

ST 96-56

Tax Type: SALES TAX

Issue: Unreported/Underreported Receipts (Fraud)

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

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THE DEPARTMENT OF REVENUE )  
OF THE STATE OF ILLINOIS, )  
 )  
Petitioner ) No.  
 )  
v. ) IBT No.  
 )  
TAXPAYER )  
 )  
Taxpayer ) Linda K. Cliffel,  
 ) Admin. Law Judge  
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RECOMMENDATION FOR DISPOSITION

**APPEARANCES:** Saul Leibowitz for taxpayer; Mark Dyckman, Special Assistant Attorney General, for the Illinois Department of Revenue.

**SYNOPSIS:**

TAXPAYER, doing business as TAXPAYER (hereinafter "TAXPAYER" or "Taxpayer"), was issued Notices of Tax Liability XXXXX by the Department of Revenue ("Department") for the period February 1986 to June 1994 for retailers' occupation tax ("ROT") on unreported sales and related fraud penalties.

The issues<sup>1</sup> presented for review are the following:

1. Whether the taxpayer has overcome the prima facie correctness of the NTL's through the submission of evidence associated with its own books and records.

2. Whether the taxpayer is entitled to abatement of fraud penalties assessed in the NTL's.

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<sup>1</sup> An issue was raised by taxpayer's counsel at hearing regarding the statute of limitations. (Tr. p. 5) No testimony or evidence was offered at hearing regarding this issue, and taxpayer's counsel failed to file a brief on this issue as he had requested. (Tr. p. 37)

Following the submission of all evidence and a review of the record, it is my recommendation that this matter be resolved in favor of the Department.

**FINDINGS OF FACT:**

1. TAXPAYER is a sole proprietorship owned by TAXPAYER. (Dept. Group Ex. No. 1)
2. TAXPAYER was criminally charged filing fraudulent ROT returns for the period July 1989 through December 31, 1992. (Dept. Group Ex. No. 2)
3. TAXPAYER pled guilty and entered into a plea agreement in which he agreed to make restitution of unpaid ROT to the Department of Revenue in the amount of \$27,539. Paragraph 8 of the plea agreement specifically states:

The defendant understands that interest and penalties together with additional taxes may be due for the period for which restitution is being paid pursuant to this agreement. Defendant understands and agrees that nothing in this plea agreement will limit the Illinois Department of Revenue from proceeding civilly in the assessment or collection of additional sales or other taxes that may be due from the defendant or his spouse for the period of July, 1989 through December, 1992 or any other period. In addition, defendant understands and agrees that neither this prosecution nor anything contained in this plea agreement shall bar the Illinois Department of Revenue from assessing and collecting any interest or civil penalties that are provided for by statute. (Dept. Group Ex. No. 2, Tr. p. 27)

4. The Department determined taxpayer's ROT liability for other periods by projecting unreported sales, as determined in the criminal investigation through suppliers records, and by including the markup of the sales price over the purchase price of the items sold. (Tr. p. 35)
5. Taxpayer's brother who also worked in the store provided the auditor with information regarding the best selling brands of beer, wine and liquor, what the markup on those brands were, and the mix of beer, wine and liquor in taxpayer's sales. (Tr. p. 36-37)
5. Taxpayer did not produce any of its own books and records, or evidence associated therewith, to rebut the Department's prima facie case.

## CONCLUSIONS OF LAW:

On examination of the record in this case, the taxpayer has not presented sufficient competent evidence to overcome the Department's *prima facie* case. Pursuant to 35 ILCS 120/4, the Correction of Returns submitted as Dept. Ex. No. 3 is *prima facie* correct and constitutes *prima facie* evidence of the correctness of the amount of tax due as shown thereon. See also, A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3rd 826 (1st Dist. 1988).

Once the Department establishes the *prima facie* correctness of the amount of tax due via admission into evidence of the Correction of Returns, the burden shifts to the taxpayer to show that such determination is incorrect. In order to overcome the presumption of validity attached to the Department's corrected returns, the taxpayer must produce competent evidence, identified with its books and records showing that the Department's returns are incorrect. Copilevitz v. Department of Revenue, 41 Ill.2d 154 (1968). Taxpayer has failed to produce any books and records which would serve to support its position.

Taxpayer mistakenly believed that the plea agreement foreclosed further action by the Department. (Tr. pp. 5, 25) Paragraph 8 of the agreement, quoted at Findings of Fact No. 4 above, clearly leaves open the possibility of civil action by the Department to recover unpaid taxes. The criminal complaint was based on the cost to the taxpayer for inventory which was sold at retail but not reported. ROT, however, is calculated on the sales price to the consumer, and by definition retail sales include a markup over cost. Since the full amount of the sales price is subject to ROT, the tax on the differential between the cost and the sales price may be assessed by the Department in a civil proceeding. Likewise, the criminal action does not preclude the Department from imposing civil fraud penalties.

Taxpayer's case consisted entirely of cross-examination of the auditor regarding his methods. In Masini v. Department of Revenue, 60 Ill. App. 3d 11, 16 (1st Dist. 1978), the Court stated "simply questioning the Department of Revenue's return or denying its accuracy does not" overcome the Department's

*prima facie* case. Taxpayer's challenge to the NTL, therefore, is legally insufficient to rebut the Department's case.

Likewise, the taxpayer has introduced no evidence to refute the assessment of fraud penalties. The taxpayer has been held criminally liable for underreporting sales, and therefore, I am compelled to find that the Department's imposition of fraud penalties is reasonable. Since the taxpayer was unable to rebut the inference of fraud associated with the underreported receipts, the taxpayer is not entitled to an abatement of the fraud penalties as a matter of law.

WHEREFORE, for the reasons stated above, it is my recommendation that the Notices of Tax Liability Nos. XXXXX be finalized as issued.

Date:

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Linda K. Cliffel  
Administrative Law Judge