taxpayer which assessed tax, penalties and interest in the following amounts:

	NTL No. XXXX			NTL No. XXXX		
	Liability	Payments/ Credit	Unpaid Balance	Liability	Payments/ Credit	Unpaid Balance
Tax	XXXX	XXXX	XXXX	XXXX	(XXXX)	XXXX
Late Pay[] Penalty	XXXX	0	XXXX	XXXX	0	XXXX
Negligence Penalty	XXXX	0	XXXX	XXXX	0	XXXX
Interest	XXXX	0	XXXX	XXXX	0	XXXX
Total	\$XXXX	(\$XXXX)	\$XXXX	\$XXXX	(\$XXXX)	\$XXXX

Department Ex. 1 (copy of NTLs).

14. On February 24, 2012, John Doe, Taxpayer’s incorporator, president and secretary, plead guilty to the offense of failing to keep books and records, in violation of § 13 of the Retailers’ Occupation Tax Act (ROTA). Department Ex. 5 (copy of Sentencing Order, and Order).

Conclusions of Law:

The Department introduced a copy of the NTLs it issued to Taxpayer into evidence under the certificate of the Director. Department Ex. 1. Pursuant to § 4 of the ROTA, those NTLs constitute the Department’s prima facie case in this matter. 35 ILCS 120/4, 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); DuPage Liquor Store, Inc. v. McKibbin, 383 Ill. 276, 279, 48 N.E.2d 926, 927 (1943). The statutory presumption extends to all elements necessary for a determination that the tax and penalties assessed are due as determined by the Department. *E.g.* Branson v. Department of Revenue, 68 Ill. 2d 247, 258, 659 N.E.2d 961, 966-67 (1995) (“nothing more [than the certified copy of the NPL] is needed to prove

the Department's claim for a tax penalty against the corporate officer or employee.'").

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 assessment is not correct. Fillichio 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.

Issue and Arguments

Taxpayer does not contest any amounts of tax assessed. Tr. pp. 11-12. Taxpayer's counsel pointed out that Taxpayer's incorporator and officer agreed to make restitution payments, and that the only matters remaining at issue are the penalties and interest assessed as part of the NTLs. Tr. p. 10.

At hearing, Department counsel initially indicated that the first NTL, issued for the period from January 2007 through June 2009, assessed amnesty penalties (Tr. p. 12), which Taxpayer's counsel asserted would be improper, since Taxpayer was subject to a criminal investigation, and could not take part in the 2010 Amnesty program. *Id.*, pp. 12-13; *see also* 35 ILCS 745/10 (2010). Department counsel then corrected the record, and notified the ALJ and Taxpayer that the penalties assessed for the period from January 2007 through June 2009 were not doubled pursuant to amnesty, but instead reflected the identical amounts of two, distinct penalties authorized by the Uniform Penalty and Interest Act (UPIA). Tr. pp. 13-14. More specifically, counsel pointed out that the NTL assessed a 20% penalty for late payment of the tax assessed, and another 20% penalty for negligence. Tr. p. 14; Department Ex. 1; 35 ILCS 735/3-

3(b-20)(2); 35 ILCS 735/3-5. Following that exchange, the Department rested, and Taxpayer offered no evidence.

Analysis

Section 4 of the ROTA provides, in pertinent part:

As soon as practicable after any return is filed, the Department shall examine such return and shall, if necessary, correct such return according to its best judgment and information. *** In the event that the return is corrected for any reason other than a mathematical error, any return so corrected by the Department shall be prima facie correct and shall be prima facie evidence of the correctness of the amount of tax due, as shown therein. ***

If the tax computed upon the basis of the gross receipts as fixed by the Department is greater than the amount of tax due under the return or returns as filed, the Department shall ... issue the taxpayer a notice of tax liability for the amount of tax claimed by the Department to be due, together with a penalty in an amount determined in accordance with Section 3-3 of the Uniform Penalty and Interest Act. Provided, that if the incorrectness of any return or returns as determined by the Department is due to negligence or fraud, said penalty shall be in an amount determined in accordance with Section 3-5 or Section 3-6 of the Uniform Penalty and Interest Act, as the case may be.

Proof of such notice of tax liability by the Department may be made at any hearing before the Department or the Illinois Independent Tax Tribunal or in any legal proceeding by a reproduced copy of the Department's record relating thereto in the name of the Department under the certificate of the Director of Revenue. Such reproduced copy shall without further proof, be admitted into evidence before the Department or in any legal proceeding and shall be prima facie proof of the correctness of the amount of tax due, as shown therein.

35 ILCS 120/4.

Illinois courts have long treated the issuance of penalties like those described in UPIA § 3-3 to be a ministerial act, based simply on a mathematical percentage of the amount of tax the Department determined to be due. Diogenes v. Department of Finance, 377 Ill. 15, 22, 35 N.E.2d 342, 346 (1941) (“The taxpayer's return, as amended by the Department to include the ‘A’ penalty, was prima facie correct, and the duty rested upon the plaintiff to establish that his tax

return had been filed on time and that the penalty was, in consequence, improperly exacted.”); Department of Finance v. Gandolfi, 375 Ill. 237, 240, 30 N.E.2d 737, 739 (1940) (“Our decision in Department of Finance v. Cohen, supra, that the power to review and revise tax returns under the Retailers’ Occupation Tax Act is ministerial, and not judicial, as requiring merely a calculation or computation from data upon which all minds must ordinarily reach the same result, applies with equal force to the assessment of penalties under sections 4 and 5.”).

Additionally, during the entire audit period, § 3-5 of the UPIA provided, in pertinent part:

Sec. 3-5. Penalty for negligence.

(a) If any return or amended return is prepared negligently, but without intent to defraud, and filed, in addition to any penalty imposed under Section 3-3 of this Act, a penalty shall be imposed in an amount equal to 20% of any resulting deficiency.

(b) Negligence includes any failure to make a reasonable attempt to comply with the provisions of any tax Act and includes careless, reckless, or intentional disregard of the law or regulations.

(c) No penalty shall be imposed under this Section if it is shown that failure to comply with the tax Act is due to reasonable cause. A taxpayer is not negligent if the taxpayer shows substantial authority to support the return as filed.

35 ILCS 735/3-5.

Here, the evidence shows that Taxpayer’s incorporator and officer pled guilty to failing to keep books and records, in violation of § 13 of the ROTA. Department Ex. 5. That evidence also fully supports the Department’s determination to assess both the late payment and the negligence penalties. The evidence confirms that Taxpayer did not timely pay all tax due (Department Exs. 2-3), and that it failed to comply with the statutory obligation to make and keep records. Department Ex. 5; 35 ILCS 120/7. Taxpayer offered no evidence at hearing, so it has not borne its burden to show that either of the penalties assessed should be abated for reasonable cause. 35 ILCS 735/3-5(b); 35 ILCS 735/3-8; 86 Ill. Admin. Code § 700.400.

Conclusion:

I recommend that the Director finalize the NTLs as issued, with penalties and interest to accrue pursuant to statute.

October 20, 2014

John E. White
Administrative Law Judge