

UT 04-1

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
OF THE STATE OF ILLINOIS**

v.

JOHN DOE,

Taxpayer

**No. 03-ST-0000
IBT 0000-0000
NTL 00 00000000000000**

**Kenneth J. Galvin,
Administrative Law Judge**

RECOMMENDATION FOR DISPOSITION

Appearances: Mr. Patrick Hartnett, on behalf of John Doe; Mr. George Foster, Special Assistant Attorney General, on behalf of the Department of Revenue of the State of Illinois.

Synopsis:

This matter comes on for hearing pursuant to John Doe's protest of Notice of Tax Liability No. 0000000000000000 issued April 11, 2001. The basis of the assessment was the Department's determination that Mr. Doe had not paid use tax due to the Department for items purchased outside of Illinois in 1998. Mr. Doe protested the assessment claiming that the items were exempt from use tax. An evidentiary hearing was held in this matter on December 16, 2003 with Mr. Doe testifying. Following a review of the testimony and the evidence submitted by the taxpayer, it is

recommended that the Notice of Tax Liability be finalized as issued. In support thereof, the following “Findings of Fact” and “Conclusions of Law” are made.

Findings of Fact:

1. The Department’s *prima facie* case, inclusive of all jurisdictional elements, is established by the admission into evidence of Notice of Tax Liability No. 000000000000000000, issued April 11, 2001, which shows use tax due of \$4,971 plus penalty and interest. Tr. pp. 5-6; Dept. Ex. No. 1.
2. The items at issue in this case were purchased in 1998 and have not been resold. Tr. pp. 22, 25.
3. In 1998, Mr. Doe called his business “Doe Outlet.” Doe Outlet was not registered with the Illinois Department of Revenue in 1998. Tr. pp. 17, 20, 22-23.
4. The items purchased by Mr. Doe are currently stored in a warehouse at 0000 North Anywhere. Tr. p. 11.
5. Articles of Incorporation for “Doe and Doe Outlet, Corp.” signed by John Doe on July 10, 2003, and filed with the Illinois Secretary of State on August 25, 2003, state that the corporation is organized “to sell metal artifacts and imported furniture, at retail, to the public.” Tr. pp. 8-9; Taxpayer Ex. No. 2.
6. An “SS-4, Application for Employer Identification Number” for “Doe and Doe Outlet, Corp.” signed by John Doe on July 10, 2003, states that the corporation’s principal line of merchandise is “bronze artifacts and furniture.” Tr. pp. 9-10; Taxpayer’s Ex. No. 3.

Conclusions of Law:

The Use Tax Act, 35 ILCS 105/1 *et seq.* (hereinafter referred to as the “UTA”) imposes a tax upon the privilege of using in this State tangible personal property purchased at retail from a retailer...” *Id.* at 105/3. The UTA was passed to complement and prevent evasion of the Retailers’

Occupation Tax Act. Needle Co. v. Department of Revenue, 45 Ill. 2d 484 (1970). On April 11, 2001, the Department issued a Notice of Tax Liability (“NTL”) assessing use tax upon the taxpayer. Section 12 of the UTA (35 ILCS 105/12) incorporates by reference Section 4 of the Retailers’ Occupation Tax Act (35 ILCS 120/1 *et seq.*), which provides that the NTL issued by the Department is *prima facie* correct and is *prima facie* evidence of the correctness of the amount of tax due. *Id.* at 120/4. Once the Department has established its *prima facie* case by submitting the NTL into evidence, the burden shifts to the taxpayer to overcome the presumption of validity. Clark Oil & Refining v. Johnson, 154 Ill. App. 3d 773 (1st Dist. 1987).

In order to overcome the presumption of validity attached to the NTL, the taxpayer must produce competent evidence, identified with its book 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 of tax-exempt status is required to prevail against an assessment of tax by the Department. Sprague v. Johnson, 195 Ill. App. 3d 798 (4th Dist. 1990). On examination of the record in this case, I find that the taxpayer has failed to demonstrate by testimony, through exhibits or through argument, evidence sufficient to overcome the Department’s determination that use tax is due.

The record shows that in 1998, taxpayer purchased brassware, bronzeware and furniture from various companies in Thailand and Egypt and had these items shipped to Illinois. During this time, Mr. Doe called his business “Doe Outlet.” Tr. pp. 17, 20. Several invoices, shipping bills, and bills of lading for the items purchased were addressed to “Doe Outlet, 0000 Anywhere, Chicago.” Taxpayer’s Ex. Nos. 4, 6, 8, 11, 12, and 13. A packing list from Majestic Art Limited Partnership, dated “Bangkok, June 4, 1998,” is addressed to “Mr. John Doe, U.S.A.” Taxpayer’s

Ex. No. 5. An invoice from Capital Art Casting in Bangkok is addressed to “John Doe, 0000 Anywhere, Chicago.” Taxpayer’s Ex. No. 9. Mr. Doe testified that 0000 Anywhere in Chicago was a building that he owned and that he used as an office, while living there. Tr. p. 21. The items purchased were never stored in Mr. Doe’s apartment at 0000 Anywhere. Tr. pp. 24-25. When the items were delivered, they were sent to a warehouse, and then “bounced” around. Tr. p. 25. The items are now stored in a warehouse at 0000 Anywhere. Mr. Doe owns this warehouse. Tr. p. 11. Mr. Doe was asked on cross-examination if “[B]asically these goods have all been sitting in a warehouse for approximately 5 years now?” He responded “Yes.” Tr. p. 22.

