UT 10-05
Tax Type: **Use Tax**
Issue: **Rolling Stock (Vehicle Used Interstate For Hire)**
Use Tax On Aircraft Purchase

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

THE DEPARTMENT OF REVENUE	)	**No.:**
OF THE STATE OF ILLINOIS	)	**IBT No.:**
	)	**NTL No.:**
v.	)	
	)	
ABC, LLC,	)	**Julie-April Montgomery**
Taxpayer.	)	**Administrative Law Judge**

RECOMMENDATION FOR DISPOSITION

Appearances: John Doe, on behalf of ABC, LLC; John D. Alshuler, Special Assistant Attorney General, on behalf of the Department of Revenue of the State of Illinois.

Synopsis:

On May 30, 2008, the Illinois Department of Revenue ("Department") issued a Notice of Tax Liability ("NTL") to ABC, LLC ("Taxpayer") that assessed use tax for an airplane purchased by Taxpayer for which no sales or use tax had been paid elsewhere. Taxpayer protested the NTL contending that the aircraft purchased was exempt because it constituted rolling stock for use in interstate commerce exempt from tax pursuant to 35 ILCS 105/3-55(b).

The Parties agreed that the sole issue to be decided is whether Taxpayer's purchase of the aircraft was exempt under the Illinois Use Tax Act (35 ILCS 105/1 *et seq.*). May 11, 2009 Order. An evidentiary hearing was held at which Taxpayer presented documentary and testimonial evidence. Subsequent to the hearing, the Parties filed briefs[1] in lieu of closing arguments.

[1] Taxpayer's Post-Hearing Brief is identified as "TP Br" and the Department's Reply Brief is identified as "Dept. Br."

Following a review of the testimony and the evidence, it is recommended that the NTL be finalized. In support thereof, are the following "Findings of Fact" and "Conclusions of Law."

Findings of Fact:

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, was established by the admission into evidence of the "Notice of Tax Liability" reflecting use tax of $150,500, a late payment penalty of $30,100 and interest of $29,760 through May 30, 2008.[2] Dept. Gr. Ex. No. 1; Tr. pp. 8-9.
2. Taxpayer purchased a Hawker Siddeley HS 125 Series 700A ("Aircraft") on February 11, 2005. TP Ex. No. 1 (Bill of Sale); Tr. pp. 11, 15.
3. Taxpayer leased the Aircraft to XYZ Group, LLC ("Jet") for an initial term of twelve months. TP Ex. No. 2 (Aircraft Lease/Management Agreement, par. 3.3); Tr. pp. 7, 11, 15-16.
4. The Aircraft was "positioned at Chicago/Aurora Municipal Airport…or at a similar facility located in the same area." TP Ex. No. 2, par. 3.1; Tr. p.11.
5. Taxpayer placed the Aircraft "under exclusive management authority and usage rights of XYZ." Tr. p. 23; TP Ex. No. 2.
6. Jet utilized the Aircraft to provide both charter flights and flights for Taxpayer. TP Ex. Nos. 3 (Journey Log Record), 4 (ABC: Charter Use Hours - February 11, 2005 – December 31, 2005); Tr. pp. 11-12, 18.
7. Jet used the Aircraft in interstate commerce. TP Ex. Nos. 3-4.

Conclusions of Law:

In Illinois, the Use Tax Act ("UTA") (35 ILCS 105/1 *et seq.*), imposes a tax upon the privilege of using in Illinois tangible personal property purchased at retail from a retailer. 35 ILCS

[2] The "SC-10-K Audit Correction and/or Determination of Tax Due" was also admitted into evidence by the Department.

105/3. Section 12 of the UTA incorporates by reference section 4 of the Retailers' Occupation Tax Act ("ROTA") (35 ILCS 120/1 *et seq.*), which provides that a certified copy of the NTL issued by the Department is *prima facie* correct and is *prima facie* evidence of the correctness of the amount of tax due. 35 ILCS 105/12; 120/4. Once the Department has established its *prima facie* case by submitting the certified copy of the NTL into evidence, the burden shifts to the taxpayer to overcome the presumption of validity attached to the established *prima facie* case. Clark Oil & Refining v. Johnson, 154 Ill. App. 3d 773, 783 (1st Dist. 1987).

