

UT 01-2

Tax Type: Use Tax

Issue: Occasional Sales – Non-Retail Transactions (Exempt)

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. 00-ST-0000
IBT# 0000-0000
NTL 00 00000000000000

**Ted Sherrod
Administrative Law Judge**

RECOMMENDATION FOR DISPOSITION

Appearances: Lawrence C. Jaynes of Lawrence C. Jaynes & Associates, for John Doe; Marc Muchin, Special Assistant Attorney General, for the Illinois Department of Revenue.

Synopsis:

This matter comes on for hearing pursuant to a timely filed protest of Notice of Tax Liability No. 00 00000000000000 issued to John Doe (hereinafter referred to as “taxpayer”) by the Department of Revenue (“Department”) on November 15, 1999. A pre-trial order was entered on August 23, 2000, in which the parties stated the issue to be decided as “whether, for purposes of applying the exemption from the Illinois Use Tax for occasional sales, the seller is or is not a seller at retail of the aircraft which is the subject matter of this case”. Following the submission of evidence and a review of the record, it is recommended that this matter be decided in favor of the taxpayer. In support of this recommendation, I make 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 Notice of Tax Liability number 0000000000000000 showing a use tax and related tax liabilities. Dept. Ex. 1.
2. On December 28, 1993, Mr. Smith (herein “Smith”) dba ABC Aviation purchased a 1978 Cessna Citation 501 with registration No. 00000 and serial number 000-0000 (herein the “aircraft”) from XYZ Aircraft, Inc. (XYZ). Stip. par. 1.¹
3. On December 28, 1993, a certificate of registration of the title to the aircraft was issued by the Federal Aviation Authority ("FAA") showing XYZ as the owner. Stip. par. 2.
4. On December 28, 1993, title to the aircraft was transferred from XYZ to Smith by a bill of sale. Stip. par. 3; Stip. Doc. 1.
5. On December 28, 1993, a chattel security agreement was executed between Smith as debtor and Bank as secured party with title to the aircraft as security; on April 5, 1996, a release of this chattel security agreement was executed by Smith. Stip. par. 4, 13.
6. On January 24, 1994, the bill of sale transferring title to the aircraft from XYZ to Smith was recorded with the FAA. Stip. par. 5.
7. On January 27, 1994, a certificate of registration of title to the aircraft was issued by the FAA in the name of Smith. Stip. par. 6.
8. In April, 1996, XXX Aircraft, Inc. (“XXX”) was agent of the taxpayer and acted on behalf of the taxpayer in purchasing the aircraft. Stip. par. 7.

¹ The Department and the taxpayer have jointly submitted a stipulation of facts and agree to the truth of the facts set forth therein.

- 9.** On April 2, 1996, Smith and taxpayer through XXX entered into a contract for the sale of the aircraft from Smith to taxpayer; the price of the aircraft indicated in the contract was \$645,000. Stip. par. 8, 9; Stip. Doc. 3.
- 10.** The amount of the wire transfers of funds from taxpayer to Smith to pay for the aircraft was \$653,329.33; the aircraft was sold from Smith to the taxpayer for this amount. Stip. par. 10, 11; Stip. Doc. 7, 8.
- 11.** On April 4, 1996, Smith signed a letter directed to the taxpayer stating Smith "is not engaged in the business of selling aircraft at retail". Stip. par. 12; Stip. Doc. 5.
- 12.** On April 16, 1996, title to the aircraft was transferred from Smith to the taxpayer by bill of sale; on August 15, 1996, this bill of sale was recorded with the FAA and a certificate of registration of title to the aircraft was issued by the FAA showing the taxpayer as the owner. Stip. par. 14, 15, 16; Stip. Doc. 6.
- 13.** Smith is an individual who did business as a sole proprietorship and occasionally used the title "dba ABC Aviation". Stip. par. 17.
- 14.** Smith was never registered as a dealer of aircraft with the state of Wisconsin or the FAA; however the state of Wisconsin Department of Revenue issued seller's permit No. 0000000 to Smith dba ABC Aviation effective on January 9, 1984, which expired on December 31, 1988 for SIC Code 5010-(Whole Trade - motor vehicles and auto parts). Stip. par. 22, 24, 26, 33; Stip. Doc. 5, 11.
- 15.** ABC Aviation, Inc. (FEIN 00-0000000) is a Wisconsin Corporation and was issued a Wisconsin seller's permit required by the state of Wisconsin if a person or entity sells more than \$1,000 of personal property per year. Stip. par. 18, 20, 21, 35; Stip. Doc. 11, 12.

