

ST 95-26

Tax Type: SALES TAX

Issue: Disallowed Resale Deduction (No Valid Certificates)

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

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THE DEPARTMENT OF REVENUE      )      Case No.
OF THE STATE OF ILLINOIS      )      Reg. No.
      v.                        )      NTL No.
XXXXXX                        )
                               )      John E. White,
                               )      Administrative Law Judge
      Taxpayer                 )
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RECOMMENDED DECISION

APPEARANCES: XXXXX, appeared on Taxpayer's behalf.

SYNOPSIS: This matter arose after XXXXX, ("taxpayer") protested the Department of Revenue's ("Department's") issuance of Notice of Tax Liability ("NTL") No. XXXXX. At issue is taxpayer's liability for retailers' occupation tax on certain sales during the audit period, which sales taxpayer claims were sales for resale.

A hearing was held on February 27, 1995 at the Department's Office of Administrative Hearings in Chicago. Taxpayer was represented by counsel at hearing. At the hearing, taxpayer introduced evidence via documents consisting of, inter alia, taxpayers' books and records, and Department audit schedules. After considering the evidence, I am including in this recommendation specific findings of fact and conclusions of law. I respectfully recommend that the issue be resolved in favor of the Department, and that the Director finalize the NTL previously issued.

FINDINGS OF FACT:

1. The Correction of Returns prepared by Department Auditor Robert Malnar on April 28, 1990, showing Retailers' Occupation Tax ("ROT") deficiencies in the aggregate of \$10,581.00, and penalties in the aggregate

of \$761.00 for the period beginning January 1, 1986 through and including June 30, 1989, was admitted into evidence under the certificate of the Director of the Illinois Department of Revenue, and established the prima facie correctness of the tax due from taxpayer. Department Exhibit ("Dept. Ex.") 1; Hearing Transcript ("Tr.") p. 5; see also 35 ILCS 120/5.

2. Taxpayer sells casters. See Taxpayer Ex. No. 2.

3. A pre-hearing conference was held on September 21 and 30, 1994, after which taxpayer agreed that the sole issues to be decided at hearing were:

whether Taxpayer's sales of tangible personal property to the following purchasers during the audit period were sales for resale:

Dept. Ex. No. 2.

4. The Department assessed ROT on taxpayer's sales to XXXXX on 2/27/87, 3/13/87 and 11/22/88, taxpayer's sale to XXXXX on 4/14/86, and a sale to XXXXX on 8/26/87. See Taxpayer Ex. No. 2; Tr. pp. 24-25.

5. Taxpayer did not have resale certificates conforming to the requirements of section 2c of the Retailers' Occupation Tax Act ("ROTA"), 35 ILCS 120/1 et seq., in its possession on the dates of the transactions at issue in this matter. Taxpayer Ex. Nos. 5-7.

6. The resale certificates by XXXXX and XXXXX are blanket retail certificates which post-date the transactions on which ROT was assessed. Taxpayer Ex. Nos. 5 & 6.

7. Taxpayer Ex. Nos. 5 & 6 do not contain certifications that the transactions at issue were purchases for resale by XXXXX and XXXXX. Id.; see also 35 ILCS 120/2c.

8. Taxpayer Ex. No. 7 does not contain a certification that any of the tangible personal property purchased from taxpayer was purchased for resale. Taxpayer Ex. No. 7.

CONCLUSIONS OF LAW:

Section 1 of the ROTA provides in part:

"Sale at retail" shall be construed to include . . . any transfer, whether made for or without a valuable consideration, for resale in any form as tangible personal property unless made in compliance with Section 2c of this Act.

35 ILCS 120/1.

Section 2c of the ROTA provides, in part:

Except as provided hereinabove in this Section, a sale shall be made tax-free on the ground of being a sale for resale if the purchaser has an active registration number or resale number from the Department and furnishes that number to the seller in connection with certifying that all of the seller's sales are for resale, or that a particular sale is a sale for resale.