In order to overcome the presumption of validity attached to the NTL, the taxpayer must produce competent evidence, identified with its books and records showing that the NTL is incorrect. Copilevitz v. Department of Revenue, 41 Ill. 2d 154 (1968). Testimony alone is not enough. Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill. App. 3d 203 (1st Dist. 1991). Documentary proof is required to prevail against an assessment of tax by the Department. Sprague v. Johnson, 195 Ill. App. 3d 798 (4th Dist. 1990).

In addition, "when a taxpayer claims that he is exempt from a particular tax … the burden of proof is on the taxpayer." Balla v. Department of Revenue, 96 Ill. App. 3d 293, 296 (1st Dist. 1981) (*citing* Telco Leasing, Inc. v. Allphin, 63 Ill. 2d 305 (1976); Bodine Electric Co. v. Allphin, 81 Ill. 2d 502 (1980)). To prove its case, a taxpayer must present more than just testimony that denies the Department's determination. Sprague, *supra* at 804. Rather, the taxpayer must present sufficient documentary evidence to support its claim. *Id.*

It is well established in Illinois that there is a presumption against exemption and therefore, "exemptions are to be strictly construed" with any doubts concerning the applicability of an exemption "resolved in favor of taxation." Van's Material Co. Inc. v. Department of Revenue, 131 Ill. 2d 196 (1989). The taxpayer bears the burden of proving by "clear and convincing" evidence

that the exemption applies. Evangelical Hospitals Corp. v. Department of Revenue, 223 Ill. App. 3d 225 (2nd Dist. 1991).

The "rolling stock" exemption of the UTA states:

> Section 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: …
>
> > (b) The use, in this State, of tangible personal property by an interstate carrier for hire as rolling stock moving in interstate commerce or by lessors under a lease of one year or longer executed or in effect at the time of purchase of tangible personal property by interstate carriers for-hire for use as rolling stock moving in interstate commerce as long as so used by interstate carriers for-hire. 35 ILCS 105/3-55(b).

Department regulations provide that "the same principles apply for Use Tax purposes" as those stated in Section 150.310 of the Retailers' Occupation Tax ("ROT") regulations. 86 Ill. Admin. Code, section 1530.310(a) (2). The ROT regulations state that the rolling stock "exemption applies to vehicles used by an interstate carrier for hire." 86 Ill. Admin. Code, sec. 130.340(d). These same ROT regulations further provide:

> When the rolling stock exemption may be properly claimed, the purchaser should give the seller a certification that the purchaser is an interstate carrier for hire, and that the purchaser is purchasing the property for use as rolling stock moving in interstate commerce. If the purchaser is a carrier, the purchaser must include its Interstate Commerce Commission Certificate of Authority number or must certify that it is a type of interstate carrier for hire (such as an interstate carrier of agricultural commodities for hire) that is not required by law to have an Interstate Commerce Commission Certificate of Authority. In the latter event, the carrier must include its Illinois Commerce Commission Certificate of Registration number indicating that it is recognized by the Illinois Commerce Commission as an interstate carrier for hire. If the carrier is a type that is subject to regulation by some Federal Government regulatory agency other than the Interstate Commerce Commission, the carrier must include its registration number from such other Federal Government regulatory agency in the certification claiming the benefit of the

> rolling stock exemption. If the purchaser is a long term lessor (under a lease of one year or more in duration), the purchaser must give the seller of the property a certification to that effect, similarly identifying the lessee interstate carrier for hire. The giving of a certification does not preclude the Department from going behind it and disregarding it if, in examining the purchaser's records or activities, the Department finds that the certification was not true as to some fact or facts that show that the purchase was taxable and should not have been certified as being tax exempt. The Department reserves the right to require a copy of the carrier's Interstate Commerce Commission or other Federal Government regulatory agency Certificate of Authority or Illinois Commerce Commission Certificate of Registration (or as much of the certificate as the Department deems adequate to verify that the carrier is an interstate carrier for hire) to be provide whenever the Department deems that to be necessary. 86 Ill. Admin Code, sec. 130.340(g).

At hearing, the Department introduced the NTL under the certificate of the Director. Dept. Gr. Ex. No. 1; Tr. p. 9. This exhibit, without more, constitutes *prima facie* proof of both the correctness of the amount of tax due and that Taxpayer is not entitled to an exemption. *See* Quincy Trading Post v. Department of Revenue, 12 Ill. App. 3d 725, 729-30 (4th Dist. 1973).