16. ABC Aviation, Inc. possesses an active registration (permit No. 000000) with the state of Wisconsin as a retailer of aircraft. Stip. par. 34.
17. Smith is the sole owner and President of ABC Aviation, Inc.. Stip. par. 19; Stip. Doc. 12, 14.
18. Federal Aviation Title Co. (“FATC”), which is in the business of searching records to determine the title to aircraft, searched the records of the FAA from January 27, 1994 through August 15, 1996 and located no document which transferred to or showed title being held by any person or entity other than XYZ, Smith or the taxpayer; it located no document which transferred to, or showed title being held by ABC Aviation, Inc.. Stip. par. 28, 29, 31, 32; Stip. Doc. 9, 10.
19. The FATC title search dated March 28, 1996 shows title to the aircraft being held by Smith. Stip. par. 30.
20. ABC Aviation, Inc. depreciated the aircraft for federal income tax purposes. Stip. par. 36.
21. ABC Aviation, Inc. registered as the owner of the aircraft with the Wisconsin Bureau of Aeronautics on August 9, 1994. Stip. par. 37.

Conclusions of Law:

The issue in this case is whether the taxpayer's purchase of the aircraft qualifies for the occasional sale exemption set out in statutory provisions of the Illinois Use Tax Act (“UTA”), 35 ILCS 105/1 et seq. Illinois imposes a tax on the privilege of using tangible personal property purchased at retail from a retailer. 35 ILCS 105/3. An exception to this tax is provided when the purchase is made from an individual who only engages in isolated or occasional sales of such property. 35 ILCS 105/2. This exception

is available when the selling individual does not hold himself out as being engaged or does not habitually engage in selling such tangible personal property at retail. *Id.*

The taxpayer argues that the purchase of the aircraft is covered by the above exception to the use tax. The Department has established its *prima facie* case that the taxpayer is subject to the Illinois use tax by submitting the Notice of Tax Liability for Form EDA-95. Section 12 of the UTA (35 ILCS 105/12) incorporates by reference Section 4 of the Retailers' Occupation Tax Act (35 ILCS 120/4) which provides in pertinent part as follows:

As soon as practicable after the return is filed, the Department shall examine such return and shall, if necessary, correct such return according to its best judgment and information...any return so corrected by the Department shall be *prima facie* correct and shall be *prima facie* evidence of the correctness of the amount of tax due, as shown therein.

Proof of such correction by the Department may be made at any hearing before the Department...and shall be *prima facie* proof of the correctness of the amount of tax due, as shown therein.

Pursuant to the foregoing, once proof of the Department's correction of the taxpayer's return is admitted into evidence, the amount of tax and penalty established thereby is deemed *prima facie* true and correct. The Department having established its case, the burden shifted to the taxpayer to overcome it by producing competent evidence identified with its books and records. Masini v. Department of Revenue, 60 Ill. App. 3d 11 (1st Dist. 1978), Copilevitz v. Department of Revenue, 41 Ill. 2d 154 (1968). Even if the taxpayer produces sufficient evidence to overcome the *prima facie* case, a taxpayer claiming to be exempt from tax has the burden of proving by clear and conclusive evidence that it is entitled to such an exemption. Telco Leasing, Inc. v. Allphin, 63 Ill. 2d 305 (1976).

The taxpayer argues that it should not be considered a retail purchaser under Illinois law. In support of this position, the taxpayer has offered evidence and testimony indicating that the taxpayer acquired the aircraft from Smith, and that Smith was not a registered aircraft dealer. The record indicates that on December 28, 1993, Smith d/b/a ABC Aviation purchased an aircraft from XYZ Aircraft, Inc. Stip. par. 1. On this date, the FAA issued a certificate of registration showing that XYZ was the owner of the aircraft and title to the aircraft was transferred from XYZ to Mr. Smith dba ABC Aviation by bill of sale, a copy of which is contained in the record. Stip par. 2, 3; Stip. Doc. 1. Financing to acquire the aircraft was obtained from Bank, in whose favor Smith executed a chattel mortgage agreement on December 28, 1993. Stip. par. 4. On January 24, 1994, the bill of sale transferring title to the aircraft from XYZ to Smith was recorded with the FAA. Stip. par. 5.

