

ST 97-8
Tax Type: SALES TAX
Issue: Wholesale v. Retail Sales

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

DEPARTMENT OF REVENUE)	
OF THE STATE OF ILLINOIS)	No.
)	IBT
v.)	NTL
)	
TAXPAYER,)	Daniel Mangiamele
)	Administrative Law Judge
Taxpayer)	

RECOMMENDATION FOR DISPOSITION

Appearances:

William Mosconi, for TAXPAYER; Marc Muchin, Special Assistant Attorney General, for the Illinois Department of Revenue.

Synopsis:

This matter comes on for hearing pursuant to the taxpayer's timely protest of Notice of Liability XXXXX issued by the Department on June 3, 1994, for Use Tax. The Department issued its Notice of Tax Liability based on taxpayer's inability to produce resale certificates at the time of the audit for many of its transactions. At issue are the questions 1) whether the taxpayer produced documentation in the nature of resale certificates for its claimed deductions, and 2) did the taxpayer present sufficient evidence to overcome Department's *prima facie* case of tax liability. Following the submission of all evidence and a review of the record, it is

recommended that this matter be resolved in favor of the Department on all issues.

Findings of Fact:

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, was established by the admission into evidence of the corrections of returns, and the Notice of Tax Liability. Dept. Ex. No. 1, 2, 3 and 4)

2. The Department reduced the tax liability by reaudit. Dept. Ex. No. 5.

3. Taxpayer since 1985 has been in the business of selling videos. Tr. p. 13

4. Taxpayer did not produce resale certificates from his customers. Tr. p. 17, 19

5. Taxpayer received resale certificate from most of his retail customers. Tr. pp. 19-20

6. The Department's auditor credit taxpayer for all resale certificates produced and the tax liability was reduced accordingly by reaudit. Dept. Ex. No. 5; Tr. pp. 10, 21-22

7. Taxpayer's customers buy video for inventory and not to resell them. Tr. p. 32

8. Taxpayer charged no tax on sales to his customers. Tr. p. 28

Conclusions of Law:

On examination of the record established, this taxpayer has not demonstrated by the presentation of testimony, exhibits and argument,

evidence sufficient to overcome the Department's *prima facie* case of tax liability under the assessment in question as it relates to the issue of resales.

It is clear that the Department presented a *prima facie* case based upon the information at hand at the time of the audit as testified to by the Department's auditor. It was reasonable to disallow certain claimed sales for resale because no resale certificates were presented for all the claimed deductions. Thus, the Department's Notice of Tax Liability as supported by the auditor's correction of returns established a *prima facie* case. Masini v. Department of Revenue, 60 Ill. App. 3rd 11 (1st Dist. 1978), see also Worthington, Inc. v. Department of Revenue, 96 Ill. App. 3rd 1132 (2nd Dist. 1981).

The taxpayer offered testimony that he could not find his customers and therefore was unable to produce all of the resale certificates.

35 ILCS 120/2c provides in part as follows:

Except as provided hereinabove in this Section, a sale shall be made tax-free on the ground of being a sale for resale if the purchaser has an active registration number or resale number from the Department and furnishes that number to the seller in connection with certifying to the seller that any sale to such purchaser is non taxable because of being a sale for resale.

Failure to present an active registration number or resale number and a certification to the seller that a sale is for resale creates a presumption that a sale is not for resale. This presumption may be rebutted by other evidence that all of the seller's sales are sale for resale, or that a particular sale is a sale for resale.

Since taxpayer has presented no resale certificates with active registration numbers certifying that the particular sales at issue are for resale, the statute provides the transaction "shall be made tax free" if the above information is supplied to the Department. I find it has not been supplied with respect to the transactions to be determinative of this matter.

The last paragraph of Section 2(c) allows taxpayer to overcome the presumption of taxability by the introduction of "other evidence that all of the seller's sales are for resale, or that a particular sale is a sale for resale". The Illinois Appellate Court in discussing Section 2(c) has indicated that "other evidence" means that some form of documentation is required to rebut the presumption created by the *prima facie* case Jefferson Ice Co. v. Johnson 139 Ill. App. 3rd 626 (1st Dist. 1985). In the Jefferson Ice case, the court indicated that the taxpayer had not overcome the presumption of taxability because its only evidence was testimony that an estimated percentage of sales were "probably" for resale. In the case at bar, taxpayer presented no documentation such as invoices, post transaction resale certificates, copies of customer tax returns supported by testimony of taxpayer's customer as well as its customer's vendees. Taxpayer testimony by itself introduced at the hearing does not qualify as documentary "other evidence" pursuant to the last paragraph of 2(c).

Based on all of the evidence and testimony, I find that taxpayer's lack of documentation did not overcome the Department's *prima facie* case and the rebuttable statutory presumption of taxability. I therefore recommend that the Notice of Tax Liability

as revised by reaudit be affirmed as to this taxpayer plus penalties and interest to date.

Administrative Law Judge