

ST 97-13
Tax Type: SALES TAX
Issue: Pollution Control Equipment (Exemption)

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

THE DEPARTMENT OF REVENUE)	
OF THE STATE OF ILLINOIS)	Docket #
)	IBT #
v.)	NTL #
)	
TAXPAYER)	Admin. Law Judge
Taxpayer)	Linda Olivero

RECOMMENDATION FOR DISPOSITION

Appearances: Charles Hickman, Special Assistant Attorney General, for the Department of Revenue of the State of Illinois; Roy O. Gulley of Heyl, Royster, Voelker & Allen for TAXPAYER

Synopsis:

On April 6, 1994, the Department of Revenue ("Department") issued a Notice of Tax Liability to TAXPAYER ("taxpayer") for Illinois Use Tax for the audit period of July 1, 1981 to December 31, 1992. In response to the Notice, the taxpayer filed a timely protest. Evidentiary hearings were held on March 14, 1996 and February 18, 1997.¹ The issue in this case is whether two track hoes

¹. The day before the hearing on March 14, 1996, the taxpayer filed a Motion for Judgment of Default and an Alternative Motion for Continuance, which were premised on the fact that the Department had failed to respond to the taxpayer's discovery request. At the hearing, the administrative law judge (ALJ) then presiding denied the motions on the basis that the discovery request was untimely. Subsequent to the hearing, that ALJ left the Department, and the case was reassigned to another ALJ for completion. Upon review of the record, the second ALJ determined the file should be returned to its

qualify for the pollution control facilities exemption under section 2a of the Use Tax Act (35 ILCS 105/2a). The taxpayer has also requested an abatement of the interest and penalty. After reviewing the record, it is recommended that this matter be resolved in favor of the Department.

FINDINGS OF FACT:

1. The taxpayer's primary business is the construction of water and sewer lines. The taxpayer also does some highway construction work. (3/14/96 Tr. p. 15).

2. In 1990, the taxpayer purchased a track hoe (i.e., a backhoe on tracks) that was used to install a sanitary sewer system for the Village of Belle Rive in Illinois. (3/14/96 Tr. pp. 12; 16; 19).

3. The taxpayer used the track hoe primarily for digging ditches and moving dirt. (3/14/96 Tr. p. 19).

4. After the taxpayer finished the job in Belle Rive, the taxpayer worked on a water job in Washington County, where the track hoe was accidentally destroyed in a traffic accident. (3/14/96 Tr. p. 13).

5. The taxpayer purchased a replacement track hoe approximately two years after purchasing the first one. (3/14/96 Tr. pp. 13; 18).

6. The second machine has been used on sewer jobs, water jobs, and highway work, and it is currently located at the taxpayer's place of business. (3/14/96 Tr. pp. 18-19).

original venue, reassigned, and a litigator appointed to answer the taxpayer's discovery. That was subsequently done. At the pre-trial conference prior to the second hearing, the taxpayer agreed to rely on the evidence presented at the first hearing in addition to presenting testimony from the auditor.

7. At the time that the taxpayer purchased the track hoes, the taxpayer did not pay use tax on the machines. (3/14/96 Tr. pp. 12-14).

8. The Department audited the books and records of the taxpayer for the time period from July 1, 1981 to December 31, 1992. (2/18/97 Tr. pp. 5-6; Dept. Ex. #7).

9. On November 18, 1993, the Department issued a corrected return (hereinafter "Correction of Return") for the taxpayer for the audit period from July 1, 1981 to December 31, 1992. The Correction of Return shows Use Tax due on purchases during that period in the amount of \$12,116 and a penalty in the amount of \$3,589. (Dept. Ex. #7).

10. On April 6, 1994, the Department issued a Notice of Tax Liability, number XXXXX, to the taxpayer for the audit period in question showing tax due of \$12,116, penalty of \$3,589 and interest to the date of issuance of \$6,635 for a total amount due of \$22,340. (Dept. Ex. #5).

CONCLUSIONS OF LAW:

The Use Tax Act (35 ILCS 105/1 *et seq.*) imposes a tax upon the privilege of using in Illinois tangible personal property purchased at retail from a retailer. 35 ILCS 105/3. Section 12 of the Use Tax Act incorporates by reference section 4 of the Retailers' Occupation Tax Act (35 ILCS 120/1 *et seq.*), which provides that the Correction of Return issued by the Department is *prima facie* correct and is *prima facie* evidence of the correctness of the amount of tax due, as shown therein. 35 ILCS 105/12; 35 ILCS 120/4. Once the Department has established its *prima facie* case by submitting the Correction of

Return into evidence, the burden shifts to the taxpayer to overcome this presumption of validity. Clark Oil & Refining Corp. v. Johnson, 154 Ill.App.3d 773, 783 (1st Dist. 1987); leave to appeal denied, 116 Ill.2d 549. To prove its case, a taxpayer must present more than its testimony denying the accuracy of the Department's assessment. Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill.App.3d 203, 217 (1st Dist. 1991). The taxpayer must present sufficient documentary evidence to support its claim for an exemption. Id.

