

UT 08-6

Tax Type: Use Tax

Issue: Fuel Credits

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

THE DEPARTMENT OF REVENUE
OF THE STATE OF ILLINOIS

v.

ABC, INC.,
Taxpayer

No. 05-ST-0000
IBT# 0000-0000
NOA# 00 00000000000000

Ted Sherrod
Administrative Law Judge

RECOMMENDATION FOR DISPOSITION

Appearances: John Alshuler, Special Assistant Attorney General, on behalf of the Illinois Department of Revenue; Gregory Gallagher, Esq. of Kirkland & Ellis, on behalf of ABC, Inc.

Synopsis:

This matter arises pursuant to a protest filed by the taxpayer contesting the Department's Notice of Assessment for Form EDA-105 ("NOA") number 00 000000000000 covering the period October 2000 through November 2000, NOA number 00 000000000000 covering the period December 2000 through June 2002, NOA number 00 000000000000 covering the period July 2002 through December 2002 and the taxpayer's liability for tax on fuel purchases reflected in NOA number 00 000000000000 covering the period October 2000 through November 2000, and NOA number 00 000000000000 covering the period December 2000. At the commencement of the hearing held in this case, during its opening statement, the taxpayer indicated that it

does not contest the liabilities shown in NOA number 00 0000000000000, NOA number 00 0000000000000 and NOA number 00 0000000000000, but does not agree with the liability determined to be due on jet fuel purchases during November and December 2000 indicated in Notices of Assessment number 00 0000000000000 and number 00 0000000000000. A hearing on this matter was held on November 8, 2007. During the hearing the taxpayer tendered the notices of assessment it contests, but presented no other documents, testimony or evidence of any kind to support its claim. After reviewing the record herein, comprised primarily of documents introduced by the Department establishing a *prima facie* case for liability, it is my recommendation that this matter be resolved in favor of the Department.

Findings of Fact:

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, was established by the admission into evidence of Notice of Assessment ("NOA") number 00 0000000000000 issued on July 27, 2005 covering the period October 2000 through November 2000, NOA number 00 0000000000000 issued on July 22, 2005 covering the period December 2000 through June 2002 and NOA number 00 0000000000000 issued on July 22, 2005 covering the period July 2002 through December 2002. Tr. p. 9; Department Ex. 1.
2. The Department conducted an audit of the taxpayer for the period October 2000 through December 2002. Department Ex. 2. At the conclusion of this audit, the Department prepared EDA-105 Audit Reports reflecting the amounts determined by the auditor to be due for the aforementioned tax periods. *Id.* Two of these EDA-105

- Audit Reports pertain to tax assessed on purchases of jet fuel during the months of November and December 2000. Department Ex. 2, 3.
3. On August 30, 2005, ABC filed a protest covering taxes assessed by the Department for the period October 2000 through December 2002 including taxes on jet fuel purchases indicated in the EDA-105 Audit Reports for November and December 2000. Department Ex. 2. The EDA-105 Audit Reports for November and December 2000 were signed by the Department's auditor and by a representative of the taxpayer, and indicated that both the Department and the taxpayer agreed that the amount of tax shown to be due in these reports was correct. Department Ex. 2, 3.
 4. Subsequent to the issuance of the EDA-105 Audit Reports for November and December 2000 signed by a representative of the taxpayer, the taxpayer advised that these EDA-105s had been signed in error and that the taxpayer did not agree with the amounts shown to be due in the EDA-105s for these two months. Department Ex. 2.
 5. James Newbold is an Assistant Attorney General with the Illinois Attorney General's office and is responsible for the state of Illinois' tax claims against ABC in ABC's bankruptcy proceedings. Taxpayer's Ex. 1. On April 13, 2007, James Newbold sent to the taxpayer Notices of Assessment for Form EDA-105 number 00 00000000000000 and 00 00000000000000 assessing tax on the taxpayer's jet fuel purchases during November and December 2000 based upon the aforementioned EDA-105s. Department Ex. 2; Taxpayer's Ex. 1. These Notices of Assessment were dated September 13, 2005. Taxpayer's Ex. 1.

