

UT 09-3

Tax Type: Use Tax

Issue: Use Tax On Out-Of-State Purchases Brought Into Illinois

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

**THE DEPARTMENT OF REVENUE
OF THE STATE OF ILLINOIS**

v.

**JANE DOE,
Taxpayer**

**No. 08-ST-0000
IBT# 0000-0000
NTL# 00 00000000000000**

**Ted Sherrod
Administrative Law Judge**

RECOMMENDATION FOR DISPOSITION

Appearances: Special Assistant Attorney General Marc Muchin on behalf of the Illinois Department of Revenue; Jane Doe, *pro se*.

Synopsis:

On April 7, 2008, the Illinois Department of Revenue (“Department”) issued to Jane Doe (“taxpayer”) a Notice of Tax Liability (“NTL”) for use tax due. The basis of the assessment was the Department’s determination that the taxpayer had not paid use tax on a motor vehicle purchased on December 3, 2005. On May 14, 2008, the taxpayer protested this assessment and requested a hearing. An evidentiary hearing was held on January 13, 2009 in Chicago, Illinois with John Doe testifying on the taxpayer’s behalf.

James Barborka of the Department testified on behalf of the Department. The record in this case also includes documentary evidence submitted by the parties. Following a review of the testimony and evidence submitted by the taxpayer and the Department, it is recommended that the Department's NTL showing a use tax liability of \$981, plus a late filing penalty and a late payment penalty, be finalized as issued. In support thereof, the following "Findings of Fact" and "Conclusions of Law" are made.

Findings of Fact:

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, was established by the admission into evidence of the Department's SC-10-K, Audit Correction and/or Determination of Tax Due, and the Department's NTL number 00000000000000000000 showing a tax liability of \$1,330, including penalties and interest calculated through April 7, 2008. Department Exhibit ("Ex.") 1, 2.
2. On December 3, 2005, the taxpayer and her husband, John Doe, purchased a 2006 Audi A4 motor vehicle (the "motor vehicle") an Illinois automobile retail dealership located in Anywhere, Illinois. Department Ex. 3 (ST-556 Sales Tax Transaction Return signed by the taxpayer); Taxpayer's Ex. 1.
3. At the time of the purchase, the taxpayer and her husband were legal residents of Illinois, having their principal residence in Anywhere, Illinois. Hearing Transcript ("Tr.") pp. 6, 13; Department Ex. 4 (Taxpayer's Federal form 1040 showing her principal residence address in 2005). The taxpayer held an Illinois driver's license at that time. Tr. p. 12; Department Ex. 5. The taxpayer and her husband also owned homes in Wisconsin and in California at that time. Tr. p. 13; Taxpayer's Ex. 1.

4. The motor vehicle was delivered to the taxpayer and her husband at the Illinois Audi dealership from which the motor vehicle was purchased on December 3, 2005. Department Ex. 3. Subsequent to its acquisition by the taxpayer and her husband, the motor vehicle has been kept principally at the taxpayer's home in Wisconsin. Tr. p. 13.
5. Illinois Audi issued no Illinois license plates to the taxpayer at the time the motor vehicle was purchased and did not register this vehicle in Illinois. Tr. pp. 13-16. In lieu of the foregoing, the dealer affixed Wisconsin license plates to the motor vehicle from a 2002 Audi Jeep owned by the taxpayer which the taxpayer traded-in for the motor vehicle at the time it was purchased. *Id.*; Department Ex. 3, 4.
6. Subsequent to the motor vehicle's arrival in Wisconsin, the taxpayer applied for a Wisconsin title and registration for the motor vehicle. Taxpayer's Ex. 1. On her application for a Wisconsin title, the taxpayer and her husband listed as their address XXXXXXXX, XXXXXXXX, Wisconsin. *Id.*
7. In connection with their registration of the motor vehicle in Wisconsin, the taxpayer paid tax on the motor vehicle to the State of Wisconsin. Tr. pp. 14, 17.

