

UT 10-03

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)	Docket No.	09-ST-0018
OF THE STATE OF ILLINOIS)	IBT No.	6803-3486
v.)	NTL No.	SF 0834044841007
JOHN DOE,)	John E. White,	
Taxpayer)	Administrative Law Judge	

RECOMMENDATION FOR DISPOSITION

Appearances: John Doe appeared pro se; Marc Muchin, Special Assistant Attorney General, appeared for the Illinois Department of Revenue.

Synopsis:

This matter involves a Notice of Tax Liability (NTL) the Illinois Department of Revenue (Department) issued to John Doe (Doe or Taxpayer) to assess Illinois use tax regarding the purchase of tangible personal property, for use in Illinois, from a retailer located outside Illinois. Taxpayer protested that NTL, and asked for a hearing.

The hearing was held at the Department's offices in Chicago. The issue is whether Taxpayer owes use tax regarding the purchased property. I have reviewed the evidence adduced at hearing, and I am including in this recommendation findings of facts and conclusions of law. I recommend that the NTL be finalized as issued.

Findings of Fact:

1. The State of Florida audited a retailer conducting business in that state, and thereafter notified the Department about a transaction in which the retailer sold a diamond

bracelet to Taxpayer, delivered it to Taxpayer in Illinois, and claimed that transaction as being exempt from Florida sales tax. Department Ex. 2 (copy of Audit Narrative); Department Ex. 3, p. 2 (copy of retailer's invoice regarding sale to Taxpayer).

2. The retailer prepared an invoice regarding the bracelet sale to Taxpayer, and that invoice bears a stamp that provides: "MERCHANDISE SHIPPED OUT OF STATE [-] NO FLORIDA SALES TAX CHARGED[.]" Department Ex. 3, p. 2.
3. The copy of the invoice admitted as evidence also includes, inter alia, the following pre-printed statement: "I agree to have the mentioned merchandise shipped to the above address in order that Kaufmann de Suisse Jewelers [the retailer] need not charge me Florida Sales tax. Signed _____" Department Ex. 3, p. 2. There are slight marks above the signature line on the copy of the invoice admitted into evidence, but the marks are insufficient to conclude that they were made when someone signed the invoice on or near that signature line. *See id.*
4. The invoice reflects that the purchase price for the bracelet was \$17,000. Department Ex. 3, p. 2.
5. A Department auditor reviewed the information provided by Florida, including the invoice, and conducted a limited scope audit of that transaction to see whether it was subject to Illinois use tax. Department Ex. 2, p. 2; Department Ex. 3, p. 1 (copy of letter from auditor to Taxpayer, dated May 20, 2008, regarding Taxpayer's purchase).
6. As a result of the limited scope audit, and based on the best information available to her (*see* Department Exs. 2-3), the auditor prepared a form titled, Audit Correction of Returns and/or Determination of Tax Due. Department Ex. 1 (copy of determination of tax due). On that form, the auditor calculated that Taxpayer owed the following

amounts of tax and penalties: use tax in the amount of \$1,063; a late filing penalty in the amount of \$21; and a late payment penalty of \$213, for a total amount due of \$1,297, not counting applicable interest. Department Ex. 1; 35 ILCS 105/12; 35 ILCS 120/5.

7. Taxpayer purchased the bracelet as an anniversary gift for his wife. Hearing Transcript (Tr.) pp. 7-10. He purchased the bracelet from the retailer via the phone, and it was delivered to his law offices in Illinois. Tr. pp. 7-10; Department Ex. 3, p. 2.

Conclusions of Law

The Illinois Use Tax Act (UTA) imposes a tax “upon the privilege of using in this State tangible personal property purchased at retail from a retailer” 35 ILCS 105/3. The Illinois General Assembly incorporated into the UTA certain provisions of the complementary Retailers’ Occupation Tax Act (ROTA). 35 ILCS 105/12. Among them is § 5 of the ROTA, which provides that, in the event a required return is not filed, the Department shall determine the amount of tax due using its best judgment and information. 35 ILCS 120/5. It also provides that, under such circumstances, the Department’s determination of tax due constitutes prima facie proof that tax is due in the amount determined by the Department. 35 ILCS 120/5. In this case, the Department established its prima facie case when it introduced Department Exhibit 1, consisting of a copy of the auditor’s determination of tax due, under the certificate of the Director. Department Ex. 1; 35 ILCS 105/12; 35 ILCS 120/5. That exhibit, without more, constitutes prima facie proof that Taxpayer owes Illinois use tax in the amount determined by the Department. 35 ILCS 105/12; 35 ILCS 120/5; Copilevitz v. Department of Revenue, 41 Ill. 2d 154, 156, 242 N.E.2d 205, 206-07 (1968).