Conclusions of Law:

This matter is before this administrative tribunal pursuant to a protest filed by the taxpayer, ABC, Inc. (“ABC” or “taxpayer”) to the Department’s Notice of Assessment for Form EDA-105 (“NOA”) number 00 00000000000000 covering the period October 2000 through November 2000, NOA number 00 00000000000000 covering the period December 2000 through June 2002 and NOA number 00 00000000000000 covering the period July 2002 through December 2002. Department Ex. 1. At the commencement of the hearing, during its opening statement, the taxpayer indicated that it does not contest any of the liabilities shown to be due in these Notices of Assessment but is contesting the liability determined to be due on jet fuel purchases indicated in the EDA-105 Audit Reports for November and December 2000 and on Notices of Assessment for EDA-105 number 00 00000000000000 and number 00 00000000000000. Tr. p. 5; Department Ex. 2. These notices of assessment are based upon EDA-105 Audit Reports that are the functional equivalent of ST-1 Sales and Use Tax Returns. Compare Department Ex. 3 and Form ST-1, Sales and Use Tax Return.

The record indicates that the taxpayer executed the EDA-105s thereby agreeing to the liability shown by them to be due. Department Ex. 3. Since the taxpayer agreed to the amounts shown to be due in the EDA-105 “returns” it signed, the Department was not required to accord the taxpayer any right to protest the amounts it agreed to pay by issuing a protestable notice of tax liability. See 35 **ILCS** 120/4 (“If the tax computed upon the basis of gross receipts as fixed by the Department is greater than the amount of tax due under the return or returns as filed, the Department shall (or if the tax on any part thereof that is admitted to be due by a return or returns, whether filed on time or not, is not paid, the Department may) issue the taxpayer a notice of tax liability ... [.]”).

Accordingly, Notices of Assessment number 00 000000000000 and 00 000000000000 issued in this case with respect to the EDA-105s the taxpayer agreed to do not provide for any such protest rights. Taxpayer's Ex. 1.

However, the Department has placed into evidence the protest letter in which the taxpayer objected to the amounts shown to be due on these EDA-105 Audit Reports upon which Notices of Assessment number 00 000000000000 and 00 000000000000 are based and has agreed to the inclusion of these Notices of Assessment as part of this case in the pre-trial order entered in this matter on June 14, 2007. As a consequence of the foregoing, and because the Department at no time objected to any evidence or discussion at hearing regarding these notices of assessment, I am compelled to include these notices of assessment as part of this case and address the substantive arguments made by the taxpayer concerning these assessments.

The liabilities determined to be due for the months of November and December 2000 were computed by applying the use tax rate prescribed by the Illinois Use Tax Act of 6.25% (see § 3-10 of the Illinois Use Tax Act, 35 **ILCS** 105/3-10) for these two months to the taxpayer's purchases of aviation jet fuel rather than a reduced tax rate applicable to motor fuel purchases in effect during these tax periods pursuant to Public Act 91-872. Tr. p. 4. Public Act 91-872 authorizes a temporary (six month) rate reduction for a particular type of tangible personal property, namely motor fuel and gasohol by adding the following paragraph to § 3-10 of the Illinois Use Tax Act:

Beginning on July 1, 2000 and through December 31, 2000, with respect to motor fuel, as defined in Section 1.1 of the Motor Fuel Tax Law, and gasohol, as defined in Section 3-40 of the Use Tax Act, the tax is imposed at a rate of 1.25%.

35 ILCS 105/3-10¹

As noted in the Department's opening statement, subsequent to the conclusion of the audit and the Department's determination of additional tax due on jet fuel purchases during November and December 2000, the Illinois Appellate Court ruled that the reduced use tax rate applicable to motor fuel pursuant to PA 91-872 did not apply to purchases of jet fuel. ABC, Inc. v. Department of Revenue, 367 Ill. App. 3d 42 (1st Dist. 2006). The taxpayer concedes that it is taxable on jet fuel at the regular use tax rate. Tr. p. 4. Accordingly, its returns for November and December 2000 reporting tax at the lower rate applicable to motor fuel were incorrect. Tr. p. 6. At no time did the taxpayer raise any issue that the amounts shown to be due on these assessments were not correct or present any evidence to support such a claim. However, ABC argues that the Department's Notices of Assessment pertaining to the tax on jet fuel determined to be due for November and December 2000 were not issued until September 2005 and therefore are barred by the statute of limitations on assessments prescribed by section 4 of the Retailers' Occupation Tax Act, 35 ILCS 120/4 which is incorporated by reference into the Use Tax Act at 35 ILCS 105/13. Tr. pp. 5-7.

