

UT 10-11
Tax Type: Use Tax
Issue: Use Tax on Aircraft Purchase

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

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

v.

**JOHN DOE,
Taxpayer**

**No. 10-ST-0000
Account ID
Letter ID
Period 6/24/05**

**Ted Sherrod
Administrative Law Judge**

RECOMMENDATION FOR DISPOSITION

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

Synopsis:

This matter is before this administrative tribunal as the result of a timely protest by John Doe (“taxpayer”) to the Department’s Notice of Tax Liability Letter ID number XXXXX which assessed use tax regarding his purchase of an aircraft that was used in Illinois. The parties have indicated that the issue to be determined in this case is whether this tax was properly assessed.

A hearing regarding this matter was held on August 16, 2010. At the hearing, the taxpayer and three other witnesses testified on behalf of the taxpayer and both the Department and the taxpayer offered copies of books, records and other documents including copies of records maintained by the United States Federal Aviation Authority.

I have reviewed this evidence, and I am including in this recommendation findings of fact and conclusions of law that are based upon this review. After a review of the record, I recommend that this matter be resolved in favor of the taxpayer.

Findings of Fact:

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, was established by admitting, under the Certificate of the Director of the Department of Revenue, the Department's SC-10-K Audit Correction and/or Determination of Tax Due covering the period 6/24/05 showing a use tax deficiency and penalties in the aggregate amount of \$535. Department Exhibit ("Department Ex.") 1.
2. John Doe ("taxpayer") purchased a Corben Bay Ace E aircraft, serial no. XXXX, United States Registration number XXXX (the "aircraft") on June 13, 2003. Department Ex. 3. The Bill of Sale evidencing the sale indicates that the transfer of title occurred on June 13, 2003 and that the seller was Smith. *Id.* Smith is indicated in the Bill of Sale to be an individual owner of the aircraft. *Id.*
3. The taxpayer registered as owner of the aircraft and recorded the conveyance of the aircraft from Smith to the taxpayer with the Federal Aviation Administration ("FAA") by filing an Aircraft Registration Application and Aircraft Bill of Sale with the FAA on October 19, 2005. Department Ex. 3, 4. The Aircraft Bill of Sale indicates John Doe as the purchaser of the aircraft and shows as his residential address "Box, Anywhere, IL." Department Ex. 3. The Bill of Sale further states that the aircraft is "Hangered at Anywhere Airport" which is located in Illinois. Hearing Transcript ("Tr.") pp. 9, 10, 52, 53; Department Ex. 3.

4. Subsequent to the taxpayer's purchase of the aircraft, the aircraft was flown to Illinois where it underwent an extensive repair involving the removal and replacement of the aircraft's engine. Tr. p. 29. The aircraft was kept in Illinois during the time this repair was being undertaken. Tr. pp. 29, 30.
5. The Department's auditor determined that a taxable use of the aircraft in Illinois occurred during June 2005. Department Ex. 1.

Conclusions of Law:

The issue in this case is whether the taxpayer's purchase of an aircraft on June 13, 2003 and subsequent use of this aircraft in Illinois constituted a taxable use of this aircraft in this state. 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 has incorporated into the UTA certain provisions of the Retailers' Occupation Tax Act ("ROTA"). 35 **ILCS** 105/12. Among them is section 4 of the ROTA, which provides that the Department's determination of tax due constitutes *prima facie* proof of the tax due in the amount determined by the Department. 35 **ILCS** 120/4. In the instant case, the Department established its *prima facie* case when it introduced into the record the Department's Exhibit 1, consisting of the auditor's determination of tax due. Tr. p. 7; Department Ex. 1. This exhibit, introduced under the certificate of the Director pursuant to 35 **ILCS** 120/4, constitutes *prima facie* proof that the taxpayer owes Illinois use tax in the amount determined by the Department. 35 **ILCS** 105/12; 35 **ILCS** 120/4.

The presumption of correctness that attaches to the Department's *prima facie* case, moreover, extends to all elements of taxability. Branson v. Department of Revenue,

168 Ill. 2d 247 (1995) (Department’s introduction of Notice of Penalty Liability establishes *prima facie* proof that taxpayer acted with required mental state); Soho Club, Inc. v. Department of Revenue, 269 Ill. App. 3d 220 (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). Here, therefore, the Department’s Exhibit 1 constitutes *prima facie* proof that the taxpayer purchased the aircraft at retail from a retailer and is, therefore, subject to use tax on this purchase. *Id.* The Department’s *prima facie* case is overcome, and the burden shifts to the Department to prove its case, only after the presentation of documentary evidence that is consistent, probable, and identified with the taxpayer’s books and records showing that the Department’s determination was not correct. Copilevitz v. Department of Revenue, 41 Ill. 2d 154 (1968).