To begin the determination of whether use tax was properly assessed in this case, it must first be determined whether the taxpayer used the items purchased in Illinois as the term “use” is defined in the UTA. Section 2 of the UTA (35 ILCS 105/2) defines “use” broadly as “the exercise by any person of any right or power over tangible personal property incident to the ownership of that property...” The record shows that the items purchased in Thailand and Egypt were sold to Mr. Doe who resided at 0000 Anywhere in Chicago, Illinois, for delivery in Illinois. Section 4 of the UTA (35 ILCS 105/4) provides that “[E]vidence that tangible personal property was sold by any person for delivery to a person residing ... in this State shall be *prima facie* evidence that such tangible personal property was sold for use in this State.” Accordingly, Mr. Doe’s admission that he resided in Illinois at 0000 Anywhere in Chicago at the time of the delivery of the items is *prima facie* evidence that the property was sold for use in Illinois.

Furthermore, the evidence clearly indicates that Mr. Doe “used” the property in Illinois in accordance with the definition of “use” in the UTA. When Mr. Doe first received the items, he testified that he “had a different warehouse. And [he] was bouncing them around.” Tr. p. 25. “Every piece” purchased is now located at a warehouse owned by Mr. Doe at 0000 Anywhere. Tr.

pp. 10-11. All of these acts, including initially storing the goods in a warehouse, “bouncing” them around, and finally storing them in another warehouse owned by the taxpayer are clear indicia of the exercise of right or power over tangible personal property incident to ownership, constituting a taxable “use” under the UTA. The use tax is not a tax which arises out of the use or operation of tangible personal property, but rather it is a tax placed upon the exercise of powers or rights incident to ownership.” Time, Inc. v. Dept. of Revenue, 11 Ill. App. 3d 282 (1st Dist. 1973). Mr. Doe’s movement of the goods, and storage of them in a warehouse owned by him fits exactly into the statutory definition of “use” which triggers the application of the use tax.

Mr. Doe contends that his purchase of the items at issue qualifies for exemption from use tax pursuant to Section 2 of the UTA which defines “use” to exclude the “sale of such [tangible personal] property ... in the regular course of business...” 35 ILCS 105/2. The UTA goes on to define a “sale at retail” giving rise to a taxable use as “any transfer of the ownership of or title to tangible personal property to a purchaser, for the purpose of use, and not for the purpose of resale. *Id.* Mr. Doe argues that this “sale for resale” exclusion from use tax applies here because he purchased the items for the purpose of reselling them. Tr. p. 10.

A statute which exempts property or an entity from taxation must be strictly construed in favor of taxation and against exemption. All facts are to be construed and all debatable questions resolved in favor of taxation. Wyndemere Retirement Community v. Department of Revenue, 274 Ill. App. 3d 455 (2d Dist. 1995). An exemption claimant must clearly and convincingly prove entitlement to the exemption claimed. United Air Lines, Inc. v. Johnson, 84 Ill. 2d 446 (1981). I find that Mr. Doe has not met this burden because the record in this matter does not support his claim. While Section 2 of the UTA (35 ILCS 105/2) defines a taxable “use” to exclude purchases for resale, this section mandates that a “[s]ale at retail” includes any such transfer made for resale

unless made in compliance with Section 2c of the Retailers' Occupation Tax Act ..." *Id.* (Emphasis added). Section 2c of the Retailers' Occupation Tax Act (35 ILCS 120/2c) provides, in pertinent part, as follows:

If the purchaser is not registered with the Department as a taxpayer, but claims to be a reseller of the tangible personal property in such a way that such resales are not taxable under this Act or under some other tax law which the Department may administer, such purchaser ... shall apply to the Department for a resale number...Except as provided herein above in this Section a sale shall be made tax-free on the ground of being a sale for resale if the purchaser has an active registration number or resale number from the Department and furnishes that number to the seller in connection with certifying to the seller that any sale to such purchaser is nontaxable because of being a sale for resale.

See also, 86 Ill. Admin Code ch. I, Sec. 130.1401, 130.1405, 130.1415. These statutory and regulatory provisions clearly indicate that, in order for the "sale for resale" exemption of the UTA to apply, the purchaser must either be registered with the Department or have a resale number from the Department. Mr. Doe was specifically asked if at the "time you purchased the goods five years ago, at that time you were not registered with the Illinois Department of Revenue as a retailer...?" He responded: "No, I was not." Tr. pp. 22-23. Moreover, there is no indication from the record that the taxpayer ever applied for a resale number from the Department. Consequently, the taxpayer has failed to demonstrate that the requirements for exemption pursuant to the "sale for resale" provisions of the UTA have been met.

