

UT 15-05

Tax Type: Use Tax

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.

**ABC BUSINESS LLC,
Taxpayer**

**No. XXXX
Account ID XXXX
Letter ID XXXX
XXXX
Period 4/06-12/11**

**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, on behalf of ABC Business LLC, *pro se*.

Synopsis:

This matter is before this administrative tribunal as the result of a timely protest by ABC BUSINESS LLC (“taxpayer”) to Notices of Tax Liability issued by the Illinois Department of Revenue (“Department”) for Illinois use tax liabilities for the period April 2006 through December 2011. The issue in this matter is whether the taxpayer, located in another state, is liable under the Illinois Use Tax Act for tax on sales of computer equipment to Illinois customers during the aforementioned period. An evidentiary hearing was held in this matter on September 23, 2014 during which John Doe, the President of the taxpayer, testified on behalf of the taxpayer, Yvonne Schwartz, an audit supervisor with the Department, testified on behalf of the Department, and both parties introduced documentary evidence into the record. Following a

review of the testimony and the documents of record, it is recommended that the Notices of Tax Liability at issue be revised to exclude receipts from transactions evidenced by invoices indicating that the sales they cover were not taxable in Illinois and, as so modified, be finalized. In support of this recommendation, the following findings of fact and conclusions of law are made.

Findings of Fact:

1. The ABC BUSINESS LLC (“taxpayer”) is engaged in the business of selling and servicing computer equipment. Tr. pp. 6, 32; Department Exhibit (“Ex.”) 2, 5. The taxpayer conducted business operations in another state from its computer store located in that state, during the period April, 2006 through December, 2011, the audit period in controversy. Department Ex. 1, 2.
2. During the audit period, the taxpayer made sales and deliveries of computer equipment to Illinois customers at its computer store in another state. Tr. pp. 14-23. The taxpayer also delivered computer equipment to Illinois customers in Illinois using vehicles provided to it by its owners. Department Ex. 5.
3. The taxpayer introduced invoices at the hearing to show that another state sales tax was charged and collected on several transactions involving the delivery of computer equipment to Illinois residents in that state. Tr. p. 20; Taxpayer’s Ex. 2, 3.
4. Pursuant to statutory authority, the auditor caused to be issued two separate Audit Correction and/or Determination of Tax Due (SC-10-K) forms that served as the basis for Notices of Tax Liability issued the taxpayer for \$1,767.70 inclusive of tax, penalty and interest. Tr. pp. 7-12; Department Ex. 1-4.

5. The introduction of the Department's corrected returns and Notices of Tax Liability into evidence established the Department's *prima facie* case.

Conclusions of Law:

Background

The tax at issue in this case is the Use Tax Act ("UTA"), as prescribed at 35 **ILCS** 105/1 *et. seq.* The 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 statute provides that a taxable retailer is any person engaged in the business of making sales at retail “having ... any agent or other representative operating within this State under the authority of the retailer [.]” (Emphasis added) 35 **ILCS** 105/2. The aforementioned statute does not define the term “operating” as used therein. However, given its ordinary meaning, this term has been held to include delivering products to a customer by a retailer. Brown’s Furniture, Inc. v. Wagner, 171 Ill. 2d 410, 419 (1996) (“When ... Brown’s Furniture made deliveries in Illinois [from Missouri] during the 10-month audit period, they were ‘operating’ within the State as the term is ordinarily understood[.] Thus, Brown’s Furniture’s deliveries in Illinois bring it within the ambit of the Act[.]”).

The UTA requires that use tax be collected by a retailer maintaining a place of business in the state by having an agent or other representative operating in this state. Compare 35 **ILCS** 105/2(1) (defining a retailer “maintaining a place of business in this State” to include a retailer having “an agent or other representative operating in this State”) and 35 **ILCS** 105/3-45 (requiring any retailer “maintaining a place of business in this State” to collect use tax).

In this case the taxpayer, a retailer of computer equipment registered to do business in Illinois, regularly delivered computer equipment it sold to Illinois customers in Illinois in

vehicles provided to it for use in making such deliveries by its owners. Department Ex. 5. The Department's records identify 28 such transactions during the audit period in controversy. *Id.*

In those cases in which the taxpayer delivered computer equipment to Illinois customers in Illinois, the taxpayer was operating directly in Illinois. By delivering the computer equipment on its own vehicles to its customers in Illinois, the taxpayer was operating in Illinois as a retailer within the meaning of the UTA as the term "operating" is defined in Brown's Furniture, *supra*, and so was within the ambit of 35 ILCS 105/3-45 requiring retailers maintaining a place of business in this manner to collect use tax. Consequently, the taxpayer had a statutory obligation to collect Illinois use tax on sales of computer equipment delivered to Illinois customers in Illinois pursuant to 35 ILCS 105/3-45.