The presumption of correctness that attaches to the Department's prima facie case extends to all elements of taxability. Branson v. Department of Revenue, 68 Ill. 2d 247, 258, 659 N.E.2d 961, 966-67 (1995) (Department's introduction of Notice of Penalty Liability establishes prima facie proof that taxpayer acted with the required mental state); Soho Club, Inc. v. Department of Revenue, 269 Ill. App. 3d 220, 232, 645 N.E.2d 1060, 1068 (1st Dist. 1995) (Department's introduction of Notice of Tax Liability establishes prima facie proof that taxpayer is engaged in the occupation that is subject to taxation). Thus, in this case, the Department's determination of tax due reflects its determinations that, among other things, Taxpayer purchased the bracelet from a retailer for use in Illinois, the purchase was at retail, and that Taxpayer had not previously filed a return to report his purchase from the out-of-state retailer. *See* Department Ex. 1; 35 ILCS 105/12; 35 ILCS 120/5.

The Department's prima facie case is overcome, and the burden shifts to the Department to prove its case, only after a taxpayer presents evidence that is consistent, probable and identified with its books and records, to show that the Department's determinations were not correct. Copilevitz, 41 Ill. 2d at 157-58, 242 N.E.2d at 207; Balla v. Department of Revenue, 96 Ill. App. 3d 293, 296, 421 N.E.2d 236, 238 (1st Dist. 1981).

Analysis

What is colloquially known as Illinois sales tax consists of two separate, complementary taxes, the retailers' occupation tax and the use tax. Weber-Stephen Products, Inc. v. Department of Revenue, 324 Ill. App. 3d 893, 898, 756 N.E.2d 321, 324 (1st Dist. 2001) (*quoting* Brown v. Zehnder, 295 Ill. App. 3d 1031, 1034, 693 N.E.2d

1255, 1258 (1998)). The ROTA imposes an occupational tax upon retailers, who are persons engaged in the business of selling tangible personal property at retail. 35 ILCS 120/1-2; Weber-Stephen, 324 Ill. App. 3d at 898, 756 N.E.2d at 324. Under the ROTA, Illinois retailers are required to remit to the State a percentage of the gross receipts of every retail sale. 35 ILCS 120/2; Weber-Stephen, 324 Ill. App. 3d at 898, 756 N.E.2d at 324. The UTA was enacted as a complement to the ROTA (Turner v. Wright, 11 Ill. 2d 161, 170, 142 N.E.2d 84, 89 (1957)), and it imposes a tax on the purchaser-user of the property for the privilege of using, in Illinois, property purchased at retail, regardless of where the sale occurred. 35 ILCS 105/3; Weber-Stephen, 324 Ill. App. 3d at 898, 756 N.E.2d at 324-25. The State thereby benefits by taxing in-state retailers and purchases, and also out-of-state purchases by consumers for use in Illinois, which otherwise would not be reached by the ROTA. Weber-Stephen, 324 Ill. App. 3d at 898, 756 N.E.2d at 325.

“When a single purchase occurs, Illinois retailers collect both forms of sales tax from the consumer. [citations omitted] However, if the retailer pays the ROTA tax to the State, he or she does not have to pay, and may keep, the use tax. If the retailer is outside Illinois and therefore has no ROTA or UTA obligations, the purchaser-user in Illinois must pay the use tax directly to the State.” Weber-Stephen, 324 Ill. App. 3d at 898-99, 756 N.E.2d at 325. In order for a use tax to be imposed, it must be shown that tangible personal property has been (1) purchased at retail; and (2) purchased from a retailer. 35 ILCS 105/3; JM Aviation, Inc. v. Department of Revenue, 341 Ill. App. 3d 1, 9-10, 791 N.E.2d 1152, 1159 (1st Dist. 2003). Here, Taxpayer does not dispute these two factual determinations. Tr. pp. 7-8.