The record in this case indicates that Notices of Assessment number 00 000000000000 and number 00 000000000000 with respect to the taxpayer's liability for tax on jet fuel were issued on September 13, 2005. Taxpayer's Ex. 1. The taxpayer's protest of its liability for tax on jet fuel was filed on August 30, 2005. Department Ex. 2.

Section 120/4 of the Retailers' Occupation Tax Act, 35 ILCS 120/4 provides as follows:

¹ See 35 ILCS 105/3-10 (Smith-Hurd) (Historical and Statutory Notes); P.A. 91-872 (effective July 1, 2000).

If the tax computed upon the basis of the gross receipts as fixed by the Department is greater than the amount of tax due under the return or returns as filed, the Department shall ... issue the taxpayer a notice of tax liability for the amount of tax claimed by the Department to be due ... [.] If [the taxpayer] shall within 60 days after such notice of tax liability file a protest to said notice of tax liability and request a hearing thereon, the Department shall give notice to such person or legal representative of the time and place fixed for such hearing and shall hold a hearing in conformity with the provisions of this Act, and pursuant thereto shall issue to such person or legal representative a final assessment for the amount found to be due as a result of such hearing. ... If a protest to the notice of tax liability and request for a hearing thereon is not filed within 60 days after such notice, such notice of tax liability shall become final without the necessity of a final assessment being issued and shall be deemed a final assessment.

35 ILCS 120/4

Pursuant to this provision, in order for this tribunal to obtain jurisdiction to adjudicate issues raised by the taxpayer at a formal hearing, a protest must be filed within 60 days after a protestable notice is issued. As noted above, by virtue of the Department's waiver of any argument that Notices of Assessment number 00 0000000000000 and number 00 00000000000000 were not protestable, these notices are deemed to be protestable notices for purposes of this case. In the instant case, the taxpayer's protest with respect to its liability for November and December 2000 for the tax due on jet fuel was filed on August 30, 2005. Department Ex. 2. However, the notices of assessment for unpaid tax on jet fuel due for these months were issued on September 13, 2005 which was after the taxpayer's protest was filed. Taxpayer's Ex. 1. No protest was filed within 60 days after the issuance of the notices of assessment assessing tax on unpaid jet fuel or at any other time subsequent to the issuance of these notices. Accordingly, the record plainly shows that the taxpayer failed to meet the requirements for according jurisdiction over the notices of assessment for tax on jet fuel because it failed to file a protest of these assessments within 60 days after the issuance of these notices of assessment as required

by the provisions of 35 **ILCS** 120/4 noted above. Consequently, these assessments became final assessments pursuant to 35 **ILCS** 120/4.

The taxpayer contends that it did not receive the notices of assessment noted above dated September 13, 2005 until they were forwarded to it by James Newbold, the Department's Attorney General who was in possession of these assessments in connection with his oversight of Illinois claims against ABC in ABC's bankruptcy proceedings. Taxpayer's Ex. 1. James Newbold forwarded these notices of assessment to the taxpayer on April 13, 2007. Tr. p. 10; Taxpayer's Ex. 1. However, even if the 60 day period within which the taxpayer was required to file its protest did not commence until April 13, 2007, the exercise of jurisdiction by this tribunal over the taxpayer's objections to these assessments for unpaid tax on jet fuel purchases would still be barred because the record contains no evidence that any protest was filed by the taxpayer within 60 days of that date.