Failure to present an active registration number or resale number and a certification to the seller that a sale is for resale creates a presumption that a sale is not for resale. This presumption may be rebutted by other evidence that all of the seller's sales are sales for resale, or that a particular sale is a sale for resale.

35 ILCS 120/2c.

When construing the requirements of section 2c of the ROTA, the Illinois Supreme Court, in *Tri-America Oil Co. v. Department of Revenue*, stated:

Section 2c . . . provides a method whereby a seller can avoid paying a retailers' occupation tax on sales it makes to others, sales which might otherwise be taxable as retail sales even though they may not in fact be retail sales. [citations omitted] The presumption raised by section 4 is thus not that a given sale is a sale for retail, but is rather that tax is due in the amount indicated by the Department. The presumption is rebutted, not by evidence that certain sales were made for resale, but either by a showing of compliance with section 2c or by a showing that section 2c does not apply.

Tri-America Oil Co. v. Department of Revenue, 102 Ill.2d 234, 240, 464 N.E.2d 1076, 1078-9 (1984). In this matter, taxpayer has never contended that section 2c does not apply to it.

The Illinois Supreme Court's *Tri-America* decision clearly identifies the risk a seller takes when it makes untaxed sales without having in its possession a resale certificate from the purchaser which conforms to section 2c of the ROTA. Such transactions are, pursuant to statute, sales

at retail, 35 ILCS 120/1, and are presumptively taxable. 35 ILCS 120/2c; 35 ILCS 120/7.1 Where a seller, as in this case, sells both at retail and wholesale, the seller may rebut the presumption of taxability which attaches to such sales only by presenting evidence that the particular sales assessed were for resale, or that all sales to such purchasers were for resale. 35 ILCS 120/2c; 35 ILCS 120/7; Tri-America Oil Co. v. Department of Revenue, 102 Ill.2d at 239-40, 464 N.E.2d at 1078. None of the resale certificates admitted into evidence in this case, however, contain a certification that the transactions assessed were purchases for resale. See Taxpayer Ex. Nos. 5-7.

The transactions at issue in this matter involve taxpayer's sales to XXXXX on 2/27/87, 3/13/87 and 11/22/88, taxpayer's sale to XXXXX on 4/14/86, and a sale to XXXXX on 8/26/87. See Taxpayer Ex. No. 2; Tr. pp. 24-25. Taxpayer Ex. No. 7 contains a certification that the purchaser, XXXXX, is authorized to sell tangible personal property at retail in Alabama. Taxpayer Ex. No. 7. It does not contain a certification that any (let alone all) of the property XXXXX purchased from taxpayer was purchased for resale. Id.

Additionally, the blanket resale certificates from XXXXX and XXXXX do not contain a certification that the particular transactions at issue were purchases for resale. See Taxpayer Ex. Nos. 5 & 6. Taxpayer Ex. No. 5 is dated 5/7/90, and Taxpayer Ex. No. 6 is dated 5/18/90. Each of those documents provide, in part, "The undersigned hereby certifies that all tangible personal property hereafter purchased by him is for purposes of resale." Id. (emphasis added). The blanket resale certificates from XXXXX and XXXXX are silent regarding the sales which pre-date the certificates. Again, what was required to be shown by taxpayer in this matter was that the particular transactions assessed were sales for resale or that all sales to the particular purchasers were for resale. Instead, taxpayer

introduced certifications from agents of XXXXX and XXXXX that all purchases after 1990 were purchases for resale.

No competent evidence was introduced showing taxpayer's compliance with section 2c of the ROTA for the sales at issue. Taxpayer, therefore, has not rebutted the prima facie evidence of the Department. Based on my review of the evidence adduced at hearing regarding the agreed issues, I recommend that the Director finalize NTL No. XXXXX as issued.

Administrative Law Judge

Date

1. Section 7 of the ROTA provides, in part:

It shall be presumed that all sales of tangible personal property are subject to tax under this Act until the contrary is established, and the burden of proving that a transaction is not taxable hereunder shall be upon the person who would be required to remit the tax to the Department if such transaction is taxable.

35 ILCS 120/7.