Burden of Proof

The UTA makes numerous sections of the Retailers' Occupation Tax Act ("ROTA") 35 ILCS 120/1 *et seq.*, applicable to the UTA including sections 120/4 and 120/8. 35 ILCS 105/12. Pursuant to these ROTA measures, the admission into evidence of the records of the Department under the certification of the Director at a hearing before the Department or in any legal proceeding establishes the Department's *prima facie* case. 35 ILCS 120/4; 35 ILCS 120/8. See also Copilevitz v. Department of Revenue, 41 Ill. 2d 154 (1968); Central Furniture Mart v. Johnson, 157 Ill. App. 3rd 907 (1st Dist. 1987). Thus, when the Department introduced its corrected returns and the Notices of Tax Liability issued in this case under the certificate of the Director by having them admitted into the record as exhibits, the Department's *prima facie* case was established.

To overcome the Department's *prima facie* case the taxpayer must present consistent, probable evidence identified with its books and records Copilevitz, *supra*; Central Furniture

Mart, supra. Testimony alone is not enough. Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill. App. 3d 203, 217 (1st Dist. 1991).

Taxpayer's Contentions

The audit in controversy identified 28 invoices the Department claims identified transactions involving deliveries to Illinois customers in Illinois on which use tax was not collected. Department Ex. 5. During the hearing in this case, the taxpayer contested only 15 of the invoices that form the basis of the Department's assessment at issue in this case. Taxpayer's Ex. 3. Accordingly, the taxpayer, by admitting liability on the remaining transactions assessed, has conceded that it had nexus with Illinois, was operating in this state and was required to collect tax on deliveries to Illinois customers in Illinois.

With respect to the transactions reflected on the invoices the taxpayer is contesting, the taxpayer contends that it has submitted sufficient documentary evidence to prove that these invoices relate to transactions where computer equipment was delivered to Illinois customers in another state. Tr. pp. 25, 26. During the hearing, the taxpayer presented 15 invoices which it contends, on their face, indicate that the transactions they cover involved the delivery of computer equipment to Illinois customers in another state. *Id.*; Taxpayer's Ex. 1-3. These invoices are summarized below.

<u>INVOICE # AND DATE</u>	<u>AMOUNT</u>	<u>ANOTHER STATE TAX</u> <u>COLLECTED</u>
#XXXX – 9/22/09	\$XXXX	No
#XXXX – 1/21/10	\$XXXX	No
#XXXX - 1/8/10	\$XXXX	No

#XXXX - 1/15/10	\$XXXX	No
#XXXX - 1/04/09	\$XXXX	No
#XXXX - 8/9/08	\$XXXX	No
#XXXX - 6/2/08	\$XXXX	No
#XXXX - 3/27/07	\$XXXX	No
#XXXX - 1/12/07	\$XXXX	No
#XXXX - 1/8/07	\$XXXX	No
#XXXX - 12/8/09	\$XXXX	No
#XXXX - 11/7/06	\$XXXX	Yes
#XXXX - 2/13/08	\$XXXX	Yes
#XXXX - 7/31/09	\$XXXX	Yes
#XXXX - 12/18/09	\$XXXX	Yes

Sufficiency of Proof - Invoices Containing No Evidence Another state Tax Was Collected

Section 7 of the ROTA, which is incorporated by reference into the UTA pursuant to section 105/12 of the UTA, 35 ILCS 105/12 (“Section 7”), provides, in pertinent part, as follows:

§ 7. Every person engaged in the business of selling tangible personal property at retail in this State shall keep records and books of all sales of tangible personal property, together with invoices, bills of lading, sales records, copies of bills of sale, inventories prepared as of December 31 of each year or otherwise annually as has been the custom in the specific trade and other pertinent papers and documents.

To support deductions made on the tax return form, or authorized under this Act, on account of receipts from isolated or occasional sales of tangible personal property, on account of receipts from sales to governmental bodies or other exempted types of purchasers, on account of receipts from sales of tangible personal property in interstate commerce, and on account of receipts

from any other kind of transaction that is not taxable under this Act, entries in any books, records or other pertinent papers or documents of the taxpayer in relation thereto shall be in detail sufficient to show the name and address of the taxpayer's customer in each such transaction, the character of every such transaction, the date of every such transaction, the amount of receipts realized from every such transaction and such other information as may be necessary to establish the non-taxable character of such transaction under this Act.

35 ILCS 120/7

Even though the taxpayer has presented documentary evidence, i.e. invoices, which is a type of evidence required to rebut the Department's *prima facie* case, I cannot give the taxpayer credit for all of the invoices that have been presented. This is true because invoices numbered XXXX, XXXX, XXXX, XXXX, XXXX, XXXX, XXXX, XXXX, XXXX, XXXX and XXXX are, on their face, fatally defective when measured against the criteria necessary to document non-taxable transactions enumerated in section 7. Section 7 of the ROTA, which is incorporated into the UTA by section 12 of the UTA, 35 ILCS 105/12, mandates, *inter alia*, that the documentation required to be kept by a retailer evidencing non-taxable sales “shall be in detail sufficient to show the name and address of the taxpayer's customer in each such transaction, the date of every such transaction, the amount of receipts realized from every such transaction and such other information as may be necessary to establish the non-taxable character of such transaction under this Act.” (Emphasis added) Although the invoices referenced above show sales to Illinois customers, the dates of the transactions, the amount of receipts from such sales, the methods of payment and information concerning shipping charges borne by the customer, important and necessary information is missing from every one of them. Specifically, none of these invoices contain sufficient information to “establish the non-taxable character” of the sales they identify as intrastate sales in another state as required by Section 7.