Moreover, the taxpayer made no effort to preserve its rights to an administrative hearing by way of a request for an initial review pursuant to Department regulation 86 Ill. Admin. Code, ch. I, section 200.175 on the grounds that the notices of assessment to which it objects were not timely received. In sum, since the taxpayer has failed to timely protest notices of assessment for tax on jet fuel for the months of November and December 2000 and has not sought a late discretionary hearing concerning these assessments pursuant to Department regulation 86 Ill. Admin. Code, ch. I, section 200.175, the Department has no jurisdiction to adjudicate the taxpayer's objections to

these assessments. Moreover, as a consequence of the taxpayer's failure to timely protest these assessments they are now final assessments pursuant to 35 ILCS 120/4.²

Even if the taxpayer had timely protested the assessments on jet fuel, the taxpayer cannot prevail on the merits of its claim. The use taxes at issue in this case were imposed pursuant to the Illinois Use Tax Act, 35 ILCS 105/1 *et seq.* which imposes a use tax upon the storage, use or consumption of tangible personal property purchased at retail in this state. 35 ILCS 105/2; 35 ILCS 105/3. The taxpayer contends that it is not required to pay the tax shown to be due because the Notices of Assessment establishing the taxpayer's liability for additional tax on jet fuel purchases for the months of November and December 2000 were not issued to the taxpayer in a timely manner. Tr. pp. 5-7. While the taxpayer does not cite any statutory basis for its contention, it presumably is relying upon section 12 of the Illinois Use Tax Act, 35 ILCS 105/12 and section 4 of the Retailers' Occupation Tax Act, 35 ILCS 120/4. Section 4 of the Retailers' Occupation Tax Act, 35 ILCS 120/4 provides in part as follows:

Except in case of a fraudulent return, or in the case of an amended return (where a notice of tax liability may be issued on or after each January 1 and July 1 for an amended return filed not more than 3 years prior to such January 1 or July 1, respectively), no notice of tax liability shall be issued on and after each January 1 and July 1 covering gross receipts received during any month or period of time more than 3 years prior to such January 1 and July 1, respectively. If, before the expiration of the time prescribed in this Section for the issuance of a

² The taxpayer's protest which the Department introduced into the record indicates that the taxpayer may have been advised by a Department of Revenue employee to file a protest contesting the jet fuel tax shown in the Department's audit reports in response to notices of assessment received prior to August 30, 2005 when the taxpayer's protest was filed. Department Ex. 2. For the reasons indicated herein, such advice was clearly erroneous. Moreover, there is no evidence in the record that any of this advice was given to the taxpayer in writing. Nor did the taxpayer introduce any other credible evidence that it received such advice. Absent such proof, the taxpayer's purported reliance upon such advice does not provide any excuse for its failure to timely protest the notices of assessment for tax on jet fuel. 86 Ill. Admin. Code, ch. I, section 130.101 ("Taxpayers may not rely on verbal opinions from Department employees"); 86 Ill. Admin. Code, ch. I, section 140.901.

notice of tax liability, both the Department and the taxpayer have consented in writing to its issuance after such time, such notice may be issued at any time prior to the expiration of the period agreed upon.

35 ILCS 120/4

Section 12 of the Illinois Use Tax Act, the statute at issue in this case, incorporates the aforementioned provisions by reference as follows:

All of the provisions of [section] ... 4 (except that the time limitation provisions shall run from the date when the tax is due rather than from the date when gross receipts are received) ... of the Retailers' Occupation Tax Act ... shall apply, as far as practicable, to the subject matter of this Act to the same extent as if such provisions were included herein.

35 ILCS 105/12

The gravamen of the taxpayer's claim is that the Department's Notices of Assessment covering the months of November and December 2000 assessing additional tax on the taxpayer's jet fuel purchases were barred by the statute of limitations on use tax assessments noted above which bars the issuance of a notice of tax liability by the Department on and after January 1 or July 1 covering taxes due on purchases during any month or period more than three years before that January 1 or July 1, respectively. The taxpayer contends that the Department's Notices of Assessment on jet fuel purchases during November and December 2000, which the taxpayer and the Department agree are protestable notices (and therefore equivalent to notices of tax liability) for purposes of this case, were not issued within this statutory limitations period as extended by agreement of the parties. However, as noted by the Department (Tr. pp. 12-14) section 4 of the Retailers' Occupation Tax Act provides for an exception to the generally applicable statute of limitations rule. Specifically, this section provides as follows:

The foregoing limitations upon the issuance of a notice of tax liability shall not apply to the issuance of a notice of tax liability with respect to any period of time prior thereto in cases where the Department has,

within the period of limitation then provided, notified the person making the return of a notice of tax liability even though such return, with which the tax that was shown by such return to be due was paid when the return was filed, had not been corrected by the Department in the manner required prior to the issuance of such notice, but in no case shall the amount of any such notice of tax liability for any period otherwise barred by this Act exceed for such period the amount shown in the notice of tax liability theretofore issued.