On April 2, 1996, XXX Aircraft, Inc., acting as agent for the taxpayer, entered into a contract with Smith for the sale of the aircraft from Smith to the taxpayer. Stip. par. 7, 8. The taxpayer paid Smith \$653,329.33 for the aircraft. Stip. par. 10, 11. The taxpayer wire transferred payment for the aircraft to Smith, and Smith executed a release of the chattel mortgage agreement in favor of Bank, on April 5, 1996. Stip. par. 11, 13; Stip. Doc. 7. On April 16, 1996, the aircraft was transferred from Smith to the taxpayer by bill of sale. Stip. par. 14. The bill of sale was subsequently recorded with the FAA and a copy of the recorded bill of sale is contained in the record. Stip. par. 15; Stip. Doc. 6. A certificate of registration of title to the aircraft, showing the taxpayer as the owner was issued by the FAA on August 15, 1996. Stip. par. 16.

At the request of the taxpayer, The Federal Aviation Title Company (“FATC”) conducted an aircraft title search covering January 27, 1994 through August 15, 1996. Stip. par. 28, 29. The FATC determined that there were no title documents showing that title to the aircraft was held by anyone other than XYZ, Smith or the taxpayer. Stip. par. 31. Moreover, the FATC located no documents showing that title to the aircraft was ever transferred to or held by ABC Aviation, Inc. (hereinafter “Aviation, Inc.”). Stip. par. 32.

In sum, all of the evidence regarding the sale and registration of the aircraft, including copies of the aircraft bills of sale from XYZ to Smith and from Smith to the taxpayer, and the stipulations of fact agreed to by the Department, indicates that Smith acquired the aircraft from XYZ, and held title to the aircraft at all times subsequent to its acquisition until it sold the aircraft to the taxpayer. The record also indicates that Smith was not registered as an aircraft dealer.

The Illinois use tax is imposed “upon the privilege of using in this State tangible personal property purchased at retail from a retailer”. (35 ILCS 105/3). Section 2 of the UTA (35 ILCS 105/2) provides that a person who is only engaged in the “isolated or occasional sale of tangible personal property at retail” and “who does not hold himself out as being engaged (or who does not habitually engage) in selling such tangible personal property at retail” is not a “retailer” for purposes of the UTA. See also 86 Ill. Admin. Code Sec. 150.101. Accordingly, sales by such persons are not subject to the Illinois use tax. Trans-Air Corp. v. Department of Revenue, 86 Ill. App. 3d 750, 752 (2nd Dist. 1980) (“It seems clear from the statutory definitions as amplified by the Department of Revenue’s Rules, that in order for the use tax to apply to the use of a particular piece of tangible personal property, that property must have been purchased at retail from a

retailer”). The evidence summarized above, which is not contested by the Department, indicates that the taxpayer acquired the aircraft from Smith and that Smith was not registered as an aircraft dealer. There is no evidence in the record indicating that Smith was habitually engaged in the sale of aircraft, that he held himself out as being engaged in this business or that he was in any way a “retailer” as this term is defined in Section 2 of the UTA (35 ILCS 105/2). Since it appears from the record that Smith, the seller of the aircraft in question, was not a retailer of aircraft, the use tax does not reach this property because it was not purchased from a retailer. Trans-Air Corp. v. Department of Revenue, *supra*. Accordingly, the record persuasively supports a finding that the taxpayer has overcome the Department’s *prima facie* case and proven by clear and conclusive evidence that it is entitled to the exemption it claims.

Given the evidentiary findings summarized above, there is no question that, without consideration of any other facts, no use tax is due on the taxpayer's purchase of the aircraft. However, the Department points out that the record contained stipulations and documentary evidence establishing that Aviation, Inc., a company owned by Smith, registered as the owner of the aircraft and took depreciation deductions for the aircraft on its 1996 federal income tax return. The Department contends this evidence supports a finding that the purchase of the aircraft, while in form a purchase from Smith was in substance a purchase of the aircraft from Aviation, Inc.. The Department urges this tribunal to reach the conclusion it advocates by "piercing the corporate veil" between Smith and Aviation, Inc., or disregarding the separate existence of Aviation, Inc. apart from Smith and finding that Aviation, Inc. was the alter ego of Smith rather than a separate entity. Tr. pp. 23, 27.