Pollution Control Facilities Exemption

It is well-settled that tax exemption provisions are strictly construed in favor of taxation. Heller v. Fergus Ford, Inc., 59 Ill.2d 576, 579 (1975). The party claiming the exemption has the burden of clearly proving that it is entitled to the exemption, and all doubts are resolved in favor of taxation. Id.

Section 2a of the Use Tax Act allows an exemption for pollution control facilities, and provides in relevant part as follows:

"'Pollution control facilities' means any system, method, construction, device or appliance appurtenant thereto sold or used or intended for the **primary purpose** of eliminating, preventing, or reducing air and water pollution as the term 'air pollution' or 'water pollution' is defined in the 'Environmental Protection Act', *** or for the **primary purpose** of treating, pretreating, modifying or disposing of any potential solid, liquid or gaseous pollutant which if released without such treatment, pretreatment, modification or disposal might be harmful, detrimental or offensive to human, plant or animal life, or to property." (35 ILCS 105/2a (emphasis added).)²

Thus, to qualify for the exemption, the primary purpose of the equipment must be to (1) eliminate, prevent or reduce air and water

². For the audit period in question, the controlling statutory provision is Ill. Rev. Stat., ch. 120, par. 439.2a.

pollution or (2) treat, pretreat, modify or dispose of any potential pollutant. The "primary purpose" test seeks to determine the function and ultimate objective of the equipment alleged to be exempt. Central Illinois Public Service Co. v. Department of Revenue, 158 Ill.App.3d 763, 768 (4th Dist. 1987); leave to appeal denied, 116 Ill.2d 549. Only those pollution control facilities that are directly involved in the pollution abatement process are entitled to the exemption. Id; See also Illinois Cereal Mills v. Department of Revenue, 37 Ill.App.3d 379 (4th Dist. 1976) (only equipment that has no substantial function other than to abate pollution qualifies for the exemption).

In the instant case, the taxpayer has failed to present sufficient evidence to show that the track hoes qualify for the exemption, and therefore has failed to overcome the Department's *prima facie* case. The only evidence presented by the taxpayer in support of its claim for an exemption was the uncorroborated testimony of its consultant, Mr. Jack K. Trotter, who testified that the machines were used, inter alia, to assist in the installation of sanitary sewer systems. This testimony alone is insufficient to support a finding that the hoes qualify for the exemption. See Mel-Park Drugs, Inc. at 217; Sprague v. Johnson, 195 Ill.App.3d 798, 804 (4th Dist. 1990); A.R. Barnes & Co. v. Department of Revenue, 173 Ill.App.3d 826, 833-34 (1st Dist. 1988). The taxpayer did not present any documentary evidence in support of its contention.

Moreover, even assuming that the oral testimony was sufficient evidence, none of the testimony supports a finding that the primary purpose of the two track hoes was the abatement of pollution. In

fact, Mr. Trotter's testimony supports a contrary finding because he testified that the primary use of the machines is to dig ditches and move dirt, which is ostensibly what they are designed for and manufactured to do. Under the auspices of the language of the Act, such machines are intended to dig trenches and move soil. Thus, the machines clearly do not constitute a pollution control facility within the meaning of the statute. In addition, the testimony indicates that the track hoes have been used on different jobs, and the testimony does not give any detail concerning the type of work that each track hoe was primarily used for. Therefore, the two track hoes do not qualify for the pollution control facilities exemption.

Interest and Penalty

The taxpayer has also failed to present sufficient proof that an abatement of the interest and penalty is warranted in this case. With respect to the interest, there is no statutory authority for the Department to waive the application of interest for the audit period in question. With respect to the penalty, the Department may abate it if the taxpayer establishes "reasonable cause" for the failure to file the tax return. See Ill.Rev.Stat. 1991, ch. 120, par. 439.12, incorporating by reference Ill.Rev.Stat. 1991, ch. 120, par. 444.

In this case, the only evidence presented concerning the failure to pay the tax was Mr. Trotter's testimony that the dealer informed him that he did not have to pay the tax. Mr. Trotter also testified, however, that he was negotiating the purchase price of the track hoe with two different dealers. Mr. Trotter stated that the difference in price between the two dealers was the amount of the use tax, and the track hoe with the lower price (i.e., the one for which use tax

would not have to be paid) was the one that was purchased. (3/14/96 Tr. pp. 16-17). There is no evidence in the record indicating that the taxpayer made a good faith effort to determine his proper tax liability. Thus, an abatement of the penalty is not warranted.

THEREFORE, for the foregoing reasons, it is recommended that the Notice of Tax Liability, No.XXXXX, be affirmed in its entirety.

Linda Olivero
Administrative Law Judge

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