Conclusions of Law:

Under the Use Tax Act ("UTA"), 35 ILCS 105/1 *et seq.*, Illinois imposes a tax on the privilege of using in Illinois tangible personal property purchased at retail from a retailer. 35 ILCS 105/3. The use tax is a corollary to the retailers' occupation tax ("ROT") which is a tax on persons engaged in the business of selling at retail tangible

personal property. 35 **ILCS** 105/2. The UTA was passed to compliment and prevent evasion of the ROT. Needle Co. v Department of Revenue, 45 Ill. 2d 484 (1970).

The use tax is imposed at the same rate as the ROT. Compare 35 **ILCS** 105/3-10 and 35 **ILCS** 120/2-10. The rate of the use tax after December 31, 1989 is 6.25% of the selling price of tangible personal property. *Id.* The retailers' failure to collect tax from the purchaser does not prevent the Department from collecting the tax directly from the purchaser. 86 Ill. Admin. Code, ch. I, section 150.130. ("If the user purchases the tangible personal property at retail from a retailer, but does not pay the Use Tax to such retailer, the purchaser shall pay the Use Tax directly to the Department.").

The facts at issue in the instant case are not in dispute. In December 2005, the taxpayers purchased a 2006 Audi A4 from Illinois Audi, an Illinois automobile dealer located in Anywhere, Illinois. Department Ex 3; Taxpayer's Ex. 1. The form ST-556 completed by the seller and filed with the Department to report the sale avers that the vehicle was exempt from tax because it was sold to "an out-of-state buyer." Department Ex. 3. Consequently, the taxpayers did not pay Illinois retailers' occupation tax to the dealer on the purchase. *Id.* Mr. Doe testified that he and his wife, the taxpayer, followed instructions given them by the car dealer who advised them that they should pay use tax in Wisconsin because they were going to register the motor vehicle there. Tr. p. 14.

On the merits, the taxpayer defends against the NTL asserting that the taxpayer's purchase of the motor vehicle was exempt pursuant to the state's multistate exemption prescribed by section 3-55 of the Illinois UTA, 35 **ILCS** 105/3-55. Specifically, the taxpayer premises her claim of exemption on section 3-55(h) of the UTA, which provides as follows:

§ 3-55. Multistate exemption. The tax imposed by this Act does not apply to the use of tangible personal property in this State under the following circumstances:

...

- (h) The use, in this State, of a motor vehicle that was sold in this State to a nonresident, even though the motor vehicle is delivered to the nonresident in this State, if the motor vehicle is not to be titled in this State, and if a driveaway decal permit is issued to the motor vehicle as provided in Section 3-603 of the Illinois Vehicle Code or if the nonresident purchaser has vehicle registration plates to transfer to the motor vehicle upon returning to his or her home state. The issuance of the driveaway decal permit or having the out-of-state registration plates to be transferred shall be prima facie evidence that the motor vehicle will not be titled in this State.

35 ILCS 105/3-55(h)

The taxpayer claims that she kept the motor vehicle at a residence she and her husband owned located in Wisconsin. For this reason, the taxpayer contends that the exemption prescribed by section 3-55(h) is applicable in this case. Tr. pp. 14-16.

Section 3-55(h), by its terms, is applicable only to “nonresidents.” The taxpayer has admitted that, at the time she purchased the motor vehicle, she was a resident of Illinois, even though she and her husband owned homes in Wisconsin and California and spent a considerable amount of time outside of the state of Illinois at these residences. Tr. p. 13.

The taxpayer’s status as a resident for purposes of applying section 3-55(h) is confirmed by regulation 86 Ill. Admin. Code, ch. I, section 130.605(b) which states in part as follows:

- (1) ...[T]he tax is not imposed upon the sale of a motor vehicle in this State even though the motor vehicle is delivered in this State, if all of the following conditions are met: the motor vehicle is sold to a nonresident; the motor vehicle is not to be titled in this State; and either a drive-away permit for purposes of transporting the motor vehicle to a destination outside of Illinois is issued to the motor

vehicle as provided by section 3-603 of the Illinois Vehicle Code [625 ILCS 5/3-603], or the nonresident purchaser has non-Illinois vehicle registration plates to transfer to the motor vehicle upon transporting the vehicle outside of Illinois. The issuance of the drive-away permit or having the out-of-state registration plates to be transferred is prima facie evidence that the motor vehicle will not be titled in this State. ...

