

ST 97-23  
Tax Type: SALES TAX  
Issue: Exemption For Farm Chemicals

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

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THE DEPARTMENT OF REVENUE	)	
OF THE STATE OF ILLINOIS	)	
	)	
v.	)	No.
	)	IBT #
TAXPAYER	)	NTL
	)	Charles E. McClellan
	)	Admin. Law Judge
Taxpayer	)	

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RECOMMENDATION FOR DISPOSITION

Brian L. Wolfberg of Schain, Firsell & Burney, Ltd. for the Taxpayer.

Synopsis:

This matter involves a Notice of Tax Liability issued to TAXPAYER ("taxpayer") by the Department on February 11, 1992, for the period of July 1, 1981 through June 30, 1991. Taxpayer filed a timely protest and subsequently filed a motion for summary judgment. On November 20, 1996, taxpayer's motion was denied because of the existence of a genuine issue of material fact.

Taxpayer waived its right to an evidentiary hearing and submitted documents which have been admitted as Taxpayer Group Exs. Nos. 1 through 4. The issue is whether the sale of fumigants by the taxpayer to grain growers (*i. e.*, farmers and seed companies) and its use of fumigants in its business of fumigating grain for its customers are exempt from the Illinois Retailers' Occupation Tax Act<sup>1</sup>, the Illinois Use Tax Act<sup>2</sup>, and the Service Use Tax Act<sup>3</sup>, and if not, whether penalties should be imposed.

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<sup>1</sup>. 35 ILCS § 120/1 *et seq* hereinafter referred to as the "ROT".  
<sup>2</sup>. 35 ILCS § 105/1 *et seq* hereinafter referred to as the "UT".  
<sup>3</sup>. 35 ILCS § 110/1 *et seq* hereinafter referred to as the "SUT".

My recommendation is that the NTL be reduced by the amount of tax assessed on sales of fumigants to customers who self assessed use tax, by the amount of tax assessed on sales to grain growers, grain bins and co-ops and by the amount of tax assessed on the cost of fumigants used by the taxpayer in its business of fumigating grain for grain growers, grain bins and co-ops. The balance of the tax assessment should be sustained. I further recommend that no penalties be assessed and that interest be recalculated on the revised tax assessment.

**Findings of Fact:**

1. On February 11, 1992, the Department issued NTL XXXXX to the taxpayer assessing Illinois Use Tax, penalty and interest of \$83,981 for the period of July 1, 1981 through June 30, 1991. Taxpayer filed a timely protest. (Dept. Group Ex. No. 1)

2. Taxpayer's principal offices are located in Indianapolis, Indiana. (*Id.*)

3. Taxpayer opened an office in Bloomington, Illinois during March of 1989. (Taxpayer Group Ex. No. 1)

4. Taxpayer's Bloomington office was primarily used as a base from which to coordinate fumigation jobs taking place in Illinois and other states west of Indiana. (*Id.*)

5. At the time taxpayer opened its Bloomington office, taxpayer's office manager, sought guidance from the firm of certified public accountants taxpayer relied on for tax advice regarding any collection and reporting obligations it might have to the Department for sales and use tax. (Taxpayer Group Ex. No. 2)

6. MANAGER also sought advice on taxpayer's sales and use tax obligations by letter addressed to the Department's Springfield office. (*Id.*)

7. Taxpayer's accountants advised MANAGER that taxpayer had no sales or use tax liability in Illinois. (*Id.*)

8. When taxpayer started receiving ROT forms from the Department it started charging use tax on all product sales to Illinois customers. (*Id.*)

9. Part of taxpayer's business consists of selling fumigants which are chemical pesticides. (Taxpayer Group Ex. No. 2)

10. Taxpayer is primarily engaged in the business of fumigating grains for grain growers, food processors and grain bins and co-ops. (Taxpayer Group Ex. No. 1)

11. Fumigation of stored grain is a continuing process with continual movement, drying, cooling and fumigation as needed in order to hold the grain in a marketable condition. (*Id.*)

12. For example, corn, which is stored at 15% moisture content or higher, is a growing organic seed which is very attractive to moisture and protein seeking pests like mold and insects. (Taxpayer Group Ex. No. 3)

13. Insects destroy grain, they make it less marketable, and they can also reduce the weight of the grain. (*Id.*)

14. Pest infested grain is not in a marketable condition. (Taxpayer Group Ex. No. 1)

15. Pest infested grain must be fumigated with pesticides before it can be safely stored or assigned a marketable grade. (*Id.*)

16. Fumigation is often required while the grain is in elevators or storage bins during the drying process. (*Id.*)

17. The process of fumigation consists of the following steps:

a. The correct dosage of fumigation must be computed taking into consideration the target insects of the infestation, the total volume of grain to be fumigated, the temperature of the grain, the tightness of the grain, the weather conditions, including anticipated wind directions and speed.

b. After determining the correct dosage, probes are inserted in the grain from the top at predetermined points and fumigant tablets are inserted into the core of the grain through the probes.

c. In large facilities which are able to circulate the grain, the probes are not used; instead, the fumigant is injected at computed intervals as the grain core is being rotated.

d. In the next step, fumigant is applied to the lower portion of the storage facility by infusion through the aeration system after which the aeration fans and lower openings are sealed and marked.

e. Immediately after introduction of the fumigant to the grain core, all vents and openings must be properly sealed and marked with warning signs. (*Id.*)