While Illinois imposes use tax on the privilege of using tangible personal property purchased at retail from a retailer as noted above, an important exception to the use tax is provided when the purchase is made from an individual or entity that only engages in the isolated or occasional sale of such property. This exception can be discerned from the legislature’s terminology used in the UTA. First, the legislature has defined a purchase at retail giving rise to a taxable transaction as the purchase of tangible personal property “at retail from a retailer ...[.]” 35 ILCS 105/3. A “retailer” is defined as “[A] person who holds himself or herself out as being engaged (or who habitually engages) in selling tangible personal property at retail ...[.]” *Id.* However, significantly, the statute goes on to provide that “[T]he isolated or occasional sale of tangible personal property at retail by a person who does not hold himself out as being engaged (or who does not habitually

engage) in selling such tangible personal property at retail ...does not make such a person a retailer hereunder.” 35 **ILCS** 105/2. Accordingly, to determine whether the UTA renders taxable the use at issue in this case, it must first be ascertained whether the record supports a finding that the aircraft was acquired from a retailer as defined in section 105/2 of the UTA, or alternatively, whether it was purchased in a non-retail transaction.

The record indicates that the taxpayer acquired the aircraft at issue on June 13, 2003. Department Ex. 3. This transaction is documented by a Bill of Sale executed by Smith (“Smith”), the aircraft’s seller, and recorded with the FAA on October 19, 2005. *Id.* While the Bill of Sale is an out-of-court declarant’s written statement offered to prove the truth of the matters asserted therein and is, therefore, hearsay evidence, this document was introduced into the record by the Department under the certificate of the Director pursuant to the statutory exception to the hearsay rule for “books, papers, records ... [or] memoranda of the Department, or parts thereof ...” which are allowed into evidence pursuant to 35 **ILCS** 120/8 (incorporated into the UTA by reference at 35 **ILCS** 105/12). See also 86 Ill. Admin. Code, ch. I, section 200.155(d) (“Records of or kept by the Department may be proven at hearing by a reproduced copy of such record under the Certificate of the Director.”). The Bill of Sale indicates that the aircraft was acquired on June 13, 2003 from Smith, an “individual” and contains no Dealer Certificate number or other indicia of a retail sale transaction.

There is no evidence in the Bill of Sale or anywhere else in the record that Smith, the individual designated as the “seller” in the Bill of Sale was habitually engaged in the sale of aircraft, held himself out as being engaged in this business or was in any way a “retailer” as this term is defined in Section 2 of the UTA (35 **ILCS** 105/2). Rather, the

Bill of Sale contained in the record evidences only a single, isolated sale transaction between two individuals, with the seller being an individual that is not identified in the document as a retailer. Department Ex. 3. The record before me contains documentary evidence of only one sale by Smith, the aircraft seller, namely the sale of the aircraft at issue and therefore supports the conclusion that the seller was not habitually engaged in aircraft sales. Accordingly, absent rebuttal proof, this documentary evidence indicates that this case involves a non-taxable occasional sale rather than a sale at retail. Consequently, it supports a finding that the UTA does not cover the aircraft sale at issue because the aircraft was not purchased from a retailer. Trans-Air Corporation v. Department of Revenue, 86 Ill. App. 3d 750, 754 (2nd Dist. 1980) (“Since it appears that the retailer of the property in question ... was not a retailer ... the use tax does not reach this property because it was not ‘purchased at retail.’ ”). I conclude that this finding, which is based upon documentary evidence contained in the record, rebuts the Department’s *prima facie* case.

Once the Department’s *prima facie* case has been rebutted, the burden shifts to the Department to prove its claims regarding the Department’s theory of the case by competent evidence. Novicki v. Department of Finance, 373 Ill. 342 (1940). However, the Department has submitted no evidence of any kind to show that the transaction giving rise to the use tax it assessed was a taxable retail sale and has provided no basis for its conclusion that Smith was a “retailer” as defined by section 2 of the UTA. Accordingly, I find that the Department has not met its required burden necessary to sustain its determination that the aircraft at issue in this case was purchased at retail from a retailer.

In addition to the use tax imposed by section 3 of the UTA, 35 **ILCS** 105/3, Illinois also imposes an Aircraft Use Tax pursuant to 35 **ILCS** 157/10-1 *et seq.* Unlike the use tax imposed by the UTA, the Aircraft Use Tax is imposed upon the use in Illinois of any aircraft, whether or not purchased at retail. See 86 Ill. Admin. Code, ch. I, section 152.101; Illinois Department of Revenue Information Bulletin FY 2004-06 issued 7/1/03. However, by regulation, the Aircraft Use Tax does not cover the transaction at issue in this case because it expressly provides that an aircraft that is acquired by non-retail purchase outside of Illinois before June 30, 2003 that is brought into Illinois after that date is not subject to this tax. See 86 Ill. Admin. Code, ch. I, section 152.101(a). The record in the instant case indicates that the aircraft at issue was purchased prior to June 30, 2003, on June 13, 2003 and that it was brought into Illinois in 2005. Tr. pp. 29, 30; Department Ex. 1, 3. Accordingly, the aircraft purchase at issue is not subject to taxation pursuant to the state's Aircraft Use Tax.

WHEREFORE, for the reasons stated above, it is my recommendation that the Notice of Tax Liability Letter ID number XXXXX be cancelled.

Ted Sherrod
Administrative Law Judge

Date: September 23, 2010