ST 96-8
Tax Type: SALES TAX
Issue: Disallowed Tax Collection Deduction

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 | ) | |
| | ) | Karl W. Betz |
| | ) | Administrative Law Judge |
| Taxpayer | ) | |

## RECOMMENDATION FOR DISPOSITION

### APPEARANCES

ATTORNEY FOR TAXPAYER

### 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") UPON TAXPAYER (HEREINAFTER THE "TAXPAYER"). DURING THE AUDIT PERIOD THE TAXPAYER WAS A RETAILER OF PETROLEUM PRODUCTS AND VARIOUS SUNDRY ITEMS OF TANGIBLE PERSONAL PROPERTY. THIS AUDIT FOCUSED ON THE CORRECTNESS OF THE INFORMATION TAXPAYER REPORTED ON ITS MONTHLY SALES/USE TAX RETURNS. A PORTION OF THE AMOUNT OF LIABILITY PROPOSED BY THE DEPARTMENT WAS AGREED TO BY TAXPAYER AND IS NOT SUBJECT TO THIS HEARING.

TAXPAYER DID NOT AGREE WITH THE REMAINING PROPOSED LIABILITY DETERMINED BY THE DEPARTMENT, AND A NOTICE OF TAX LIABILITY WAS ISSUED

WHOSE TIMELY PROTEST BY TAXPAYER CULMINATED IN THIS CONTESTED CASE. AT HEARING, TAXPAYER CONTESTED CERTAIN FINDINGS MADE BY THE DEPARTMENT AUDITOR AFTER AN AUDIT OF THE COMPANY'S RECORDS FOR THE PERIOD OF JANUARY 1988 THROUGH DECEMBER 1990. THE CONTESTED LIABILITY ESTABLISHED BY THE AUDITOR WAS BASED UPON THE DISALLOWANCE OF THE TAX COLLECTION DEDUCTION TAKEN BY TAXPAYER ON ITS RETAILERS' OCCUPATION TAX RETURNS. THIS DISALLOWED TAX COLLECTION DEDUCTION IS COMPOSED OF TWO PARTS, ONE ON SALES OF SUNDRIES AND CIGARETTES, AND THE OTHER ON JUST CIGARETTE SALES, THE FORMER BEING ASSESSED FOR PERIODS PRIOR TO TAXPAYER'S ACQUISITION AND USE OF CASH REGISTERS AND THE LATTER ASSESSED FOR THE PERIODS THEREAFTER. (DEPT. EX. NO. 2, PP. 1, 16-21, 49-50)

THIS DISALLOWANCE OF THE TAX COLLECTION DEDUCTION IS THE PRIMARY ISSUE IN THIS CASE, ALTHOUGH AT HEARING THE TAXPAYER ALSO CONTESTED THE COMPUTATION OF THE AMOUNT THAT WAS ASSESSED.

AFTER REVIEWING THE COMPLETE TRANSCRIPT OF RECORD INCLUDING ALL DOCUMENTS ADMITTED THEREIN, I RECOMMEND THE ISSUES BE RESOLVED PARTIALLY IN FAVOR OF THE DEPARTMENT AND PARTIALLY IN FAVOR OF THE TAXPAYER.

FINDINGS OF FACT

1. TAXPAYER CONDUCTED RETAIL BUSINESS OPERATIONS IN ILLINOIS DURING THE AUDIT PERIOD BY SELLING PETROLEUM PRODUCTS AND SUNDRY ITEMS INCLUDING CIGARETTES AT FILLING STATIONS LOCATED IN . (TR. PP. 10-11; DEPT. EX. NO. 2, P. 16)
2. BETWEEN DECEMBER 1, 1988 AND NOVEMBER 1, 1989, TAXPAYER'S STATIONS ACQUIRED AND STARTED USING CASH REGISTERS. (TR. P. 11; DEPT. EX. NO. 2, P. 16) CONCOMITANT WITH THIS SWITCH TO REGISTER USAGE WAS THE ADDITION BY TAXPAYER OF A NEW LINE OF PRODUCT