The parties agree that the sole issue to be determined is whether the Aircraft qualifies for the rolling stock exemption.

Taxpayer argues that it is entitled to the rolling stock exemption because "[t]he aircraft was under lease … for longer than one year and was used by interstate carriers for hire in interstate commerce on a regular and frequent basis." TP Br. p. 2.

The Department's responds that while it does not contest a lease between Taxpayer and Jet, nor that the Aircraft was used in interstate commerce, the Department doubts Taxpayer has provided sufficient documentation "to support that the Aircraft was leased to an 'interstate carrier for hire'." Dept. Br. p. 3. The Department therefore contends that the Aircraft does not qualify for

the rolling stock exemption inasmuch as the lease of the Aircraft was not shown to have been to an interstate carrier for hire. *Id.* at 4.

To qualify for the rolling stock exemption, Taxpayer or the lessee leasing the Aircraft from Taxpayer must be considered an interstate carrier for hire. 35 ILCS 105/3-55(b). For the Taxpayer or its lessee (Jet)[3] to be considered an interstate carrier for hire, Taxpayer or its lessee must possess an "Interstate Commerce Commission Certificate of Authority number;" an "Illinois Commerce Commission registration number indicating that it is recognized by the Illinois Commerce Commission as an interstate carrier for hire;" or "[i]f the carrier is a type that is subject to regulation by some Federal Government regulatory agency other than the Interstate Commerce Commission," a registration number from such other Federal Government regulatory agency." 86 Ill. Admin. Code, sec. 130.340(g). *See also* Instructions to the Illinois Department of Revenue Form RUT-7 "Rolling Stock Certification" which is to be completed by one claiming the rolling stock exemption. Taxpayer produced no such certificates or other official government documents that contained a registration number obtained by Taxpayer, Jet or Taxpayer's other lessees of the Aircraft to indicate that they were interstate carriers for hire. In addition, no evidence was presented to show Taxpayer had filed the Department's RUT-7 Rolling Stock Certification.

Taxpayer alleges Jet and other lessees of the Aircraft are interstate carriers for hire that are all "Part 135 Operators." TP Br. p. 2; Tr. pp. 15, 23, 27, 29, 36-37. The Department, in its brief states that it "accept[s] that persons authorized by the Federal Aviation Authority as F[ederal]A[viation] R[egulations]135 Operators/Carriers are interstate carriers for hire" (Dept. Br. p. 3) but notes that pursuant to a Federal Aviation Administration publication, such operators/carriers must be properly certified:

[3] Taxpayer submitted evidence of subsequent leasing of the Aircraft to others after Jet. These others were XXXX and XXXXX Aviation Group. TP Ex. Nos. 6 ("Private Flight Group, LLC Aircraft Flight Log and Load Manifest"), 7 (XXXXX Aviation records of flight hours and revenues), 9 (Private Flight Group invoices); Tr. pp. 26-36, 44.

> Under Title 49 of the United States Code …, anyone who wants to provide air transportation service must first obtain two separate authorizations from the Department of Transportation: "safety" authority in the form of an Air Carrier Certificate and Operations Specifications from the Federal Aviation Administration (FAA), and "economic" authority from the Office of the Secretary of Transportation (the Department) in the form of a certificate for interstate or foreign passenger and/or cargo authority issued under section 41102 of the Statute.
>
> Certificates may authorize either scheduled service or charter-only service. A certificate authorizing interstate air transportation may be issued after a finding by the Department that the applicant is "fit, willing, and able" to perform the proposed service. Information Packet on "How To Become A Certified Air Carrier", prepared by: Air Carrier Fitness Division, Office of the Secretary, U.S. Department of Transportation, May 2005, p. 3.

Again, Taxpayer presented no such certificates for itself or any of its lessees of the Aircraft at the hearing.

Taxpayer's lack of documentary evidence that substantiates an interstate carrier for hire utilized the Aircraft means Taxpayer neither sustained its burden to rebut the Department's *prima facie* case nor proved entitlement to the rolling stock exemption. Hence, Taxpayer has not met the statutory requirements of the UTA to establish its entitlement to the rolling stock exemption.

Conclusion:

WHEREFORE, for the reasons stated above, it is recommended that the NTL be finalized as issued with interest to accrue, pursuant to statute.

Julie-April Montgomery
Administrative Law Judge

December 3, 2009