

ST 96-7  
Tax Type: SALES TAX  
Issue: Separately Stating Tax/Separately Contracting For

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

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THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS	)	Docket #
	)	
v.	)	IBT #
	)	
TAXPAYER A, d/b/a	)	
TAXPAYER	)	Karl W. Betz
	)	Administrative Law Judge
Taxpayer	)	

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RECOMMENDATION FOR DISPOSITION

APPEARANCES

ATTORNEY, FOR TAXPAYER A, DOING BUSINESS AS TAXPAYER B.

SYNOPSIS

THIS CAUSE CAME ON TO BE HEARD FOLLOWING A RETAILERS' OCCUPATION/USE TAX AUDIT PERFORMED BY THE ILLINOIS DEPARTMENT OF REVENUE (HEREINAFTER THE "DEPARTMENT") FOR THE PERIOD OF JULY 1986 THROUGH JUNE 1989 UPON TAXPAYER A, DOING BUSINESS AS TAXPAYER B (HEREINAFTER THE "TAXPAYER"). AS TAXPAYER DID NOT AGREE WITH THE PROPOSED FINDINGS MADE BY THE DEPARTMENT AUDITOR AFTER HIS AUDIT OF THE COMPANY'S BOOKS AND RECORDS, AN ASSESSMENT WAS ISSUED WHOSE TIMELY PROTEST BY TAXPAYER CULMINATED IN THIS CONTESTED CASE. AT HEARING, TAXPAYER CONTESTED ONLY A PORTION OF THE ASSESSMENT LIABILITY, SPECIFICALLY THE TAX ESTABLISHED UPON THE REVENUE IT RECEIVED FOR A RIGGING/PREP CHARGE THAT IT BILLED ITS CUSTOMERS UPON THE SALE OF BASS TRACKER BOATS.

AT HEARING, TAXPAYER A, THE TAXPAYER, TESTIFIED AND REFERENCED THEIR 19 EXHIBITS, MANY OF WHICH ARE THE CARBON COPIES OF CERTAIN OF HIS SALES TRANSACTIONS. (TAXPAYER EX. NOS. 1-14) COUNSEL AND TAXPAYER A BOTH ACKNOWLEDGED THAT WHILE THE AUDITOR ESTABLISHED LIABILITY ON SEVERAL ITEMS, THE ONLY ONE THEY ARE STILL CONTESTING IS THE "PREP" ISSUE. THIS CONTESTED TAX AMOUNT IS CALCULATED TO BE \$3,925.99. (TR. PP. 10, 66-67; TAXPAYER EX. NO. 19)

AFTER REVIEWING THE COMPLETE TRANSCRIPT OF RECORD INCLUDING ALL DOCUMENTS ADMITTED THEREIN, I RECOMMEND THE ISSUE BE RESOLVED IN FAVOR OF THE DEPARTMENT AND THE LIABILITY BE UPHELD.

FINDINGS OF FACT

1. TAXPAYER CONDUCTED BUSINESS OPERATIONS IN ILLINOIS AS A RETAILER DURING THE AUDIT PERIOD BY SELLING TRAILERS AND BOATS, INCLUDING BASS TRACKERS, TO INDIVIDUAL END USERS FOR FISHING AND WATER SKIING PURPOSES. (TR. P. 12; DEPT. EX. NO. 2)
2. THE TAXPAYER CHARGED A RIGGING/PREPARATION FEE TO CUSTOMERS ON EACH SALE OF A BASS TRACKER BOAT. THIS "PREP FEE" WAS FOR THE FINAL WORK TAXPAYER PERFORMED ON THE BOAT SUCH AS INSTALLING THE ENGINE OR AN ACCESSORY. TAXPAYER WAS MANDATED BY MANUFACTURER REQUIREMENTS TO CHARGE THE PREP FEE. (TR. PP. 27-30, 34-35, 58; DEPT. EX. NO. 2)
3. THE TAXPAYER LISTED THE RIGGING/PREPARATION FEE IT BILLED CUSTOMERS ON ITS INVOICES AND DID NOT COLLECT OR REMIT TAX ON THE FEE. THE CUSTOMERS DID NOT INITIAL OR SIGN THE INVOICES. (TAXPAYER EX. NOS. 1-14; DEPT. EX. NO. 2, AUDITOR COMMENTS)