ITEMS WHICH INCREASED EACH STORE'S TAXABLE RECEIPTS. (TR. P. 15; DEPT. EX. NO. 2, PP. 110-112)

3. THE CASH REGISTER MACHINES USED AT TAXPAYER'S LOCATIONS HAD THE CAPACITY TO AND DID CALCULATE THE TAX ON THE REGISTER TAPE FOR ITEMS SOLD, EXCEPT FOR CIGARETTES. (TR. 14-16) WHEN THE TAXPAYER SOLD CIGARETTES, THE CASH REGISTER TAPES PRODUCED BY THEIR CASH REGISTER MACHINES DID NOT SEPARATELY STATE THE TAX UPON THEM. (TR. P. 23; DEPT. EX. NO. 2, P. 16)

4. PURSUANT TO STATUTORY AUTHORITY, THE DEPARTMENT 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 MAY 9, 1991 FOR $14,150.00, INCLUSIVE OF INTEREST (STILL RUNNING) AND PENALTY. (DEPT. EX. NOS. 2 AND 3)

5. THE TAXPAYER USED SIGNS AT ITS VARIOUS LOCATIONS PRIOR TO INSTALLATION OF CASH REGISTERS TO INDICATE ALL ITEMS BEING SOLD HAD TAX INCLUDED. (TR. PP. 11-13) AFTER THE CASH REGISTER MACHINES WERE INSTALLED, THE ONLY SIGNS USED BY TAXPAYER REFERRED TO THE BASE PRICE OF PACKAGES OF CIGARETTES BEING SOLD. THE CASH REGISTER RECEIPT TAPES DID NOT ITEMIZE AND SHOW THE TAX ON THE CIGARETTES BEING SOLD. (TR. P. 16)

## CONCLUSIONS OF LAW

SECTION 2 OF THE RETAILERS OCCUPATION TAX 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 RECEIPTS RECEIVED BY THE RETAILER FROM SUCH SALES. SEE 35 ILCS 120/1 ET SEQ.

THE ILLINOIS USE TAX (35 ILCS 105/1 ET SEQ.) IS COMPLEMENTARY TO THE RETAILERS' OCCUPATION TAX (SUNDSTRAND CORPORATION V. DEPARTMENT OF REVENUE, 34 ILL. APP.3D 694, 696 (2ND DIST. 1975) AND IS IMPOSED UPON THE PRIVILEGE OF USING TANGIBLE PERSONAL PROPERTY IN ILLINOIS WHEN SUCH PROPERTY WAS PURCHASED FROM A RETAILER. AN ILLINOIS RETAILER IS REQUIRED TO COLLECT THE COMPLEMENTARY USE TAX FROM HER CUSTOMER (35 ILCS 105/3-45) AND THIS IN EFFECT REIMBURSES THE RETAILER FOR HER RETAILERS' OCCUPATION TAX LIABILITY. THE RETAILER IS ALSO REQUIRED TO COLLECT AND STATE THE TAX AS A SEPARATE AND DISTINCT ITEM APART FROM THE SELLING PRICE OF THE TANGIBLE PERSONAL PROPERTY THAT IS BEING SOLD. (35 ILCS 105/3A)

IF THE TAX IS NOT STATED SEPARATELY, IT IS ASSUMED THAT IT WAS NOT COLLECTED (CENTRAL FURNITURE MART V. JOHNSON, 157 ILL. APP.3D 907, 910 (1ST DIST. 1987)), AND THE RETAILER LOSES THE BENEFIT OF THE TAX COLLECTION DEDUCTION ON HER TAX RETURN. 86 ADMIN. CODE, CH. I, SEC. 150.1315.