35 ILCS 120/4

The record indicates that the taxpayer was notified of a notice of tax liability to be issued in this matter before it received the EDA-105s indicating a liability due for November and December 2000. Specifically, the taxpayer, in its protest, states the following:

The Illinois Department of Revenue (“Department”) conducted a sales tax audit for the above-captioned periods. After considerable examination and analysis by the Department, and considering the bankruptcy of ABC, the parties agreed that (1) ABC would pay \$675,000 under the state’s Amnesty program in anticipation of a potential liability; (2) A portion of the Department’s determination would be agreed between the parties (“Agreed Portion”); (2) A portion would be unagreed (“Unagreed Portion”). The Unagreed Portion was on a very specific issue (sales tax relief on jet fuel) for a period of only two months – November and December 2000. It was also agreed that the Department would separate the two portions in its final audit report.

...

Subsequently, as agreed between the parties, ABC received Forms EDA-105 for each of the audit periods specified above for the Agreed Portion. ABC also received separate EDA-105s for the Unagreed Portion. ABC understood that we had to first sign the EDA-105s in order to be able to protest the assessment. It was further understood that a notice of tax liability would be issued, at which time we could protest any amounts being assessed. It was with these understandings that ABC signed all EDA-105s prepared by the auditor, including those for the Unagreed Portion.

Department Ex. 2

Moreover, the record further indicates that the EDA-105s issued to the taxpayer were issued prior to the expiration of the statute of limitations which had been extended by consent of the parties in accordance with 35 ILCS 120/4. Tr. p. 6; Department Ex. 2.

Accordingly, the record supports the Department's position that the assessments it issued for November and December 2000, although not issued until September 2005, were not barred by statute since they were based upon a notification of a notice of tax liability received by the taxpayer before the expiration of the statute of limitations prescribed by section 4 of the Use Tax Act, 35 **ILCS** 120/4.

The taxpayer contends, however, that even if it received notification of a notice of tax liability pertaining to the disputed tax on jet fuel due for the months of November and December 2000 before the statute of limitations on assessments had expired, this notification did not constitute the type of formal notice required by section 4 of the Use Tax Act because it was not sent by certified mail. Tr. pp. 11, 12. The taxpayer does not cite any authority for this claim, but presumably is basing it upon 35 **ILCS** 5/1402. This section provides as follows:

[W]henever notice is required by this Act, such notice shall, if not otherwise provided, be given or issued by mailing it by registered or certified mail addressed to the person concerned at his last known address. 35 **ILCS** 5/1402

The aforementioned section is prescribed by, and only applicable to, the Illinois Income Tax Act, 35 **ILCS** 5/101 *et seq.* *Id.* There is no similar mandate regarding notice in the Retailers' Occupation Tax Act or the Use Tax Act. (Compare 35 **ILCS** 120/12 which provides" "Whenever notice is required by this Act, such notice may be given by ABC States registered or certified mail, addressed to the person concerned at his last known address." (emphasis added)³ Since 35 **ILCS** 5/1402 only pertains to notices required by the Illinois Income Tax Act, this provision does not support the taxpayer's claim that the notice of tax liability notification the taxpayer received did not constitute adequate notice

³ Section 105/12 of the Use Tax Act, 35 **ILCS** 105/12, incorporates into the Use Tax 35 **ILCS** 120/12 of the Retailers' Occupation Tax Act.

that the taxpayer would be assessed and therefore did not keep the statute of limitations open beyond the ordinarily applicable limitations period.

WHEREFORE, for the reasons stated above, it is my recommendation that the Department's assessment of liability as shown in Notices of Assessment number 00 0000000000000, number 00 0000000000000 and 00 number 0000000000000, to which the taxpayer does not object, be finalized and affirmed. It is further recommended that Notices of Assessment number 00 0000000000000 and number 00 0000000000000 be finalized because the assessments were not barred by the statute of limitations and the taxpayer failed to provide any evidence that these assessment amounts were incorrect.

Ted Sherrod
Administrative Law Judge

Date: January 31, 2008