Taxpayer has characterized his defense as being that, because of the oral agreement between himself and the retailer, only the retailer should owe tax regarding the transaction. Tr. p. 9. Specifically, Taxpayer testified that he bought the bracelet over the phone, while he was in Illinois, and the retailer was located in Florida. Tr. p. 8. He said that his oral agreement with the retailer was that the negotiated purchase price would be a flat price that would include all applicable taxes. Tr. pp. 8-10. He said it was his understanding and intent that the retailer would pay whatever taxes were due. *Id.* While making this argument, Taxpayer acknowledged that the invoice does not express all of the terms of the agreement he testified about. *See* Tr. p. 8.

Notwithstanding Taxpayer's testimony and argument, § 10 of the UTA provides:

*** [W]hen tangible personal property is purchased from a retailer for use in this State by a purchaser who did not pay the tax imposed by this Act to the retailer, and who does not file returns with the Department as a retailer under Section 9 of this Act, such purchaser (by the last day of the month following the calendar month in which such purchaser makes any payment upon the selling price of such property) shall, except as provided in this Section, file a return with the Department and pay the tax upon that portion of the selling price so paid by the purchaser during the preceding calendar month. *** Such return and payment from the purchaser shall be submitted to the Department sooner than the last day of the month after the month in which the purchase is made to the extent that that may be necessary in order to secure the title to a motor vehicle or the certificate of registration for an aircraft. However, ... if the purchaser's annual use tax liability does not exceed \$600, the purchaser may file the return on an annual basis on or before April 15th of the year following the year use tax liability was incurred.

35 ILCS 105/10; Square D Co. v. Johnson, 233 Ill. App. 3d 1070, 1087, 599 N.E.2d 1235, 1245-46 (1st Dist. 1992).

If the terms of Taxpayer's agreement with the retailer were as he characterized them at hearing, he might — and I stress *might* — have a contract claim against it. *But see*

Crerar Clinch Coal Co. v. Bd. of Education of the City of Chicago, 13 Ill. App. 3d 208, 141 N.E.2d 393 (1st Dist. 1957) (“It seems to be well settled that, where a sales contract provides that the purchaser is to pay a stated price and that alone, the purchaser cannot recover from the seller the amount of the tax, if the tax is later done away with by a repeal of the statute or by its being declared unconstitutional, or, if the tax is simply reduced, recover the amount of the reduction, even though the tax had not been paid by the vendor, or, if paid, refunded to him.”) (*quoting, with approval, Golding Bros. Co. v. Dumaine*, 93 F.2d 162, 164 (1st Cir. 1937)) (internal quotation marks omitted). But the UTA does not authorize a purchaser to use a sales contract, in which the parties plan for their allocation of tax payments, as a defense *against the tax collector* in a contested case involving the purchaser’s own liability for use tax. 35 ILCS 105/10; *see United Airlines, Inc. v. Johnson*, 84 Ill. 2d 446, 454, 419 N.E.2d 899, 903 (1981) (“The mere fact that United contracted to pay Shell's gross income tax liability does not entitle United to an exemption from the Illinois use tax any more than if United would have contracted to pay any other of Shell's direct tax obligations or overhead charges.”).

Moreover, the invoice itself undercuts Taxpayer’s testimony that the purchase price of the bracelet was intended to include whatever amount was required to satisfy any sales tax due on that transaction. The invoice bears a stamp that provides: “MERCHANDISE SHIPPED OUT OF STATE [-] NO FLORIDA SALES TAX CHARGED[.]” Department Ex. 3, p. 2. If Taxpayer intended that his purchase price would include the payment of sales tax, his receipt of that invoice certainly gave him notice that the retailer did not pay any such taxes to the State of Florida. And Taxpayer offered no evidence that, as a condition of his contract, he expected the out-of-state

retailer to file an Illinois return, and to pay whatever Illinois tax would be due, regarding Taxpayer's purchase. Nor would I reasonably expect Taxpayer to make such a claim. After all, under the UTA, those are the purchaser's obligations, not the retailer's. 35 ILCS 105/10; Weber-Stephen, 324 Ill. App. 3d at 898-99, 756 N.E.2d at 325.