BEFORE CASH REGISTERS

FOR PRACTICAL REASONS, THERE HAVE BEEN SITUATIONS WHERE THE DEPARTMENT HAS HISTORICALLY AUTHORIZED THE USE OF A SIGN THAT STATED THAT THE PRICE OF THE ITEM CONTAINED ALL APPLICABLE TAXES. ONE HAS BEEN THE SALE OF ALCOHOLIC BEVERAGES BY THE DRINK BY TAVERNS AND ANOTHER IS THE SALE OF GASOLINE BY THE GALLON BY FILLING STATIONS. THE UNDERLYING REASON FOR THIS TREATMENT WAS THE IMPRACTICABILITY OF RETAILERS ISSUING RECEIPTS FOR VOLUMINOUS SMALL TICKET TRANSACTIONS. IN THE CASE OF THE CIGARETTES AND CANS OF SODA POP AND OIL SOLD PRIOR TO TAXPAYER'S INSTALLATION OF CASH REGISTERS, I FIND THERE EXISTED THE PRACTICAL PROBLEM OF ISSUING VOLUMINOUS RECEIPTS FOR SMALL TICKET TRANSACTIONS, AND I CONCLUDE THE SALES OF THESE ITEMS SHOULD BE INCLUDED WITHIN THE CATEGORY OF ITEMS FOR WHICH THE SIGN PROCEDURE IS AUTHORIZED. I THEREFORE RECOMMEND

THE LIABILITY BASED UPON THE DISALLOWANCE OF TAXPAYER'S TAX COLLECTION DEDUCTION ON SALES PRIOR TO INSTALLATION OF CASH REGISTERS BE DELETED FROM THE FINAL ASSESSMENT.

AFTER CASH REGISTERS

THE SITUATION CHANGED AFTER THE CASH REGISTERS WERE INSTALLED AS THEY WERE PROGRAMMED TO ITEMIZE AND SHOW THE TAX ON A REGISTER TICKET FOR EACH SALE. ALSO, WHEN TAXPAYER BEGAN USING THE CASH REGISTERS THEIR SALES MIX CHANGED AND INCREASED AS THEY ADDED A NEW LINE OF CONVENIENCE STORE INVENTORY PRODUCT ITEMS AVAILABLE FOR SALE. THE AUDITOR ALLOWED THE TAX COLLECTION DEDUCTION FOR THE TIME PERIODS AFTER INSTALLATION OF THE REGISTERS, EXCEPT FOR SALES OF CIGARETTES BECAUSE TAXPAYER DID NOT SEPARATELY STATE THE TAX ON THE REGISTER TICKETS FOR CIGARETTE SALES.

BECAUSE TAXPAYER HAD THE CAPABILITY TO SEPARATELY STATE THE TAX ON REGISTER TICKETS FOR CIGARETTE SALES, I FIND IT WAS CORRECT FOR THE DEPARTMENT TO DISALLOW THE PORTION OF THE TAX COLLECTION DEDUCTION ATTRIBUTABLE TO THESE SALES, AS 86 ADMIN. CODE, CH. I, SEC. 150.1305 (B) STATES IN PART:

> "THE SIGN PROCEDURE . . . MAY NOT BE RELIED ON TO PROVE COLLECTION OF THE TAX BY THE RETAILER FROM HIS CUSTOMERS AS A SEPARATE ITEM IN TYPES OF TRANSACTIONS IN WHICH SUCH RETAILER DOES ISSUE INVOICES OR SALES TICKETS TO CUSTOMERS. . ."