Furthermore, in order to qualify for the "sale for resale" exemption of the UTA, the purchaser must be a retailer. "Retailer" as defined in the UTA can be either a person or a firm "engaged in the business of making sales at retail" or who "holds out" as being engaged (or who habitually engages) in selling tangible personal property at retail. 35 ILCS 105/2. I have concluded that at the time of the purchase of the items at issue in this case, Doe Outlet was not a retailer under either of the definitions contained in the UTA. At the time of purchase of the goods, Mr. Doe and

Doe Outlet cannot have been “engaged in the business of making sales at retail” because as Mr. Doe testified, “so far,” he has not resold any of the items purchased. Tr. p. 22.

The evidence does indicate that Mr. Doe held himself out as being a “retailer.” Several of the invoices and shipping documents for the purchase of the items at issue were addressed to “Doe Outlet.” Taxpayer’s Ex. Nos. 4, 6, 8, 11, 12, and 13. A receipt of payment from State Farm Insurance Companies dated December 30, 1998, for insurance on the items purchased, is addressed to John Doe, d/b/a Doe Outlet, 0000 Anywhere, Chicago. Tr. pp. 19-20; Taxpayer’s Ex. No. 14.

Although Mr. Doe may have held himself out as a retailer, the facts show that at the time of the purchase of the items, the business of reselling the items was speculative. At the hearing, Mr. Doe was asked if he intended “to resell [the items] when you get your business up and running.” He responded “[y]es.” Tr. p. 13. The evidence is clear that the business is still not “up and running.” Mr. Doe testified that he hasn’t yet opened a store because of all “this legal problems, and we were just straightening out my paperwork.” Tr. p. 10. Mr. Doe stated further that he was going to use the items purchased “for [his] girlfriend to start a business, and we weren’t together...” Tr. p. 25. Approximately five years after the purchase of the items, Mr. Doe filed Articles of Incorporation for “Doe and Doe Outlet, Corp.” with the Illinois Secretary of State and applied for an employer identification number. Taxpayer’s Ex. Nos. 2 and 3. These filings, five years after the purchase of the items at issue, further demonstrate that at the time the items were purchased, Mr. Doe had no feasible plan for reselling the items. Even with these filings, none of the items purchased in 1998 have yet been resold. Tr. p. 25. The testimony and evidence clearly show that holding out as a retailer at the time of the purchase of the goods was unwarranted and I am unable to conclude that Doe Outlet was a retailer entitled to the “sale for resale” exemption under the UTA.

The statutory language in the UTA is clear that a retailer is entitled to a use tax exemption for the “sale of [such] property” in the “regular course of business.” 35 ILCS 105/2. I have concluded that Mr. Doe is not entitled to the “sale for resale” exemption because he was not a retailer and did not meet the registration requirements of the UTA and the Retailers Occupation Tax Act. Mr. Doe’s final argument appears to be that if the items purchased in 1998 are ever resold, the exemption would apply. A comparable argument was made by the plaintiff railroad in Chicago & Ill. Midland Ry. v. Dept. of Revenue, 68 Ill. App. 3d 397 (1st Dist. 1978). The issue in that case was whether railroad cars purchased and delivered in Illinois qualified for exemption as rolling stock used in interstate commerce under the UTA, when for a period of 20 months after purchase, the railroad cars were only used in Illinois in intrastate commerce.

In Chicago, the Department argued that the “taxable event” was the use of the railroad cars in Illinois. “No interstate use occurred during the audit period to qualify the property for exemption.” *Id.* at 398. The railroad argued that “if the rolling stock is used at any time in interstate commerce, the exemption applies.” *Id.* at 398. The court found that the Department was not limiting the rolling stock exemption by only “considering the movement of the cars during the audit period.” The court stated that “[S]ome period had to be chosen in order to be able to administer the Act.” *Id.* at 399. “Here, the property because of its intrastate use in Illinois was not exempt for the period covered by the audit.” *Id.* at 400.

In the instant case, Mr. Doe’s movement and storage of the items in Illinois was the “taxable event,” subjecting the purchase of the items to the imposition of use tax. “Some period” must be chosen in the instant case in order to determine if the items purchased in 1998 qualified for the “sale for resale” exemption of the UTA. In Chicago, the court looked at the 20-month audit period to determine if the railroad cars had been used in interstate commerce thus qualifying them

for exemption. In the instant case, not only were the items purchased in 1998 not resold in the audit period, they were not resold at the time of the evidentiary hearing, five years after purchase. Mr. Doe's position would require that the UTA be administered without reference to time periods. The court in Chicago acknowledged that "some period" is required, and accordingly, I must conclude that Mr. Doe has failed to meet his burden of showing that he is entitled to the exemption claimed.

WHEREFORE, for the reasons stated above, it is my recommendation that NTL 0 0 00000000000000 be finalized as issued.

February 25, 2004

Kenneth J. Galvin
Administrative Law Judge