The record in this case clearly supports a finding that Smith dominated and controlled Aviation, Inc. because he was the sole owner and President of this company. However, this showing is not sufficient to warrant “piercing the corporate veil” under criteria enumerated in tax and other cases applying this principle. The mere finding of control by a dominant owner is insufficient, standing alone to pierce the corporate veil. Superior Coal Co. v. Department of Finance, 377 Ill. 282 (1941), Loewenthal Securities Co. v. White Paving Co., 351 Ill. 285 (1933), Dregne v. Five Cent Cab Co., 381 Ill. 594 (1943), Holland v. Joy Candy Mfg. Corp., 14 Ill. App. 2d 531 (1st Dist. 1957), Drewick v. Republic Steel Corp., 97 Ill. App. 2nd 187 (1st Dist. 1967), Walker v. Dominick’s Finer Foods, Inc., 92 Ill. App. 3rd 645 (1st Dist. 1980), Kelsey Axle & Brake Div., Div. Of Kelsey-Hayes Co. v. Presco Plastics, Inc., 187 Ill. App. 3rd 393 (1st Dist. 1989).

Confusion as the result of the use of similar names by related entities is not enough to warrant this relief. Divco-Wayne Sales Financial Corp. v. Martin Vehicle Sales, Inc., 45 Ill. App. 2nd 192 (1st Dist. 1963). This extraordinary remedy is available in sales and use tax cases only where it can be proven that the control exercised by the owner has been used in an improper manner. Superior Coal Co. v. Department of Finance, *supra*, People ex rel. Scott v. Pintozzi, 50 Ill. 2d 115 (1971). Moreover, the burden of proving that this remedy is applicable is upon the party seeking to have the “corporate veil” lifted. Bevelheimer v. Gierach, 33 Ill. App. 3rd 988 (1st Dist. 1975), Murphy v. Walters, 87 Ill. App. 3rd 415 (2nd Dist. 1980), Divco-Wayne Sales Financial Corp. v. Martin Vehicle Sales, Inc., *supra*. Consequently, it was incumbent upon the Department to offer evidence that Aviation, Inc. and Smith were one and the same and that the “corporate veil” between them should be disregarded, the burden of proof being on the Department

to bring forth such information as would warrant such a finding. The Department has not done this. Here the Department has merely argued that, based on two pieces of information, the “corporate veil” should be lifted. This is not sufficient to carry the Department’s burden.

Furthermore, while the notion of “piercing the corporate veil” has arisen on numerous occasions in Illinois, this argument is not applicable here. The Illinois courts have disregarded the corporate entity to penalize owners and affiliates of corporations seeking to hide behind the “corporate veil” where the interests of justice require. B.F. Hirsch, Inc. v. C.T. Gustafson Co., Inc., 315 Ill. App. 56 (1st Dist. 1942), Berlinger’s, Inc. v. Beef’s Finest, Inc., 57 Ill. App. 3rd 319 (1st Dist. 1978), People ex rel. Scott v. Pintozzi, 50 Ill. 2nd 115 (1971). However, this analysis has never been used to penalize a party that is unrelated to the corporation found to be merely the alter ego of its owner or shareholders.

Moreover, the record clearly shows that the taxpayer took all possible measures to assure compliance with the UTA. The taxpayer had a title search conducted by the FATC which showed that the aircraft was owned by Smith. Stip. par. 30. The taxpayer also obtained a letter from Smith in which Smith stated that he was “not engaged in the business of selling aircraft at retail” before wire transferring payment for the aircraft to Smith. Stip. par. 12; Stip. Doc. 5. The bill of sale transferring title to the aircraft to the taxpayer indicated that Smith was the seller. Stip. Doc. 6. Based on this information, the taxpayer concluded that Smith rather than Aviation, Inc. was the vendor of the aircraft and that Smith was not an aircraft retailer. Accordingly, the taxpayer reasonably concluded that no tax was due.

Assuming Smith was the alter ego of Aviation, Inc. and that the “corporate veil” between Smith and Aviation, Inc. could be “pierced”, there is no way that the taxpayer could have determined this. To hold that the taxpayer, who conscientiously sought to comply with the law, should have known that Aviation, Inc. was actually the owner of the aircraft places a burden on the taxpayer not demanded by the Use Tax Act.

WHEREFORE, for the reasons stated above, it is my recommendation that Notice of Tax Liability 00 00000000000000 be cancelled.

Ted Sherrod
Administrative Law Judge

Date: January 5, 2001