18. The duration of a fumigation treatment depends on the ambient temperature of both the grain mass and the storage facility. (*Id.*)

19. The Department's auditor reviewed taxpayer's records and concluded that taxpayer owed ROT, UT and SUT tax on fumigants sold and fumigants taxpayer used in connection with providing fumigation services to its customers. (Dept. Group Ex. No. 1; Taxpayer Group Ex. No. 4, cols. 1 through 7)

20. The Department assessed tax on sales of fumigants to customers who self assessed use tax in the amount of \$11,565. (*Id.*, col. 8)

21. The Department assessed tax on sales of fumigants to grain growers, grain bins and co-ops in the amount of \$170,244. (*Id.*, cols. 9 and 10)

22. The Department assessed tax on the cost of fumigants which taxpayer used in providing fumigation services to grain growers, grain bins and co-ops in the amount of \$117,830. (*Id.*, cols. 12 and 13)

#### **Conclusions of Law:**

The Department's *prima facie* case was established by the admission into evidence of the Notice of Tax Liability dated March 15, 1994 and the determination of tax due dated December 22, 1993<sup>4</sup>. (Dept. Group Exs. No. 1 and 2) Once the Department introduced the NTL and the determination of tax due, its *prima facie* case was made and the burden of proof shifted to the taxpayer.

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<sup>4</sup>. 35 ILCS § 120/4 and § 120/8, made applicable to the Illinois Use Tax Act by 35 ILCS § 105.12.

Central Furniture Mart v. Johnson, 157 Ill. App.3d 907 (1st Dist. 1987) The evidence of record in this case establishes that the taxpayer has partially overcome the Department's *prima facie* case of tax liability under the assessment in question. Accordingly, NTL XXXXX should be reduced by the amount of tax assessed on sales of fumigants to customers which self assessed use tax and on sales of fumigants to grain growers, grain bins and co-ops. The assessment should also be reduced by the tax assessed on the cost of fumigants taxpayer used in providing fumigation services to grain growers, farmers' co-ops and elevators. No penalties should be assessed and interest should be recalculated accordingly.

#### **ISSUE # 1**

The first issue in this case is whether the fumigants taxpayer sells to grain growers, grain bins and co-ops and the fumigants taxpayer uses to fumigate grain for this type of customer are exempt from ROT, UT and SUT as farm chemicals. For the reasons set forth below, I have concluded that the fumigants are farm chemicals, and, therefore, exempt to the extent that taxpayer sold them to or used them in providing fumigation services for grain growers, grain bins and co-ops.

Both the ROT, in § 2-5(1) (35 ILCS 120/3-2-5(1)) and the UT, in § 3-5(7) (35 ILCS § 105/3-5(7)) exempt "farm chemicals". The SUT does not contain a similar exemption. However, the intent of the SUT is to place servicemen on a tax parity with retailers selling identical property. The objective is to tax the incidental transfer of property to the ultimate consumer in connection with the primary service function when that transfer is outside of the scope the ROT or the complementary UT. Fiorito v. Jones, 39 Ill.2d 531 (1968); Hagerty v. General Motors Corp., 59 Ill.2d 52 (1974). The corollary of this proposition is that if a transfer of certain tangible personal property in connection with a sale to a specific class of customers by a retailer is exempt then a transfer of the same property to the same class of customers by a serviceman incidental to a service transaction must also be exempt.

The Department defines "farm chemicals" to include insecticides. Fumigants are insecticides since they kill and decompose vermin that infest grain in storage bins. (86 Admin. Code ch. I, § 130.1955). Therefore, the fumigants sold to grain growers, grain bins and co-ops are exempt farm chemicals within the meaning of the statute and regulations.

When the taxpayer applies fumigants to the stored grain of grain growers, grain bins and co-ops, it is acting as a serviceman and is subject to the Service Occupation Tax Act (35 ILCS § 115/1 *et seq.*) and the Service Use Tax Act. (35 ILCS § 110/1 *et seq.*) Sales of sprays and farm chemicals as an incident to service by servicemen engaged in providing crop spraying or chemical applications to crops for others are exempt from the service occupation and use tax statutes. (86 Admin. Code ch. I §§ 140.125(m) and 160.145). Therefore, the fumigants taxpayer uses in providing fumigation services to grain growers, grain bins and co-ops are exempt farm chemicals within the meaning of the statute and regulations.

## **ISSUE # 2**

The last issue is whether penalties should be assessed on that part of the assessment which should be sustained. The statute and regulations in effect for the years at issue provided that late filing penalties should not be imposed where the late filing is due to reasonable cause. (35 ILCS § 120/5; 86 Admin. Code ch. I, § 130.901(i))

In this case documents of record show that taxpayer's office manager sought and relied upon advice from the taxpayer's public accounting firm and from the Department regarding taxpayer's Illinois sales and use tax liability with regard to the fumigants as a result of which she understood that they were exempt. These efforts constitute reasonable cause for taxpayer's failure to file when due. Penalties should not be imposed.

WHEREFORE, the assessment should be reduced to the extent it is based on fumigant sales on which the customers self-assessed UT (\$11,565), on the fumigant sales to grain growers, grain bins and co-ops (\$170,244), and on the

cost of fumigants taxpayer used in providing fumigation services to grain growers, grain bins and co-ops (\$117, 830). Taxpayer had reasonable cause for late filing, so penalties should not be imposed.

Date

Charles E. McClellan  
Administrative Law Judge