In particular, none of these invoices contains any definitive indication that the items being sold were delivered to purchasers in another state. Such indicia might have included the

imposition of another state sales tax or an explanation why tax was not due even though delivery was made in that state.

All that the aforementioned invoices conclusively show is that a sale of merchandise took place and that the buyer had an address in Illinois. These invoices contain no averments of any kind regarding whether or not in-state delivery was made or intended. While the taxpayer argued during the hearing that these invoices are not taxable because they all show that payment for the computer equipment that was sold was made in another state (tr. pp. 14-16, 24, 25), the only evidence that computer equipment was never delivered to Illinois whenever payment was made in another state is testimony given at the hearing on the taxpayer's behalf. This testimony alone is insufficient, as a matter of law, to rebut the presumption of taxable sales that attaches to the Department's notices of tax liability. Mel-Park Drugs, *supra*.

Sufficiency of Proof – Invoices Containing Evidence Another State Tax Was Collected

Section 423.15 of the another state Code provides in part as follows:

All sales of products, except those sales enumerated in section 423.16, shall be sourced according to this section by sellers obligated to collect another state sales and use tax. The sourcing rules described in this section apply to sales of tangible personal property, digital goods, and all services other than telecommunication services. This section only applies to determine a seller's obligation to pay or collect and remit a sales or use tax with respect to the seller's sale of a product. This section does not affect the obligation of a purchaser or lessee to remit tax on the use of the product to the taxing jurisdictions in which the use occurs. A seller's obligation to collect another state sales tax or use tax only occurs if the sale is sourced to this state. Whether another state sales tax applies to a sale sourced to another state shall be determined based on the location at which the sale is consummated by delivery or, in the case of a service, where the first use of the service occurs.

1. Sales, excluding leases or rentals, of products shall be sourced as follows:
 - a) When the product is received by the purchaser at a business location of the seller, the sale is sourced to that business location.
 - b) When the product is not received by the purchaser at a business location of the seller, the sale is sourced to the location where receipt by the purchaser or the purchaser's donee, designated as such by the purchaser, occurs,

including the location indicated by instructions for delivery by the purchaser or donee, known to the seller.
Another state Code §423.15

Pursuant to the foregoing statutory provision, retailers doing business in another state are required to collect and remit another state tax on sales of tangible personal property when such property is received by a customer in that state. Invoices number XXXX, XXXX, XXXX and XXXX contain, in addition to the name and address of the purchaser, and the date and the amount of the transaction, an indication that another state sales tax was collected on the computer equipment sales these invoices document. Taxpayer's Ex. 2, 3. Under another state law, another state tax would not apply to sales of computer equipment delivered in Illinois because these transactions would be sourced to Illinois pursuant to section 423.15 of the another state Code noted above. Given the statutory framework of the another state sales and use tax law, I find that evidence that another state sales tax was collected as indicated on invoices XXXX, XXXX, XXXX and XXXX noted above is evidence contained on the face of these invoices that the transactions they cover were in-state sales of computer equipment to Illinois customers involving delivery of this equipment to them in another state and were sales that were not subject to Illinois tax. As a consequence of the foregoing, I conclude that invoices XXXX, XXXX, XXXX and XXXX contain "other information necessary to establish the non-taxable character" of the transactions they enumerate as required by section 7 of the ROTA (incorporated by reference into the UTA by 35 **ILCS** 105/12) and therefore constitute sufficient evidence to rebut the Department's *prima facie* case with respect to the transactions these invoices cover.

Once the taxpayer rebuts the Department's *prima facie* case, the burden shifts to the Department to prove its case by a preponderance of the evidence. Novicki v. Department of Finance, 373 Ill. 342 (1940). In rebuttal, the Department has provided no evidence to rebut the

evidence of non-taxable another state in-state deliveries evidenced by invoices XXXX, XXXX, XXXX and XXXX. Consequently, I find that the taxpayer has successfully rebutted the Department's determination regarding the taxability of the transactions covered by these invoices.

CONCLUSION

WHEREFORE, for the reasons stated above, it is my recommendation that the Department's Notices of Tax Liability at issue be modified to abate Illinois use tax assessed upon transactions indicated by the taxpayer's invoices XXXX, XXXX, XXXX and XXXX and, as so modified, be finalized and affirmed.

Ted Sherrod
Administrative Law Judge

Date: April 8, 2015