I FIND TAXPAYER'S ARGUMENT THAT THEY NEEDED TO SELL CIGARETTES WITHOUT ITEMIZING THE TAX FOR INVENTORY CONTROL PURPOSES TO BE WITHOUT MERIT. I ALSO FIND TAXPAYER'S RELIANCE UPON SUNNYLAND CABINET AND MILLWORK, INC. V. DEPARTMENT OF REVENUE, 52 ILL APP.3D 25 (THIRD DIST. 1977) IS MISPLACED BECAUSE IT IS DISTINGUISHABLE. THE SUNNYLAND COURT HELD THE DEDUCTION WAS AVAILABLE BECAUSE THE TAXPAYER INTRODUCED WORKSHEETS OR

LISTS FROM ITS RECORDS WHICH SHOWED THE TAX AS A SEPARATE ITEM AND ALSO INTRODUCED TESTIMONY THAT THE WORKSHEET LISTS HAD BEEN EXPLAINED TO CUSTOMERS AND THAT CUSTOMERS HAD BEEN INFORMED OF THE TAX SEPARATE FROM THE SELLING PRICE OF THE CABINETS. ALSO, THE EVIDENCE IN SUNNYLAND ESTABLISHED THE CUSTOMERS COULD SEE THE WORKSHEET LISTS AT ANY TIME. IN THE INSTANT CASE, TAXPAYER INTRODUCED NO DOCUMENTS FROM ITS BOOKS AND RECORDS TO SHOW OR ESTABLISH THAT THE PURCHASERS OF CIGARETTES KNEW THEY WERE PAYING THE TAX. MERE TESTIMONY IS NOT SUFFICIENT FOR A TAXPAYER TO OVERCOME THE PRESUMPTION OF CORRECTNESS OF THE DEPARTMENT'S CORRECTED RETURN AFTER IT IS ADMITTED INTO EVIDENCE, AS THERE IS A STATUTORY BURDEN PLACED UPON THE TAXPAYER TO ESTABLISH BY COMPETENT DOCUMENTARY EVIDENCE THAT THE ADJUSTMENTS PERFORMED BY THE DEPARTMENT ARE INCORRECT. MEL-PARK DRUGS V. DEPT. OF REVENUE 218 ILL. APP.3D 203 (FIRST DIST. 1991); COPILEVITZ V. DEPARTMENT OF REVENUE, 41 ILL. 2D. 154 (1968)

BASED UPON THESE REASONS, I RECOMMEND THE LIABILITY ASSESSED ON TAXPAYER'S SALES OF CIGARETTES AFTER INSTALLATION OF THE CASH REGISTERS REMAIN IN THE FINAL ASSESSMENT. THE LIABILITY AMOUNT OF $3,836.00 FROM AUDIT SCHEDULE 60/220/102 REMAINS IN THE FINAL ASSESSMENT BECAUSE ALL PERIODS IN THIS SCHEDULE ARE AFTER THE INSTALLATION OF CASH REGISTERS. (DEPT. EX. NO. 2, PP. 92-96) THE BASE SUBJECT TO TAX IN AUDIT SCHEDULE 10/010/102 (DEPT. EX. NO. 2, PP. 66-75) IS REDUCED BY TAKING OUT THE SALES RECEIPTS AMOUNTS PRIOR TO THE CASH REGISTERS. FOR EXAMPLE, THE USAGE OF THE CASH REGISTER AT THE STATION BEGAN NOVEMBER 1, 1989, WHICH MEANS ONLY THE BASE AMOUNTS OF $591.14 (11/89) AND $567.66 (12/89), TOTALING $1,158.80 WILL REMAIN IN THE CALCULATION OF THE FINAL ASSESSMENT. SIMILARLY, SCHEDULE 10/010/102 BASE AMOUNTS FOR THE OTHER STATIONS ARE CALCULATED

TO BE $1,389.34 , $3,309.99, $1,658.06, $3,283.15, $6,680.34, AND $9,738.51, RESULTING IN A TOTAL OF $27, 218.19 TRANSLATING INTO LIABILITY AMOUNTS OF $1,361.00 STATE, $272.00 LOCAL AND $68.00 COUNTY SUPPLEMENTARY.

REGARDING TAXPAYER'S REQUEST FOR ABATEMENT OF INTEREST, I AM NOT AUTHORIZED TO GRANT THAT REQUEST.

RECOMMENDATION

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

KARL W. BETZ
ADMINISTRATIVE LAW JUDGE