In sum, I conclude that Taxpayer has not rebutted the Department's presumptively correct determination that his retail purchase of the bracelet was subject to use tax.

As a final note, I also address Taxpayer's initial response to the Department's introduction of its prima facie case. Taxpayer began by noting that the party identified on the invoice is the Law Offices of John Doe. Tr. p. 7; Department Ex. 3, p. 2. Taxpayer testified that he bought the bracelet through his law office, and pointed out that the law office and he are separate entities — the implied argument being that the Department assessed tax against the wrong person. Tr. p. 7. While Taxpayer's implied argument has a sound legal basis — the UTA imposes tax on the purchaser of tangible personal property at retail, not on other persons who happen to be associated with the purchaser (35 ILCS 105/2 (definitions of "purchaser" and "person"); 35 ILCS 105/3) — the evidence to support it is lacking in this case.

The identification of the purchaser in a particular sale at retail is a question of fact. *E.g.* JB4 Air LLC v. Department of Revenue, 388 Ill. App. 3d 970, 977, 905 N.E.2d 310, 316 (2d Dist. 2009) ("In the present case, ... the identity of the purchaser was undisputed and there was no intermediary. The parties stipulated that JB4 acquired the airplane for \$350,000."). Here, the Department determined that Taxpayer, and not his law office, purchased the bracelet. Department Exs. 1-2. That factual determination is presumed correct. 35 ILCS 105/12; 35 ILCS 120/5. To rebut that particular factual

determination, Taxpayer was obliged to offer documentary evidence, closely associated with books and records, to show that he was *not* the purchaser. Copilevitz, 41 Ill. 2d at 157-58, 242 N.E.2d at 207 Balla, 96 Ill. App. 3d at 296, 421 N.E.2d at 238.

If, in fact, Taxpayer's law office, an LLC, purchased the bracelet for use in Illinois, it presumably has corporate records showing, for example: (1) that it incurred an expense related to that purchase; (2) that it issued a company check, or other means of payment, to pay for the bracelet; (3) how the company used that item of tangible personal property in its business, and (4) how it reported the expense for that property on its books of account and/or tax returns. 805 ILCS 180/1-40 (requiring LLC to keep company records). But no such company records were offered into evidence. *See Arts Club of Chicago v. Department of Revenue*, 334 Ill. App. 3d 235, 246, 777 N.E.2d 700, 709 (1st Dist. 2002) (absence of evidence in the record regarding an issue weighs in the Department's favor because the taxpayer has the burden of proof). Further, and contrary to Taxpayer's testimony and implied argument, it is also entirely possible that the entry on the invoice, reflecting Taxpayer's law office and address, was made by the retailer because that was the address to which the retailer was directed to ship the bracelet, before Taxpayer concededly presented it to his wife, in Illinois, as an anniversary present. *See* Tr. p. 10.

In any event, Taxpayer's own, sworn, testimony at hearing acts as an admission that *he* bought the bracelet through his law office and that *he* bought it to use as an anniversary gift for his wife. Tr. pp. 7-10; In re Cook County Treasurer, 166 Ill. App. 3d 373, 379, 519 N.E.2d 1010, 1014 (1st Dist. 1988) ("Contradictory statements of a party constitute substantive evidence against the party of facts stated."); 86 Ill. Admin. Code §

150.305(c) (where a retail purchaser of tangible personal property makes a gift of the property to another, that gift constitutes a taxable use). The evidence is not sufficient to show that Taxpayer's law office was the real purchaser and actual user of the bracelet in Illinois. Thus, Taxpayer has not rebutted the Department's presumptively correct determination that Taxpayer purchased the bracelet, at retail, for use in Illinois. Department Ex. 1; Tr. pp. 7-10; 35 ILCS 105/12; 35 ILCS 120/5.

Conclusion:

I recommend that the Director finalize the Department's determination of tax and penalties due, with interest to accrue pursuant to statute.

March 3, 2010
Date

John E. White, Administrative Law Judge