4. PURSUANT TO STATUTORY AUTHORITY, THE AUDITOR DID CAUSE TO BE ISSUED A CORRECTION OF RETURNS AND THIS SERVED AS THE BASIS FOR NOTICE OF TAX LIABILITY (NTL) NO. XXXXX ISSUED BY THE DEPARTMENT ON JUNE 5, 1990 FOR \$10,758.00 TAX PLUS STATUTORY INTEREST AND PENALTY. (DEPT. EX. NOS. 1 AND 3)
5. THE DEPARTMENT'S PRIMA FACIE CASE WAS ESTABLISHED THROUGH THE INTRODUCTION OF ITS CORRECTED RETURN INTO EVIDENCE. (TR. P. 8; DEPT. EX. NO. 1)

#### CONCLUSIONS OF LAW

SECTION 2 OF THE RETAILERS OCCUPATION TAX ACT (ROT ACT) IMPOSES A TAX UPON PERSONS ENGAGED IN THE BUSINESS OF SELLING TANGIBLE PERSONAL PROPERTY AT RETAIL. THIS TAX IS IMPOSED UPON THE PRIVILEGE OF ENGAGING IN THE OCCUPATION OF RETAILING AND IS MEASURED BY A PERCENTAGE OF THE GROSS RECEIPTS RECEIVED BY THE RETAILER FROM SUCH SALES. SEE 35 ILCS 120/1 ET SEQ. SECTION 1 OF THE ROT ACT (35 ILCS 120/1) DEFINES "GROSS RECEIPTS" TO MEAN THE TOTAL CONSIDERATION RECEIVED FOR A SALE, VALUED IN MONEY, WITHOUT ANY DEDUCTION ON ACCOUNT OF THE COST OF THE PROPERTY SOLD, THE COST OF MATERIALS USED, LABOR OR SERVICE COST OR ANY OTHER EXPENSE WHATSOEVER, AND THIS STATUTORY PROVISION HAS BEEN RESTATED BY THE DEPARTMENT IN 86 ADMIN. CODE, CH. I, SEC. 130.410.

I FIND THE "PREP" CHARGES RECEIVED BY TAXPAYER TO BE PART OF HIS GROSS RECEIPTS FROM THE SALE OF THE BOATS. ACCORDINGLY, THEY ARE SUBJECT TO STATE AND LOCAL RETAILERS' OCCUPATION TAXES. I RECOMMEND THIS PORTION OF THE LIABILITY REMAIN IN THE FINAL ASSESSMENT ALONG WITH THE OTHER LIABILITY THAT TAXPAYER NO LONGER CONTESTS.

TAXPAYER TESTIFIED THAT THE PREP FEE IS FOR LABOR AND SHOULD NOT BE TAXED. HOWEVER, AS NOTED ABOVE IN APPLICABLE STATUTORY AND REGULATORY PROVISIONS, NO DEDUCTION FOR LABOR IS AUTHORIZED WHEN COMPUTING THE TOTAL SELLING PRICE OR GROSS RECEIPTS UPON WHICH THE TAX IS BASED.

THE AUDITOR EXPLAINED IN HIS AUDITOR COMMENTS REPORT THAT HE ASSESSED THE PREP FEES BECAUSE HE DETERMINED TAXPAYER HAD NOT SEPARATELY CONTRACTED FOR THESE FEES WITH HIS CUSTOMERS, AS REFERENCED IN §6 ADMIN. CODE, CH. I, SEC. 130.450. (DEPT. EX. NO. 3, P. 3) WHILE I AGREE WITH THE AUDITOR'S CONCLUSION, I HAVE DOUBTS WHETHER A SEPARATE CONTRACT WOULD BE POSSIBLE HERE AS THESE PREP FEES ARE MANDATORY CHARGES (TR. PP. 34-35, 58; TAXPAYER EX. NO. 15) NOT SUBJECT TO NEGOTIATION BETWEEN THE PARTIES, AND THEY ARE ALWAYS ASSESSED ON SALES OF BASS TRACKER BOATS FOR AT LEAST THE DRILLING OF THE HOLES FOR THE MOTOR WHICH ENTAILS SIMILAR WORK EVEN WHEN A BOAT GETS A DIFFERENT SIZE ENGINE. (TR. PP. 29-30)