(A) Documentation of nonresidency. The exemption under subsection (b) (1) is available only to nonresidents. A vehicle purchased by an Illinois resident is not eligible for the exemption (even if the purchaser is only a part-time Illinois resident or has dual residency in Illinois and another state, and, in the case of more than one purchaser, even if only one of the purchasers is an Illinois resident). ... i) when the purchaser is a natural person, the best evidence of nonresidence is a non-Illinois driver's license.

The record indicates that the taxpayer possessed an Illinois driver's license rather than a non-Illinois driver's license. Tr. p. 12; Department Ex. 5. Pursuant to regulation section 130.605(b) noted above, the taxpayer's Illinois driver's license is clear evidence that she was a resident of Illinois for purposes of the multistate exemption provision the taxpayer relies upon.

As noted in the case of Hatcher v. Anders, 117 Ill. App. 3d 236 (2d Dist. 1983), a case addressing who is a "resident" under the Illinois Vehicle Code (35 ILCS 5/1-100 *et seq.*) which governs vehicle registration:

[A] person can have only one domicile or permanent residence and once it is established it is retained until a new domicile is acquired. (citations omitted). Affirmative acts must be proved to sustain the abandonment of an Illinois residence and a temporary absence from the

state, no matter how protracted, does not equate to "abandonment." ... Only when abandonment has been proven is residency lost. (citations omitted).

Hatcher, *supra* at 239.

Accordingly, the taxpayer could not simultaneously be a resident of Illinois to which the taxpayer admits, and a resident of Wisconsin for purposes of applying section 3-55(h) of the UTA. Since section 3-55(h) is only applicable to non-residents, it is inapplicable to the taxpayer, an Illinois resident. Accordingly, the dealer erred in preparing the ST-556 reporting the taxpayer's purchase which showed no tax due on account of the taxpayer's non-resident status, and erred in failing to collect tax from the taxpayer and her husband. However, as noted above, the retailers' failure to properly collect tax from the purchaser does not prevent the imposition of tax properly due and owing upon the purchaser, as the Department has done in this case.

The taxpayer also argues that if the tax is found to be properly assessed, she should be allowed a credit toward her Illinois liability based upon her payment of taxes in Wisconsin at the time she registered the motor vehicle there. However, the taxpayer has offered no statutory or case law to support her position regarding her right to a credit. To this argument, the Department states that the tax was properly owed to Illinois, not to Wisconsin and that no credit provision applies. Tr. pp. 21, 22.

The only credit even remotely analogous to the credit the taxpayer seeks is provided at section 3-55(d) of the UTA, 35 ILCS 105/3-55(d) which states as follows:

§ 3-55. Multistate exemption. The tax imposed by this Act does not apply to the use of tangible personal property in this State under the following circumstances:

...

- (d) The use, in this State, of tangible personal property that is acquired outside this State and caused to be brought into this State by a person who has already paid a tax in another State in respect to the sale, purchase, or use of that property, to the extent of the amount of the tax properly due and paid in the other State.

35 ILCS 105/3-55(d)

Pursuant to this measure, a credit against the UTA is allowed on property acquired outside the state and brought into Illinois, to the extent of taxes properly paid on the sale, purchase, or use of the property in another state. This credit is inapplicable to the facts at issue here because the property at issue was not acquired outside of Illinois and brought into this state but, rather, was acquired in Illinois and taken outside of this state.

In sum, there is no provision that allows for a credit to be granted in a case such as this, that is, when an Illinois resident purchases and has delivered to her in Illinois a motor vehicle that she subsequently has titled in Wisconsin. Since the “right to a refund or credit can only arise from the acts of the legislature” (Jones v. Department of Revenue, 60 Ill. App. 3d 886, 889 (1st Dist. 1978)), unless there is an authorizing statutory provision allowing for a credit for any use tax the taxpayer may have paid for the motor vehicle in Wisconsin, none can be allowed.

Wherefore, for the reasons stated above, it is recommended that Notice of Tax Liability number 00 00000000000000 at issue in this case be finalized as issued.

Ted Sherrod
Administrative Law Judge

Date: March 4, 2009