ASSUMING ARGUENDO THAT THE PREP FEES ARE CAPABLE OF BEING SUBJECT TO A SEPARATE CONTRACT, THE RECORD DOES NOT PROVIDE SUPPORT FOR THE EXISTENCE OF A CONTRACT. WHILE TAXPAYER OFFERED EVIDENCE REGARDING ITS BILLING PRACTICES THROUGH INTRODUCTION OF SEVERAL CARBON COPIES OF INVOICES, NONE OF THESE ARE INITIALED OR SIGNED BY THE CUSTOMER TO INDICATE THE CUSTOMER WAS AGREEING TO A SEPARATE CHARGE FOR INSTALLATION OF THE MOTOR OR ACCESSORIES. COUNSELOR MITCHELL CORRECTLY POINTS OUT THAT THE COURT IN TERRACE CARPET CO. V. DEPT. OF REVENUE, 46 ILL. APP.3D 84, (SECOND DIST. 1977) NOTED THAT THE METHOD STATED IN THE DEPARTMENT'S REGULATIONS DOES NOT COMPRISE THE ONLY METHOD OF PROVING AN AGREEMENT BETWEEN THE TAXPAYER AND HIS CUSTOMERS. WHILE I DO NOT DISPUTE THIS, I CANNOT AGREE WITH COUNSEL THAT TAXPAYER'S BILLING METHOD SHOWS THIS TO BE A SEPARATE CHARGE. TAXPAYER TESTIFIED THAT WHILE THE CUSTOMER DID NOT SIGN THE

INVOICES, THERE WAS A WORK COPY OR WHITE TOP COPY THAT THE CUSTOMER SIGNED. (TR. P. 59) THIS TESTIMONY THAT A WHITE TOP COPY WAS SIGNED CONTRASTS WITH THE CONDITION OF THE LOWER PINK OR YELLOW INVOICE CARBONS SUBMITTED AT HEARING (TAXPAYER EX. NOS. 1-14) AS THE CARBONS WOULD PRESUMABLY SHOW THE IMPRESSION OF THE SIGNATURE FROM THE TOP SHEET, BUT THEY DO NOT. THE TOP OR WORK COPIES WERE NOT PRODUCED BY TAXPAYER AT HEARING AND TAXPAYER'S FAILURE TO PRODUCE HIS RECORDS IN THEIR TOTALITY SUGGESTS A NEGATIVE INFERENCE THAT PRODUCTION OF THE RECORDS BY TAXPAYER WOULD HAVE BEEN ADVERSE TO HIS POSITION. SMITH V. DEPT. OF REVENUE 143 ILL. APP.3D 607, 613 (FIFTH DIST. 1986) NOT A SINGLE CUSTOMER TESTIFIED AT THE HEARING TO SUPPORT THE CONTENTION OF TAXPAYER AND THERE IS NOT ANY CREDIBLE EVIDENCE IN THIS RECORD TO SUPPORT THE EXISTENCE OF A SEPARATE CONTRACT.

IN SUMMARY, I FIND THE TAXPAYER HAS NOT OVERCOME THE PRIMA FACIE CASE OF THE DEPARTMENT, AND I RECOMMEND THE NTL STAND AS ISSUED.

RECOMMENDATION

BASED UPON MY FINDINGS AND CONCLUSIONS AS STATED ABOVE, I RECOMMEND THE DEPARTMENT FINALIZE NTL NO. XXXXX IN ITS ENTIRETY AND ISSUE A FINAL ASSESSMENT.

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KARL W. BETZ  
ADMINISTRATIVE LAW JUDGE