ST 97-12
Tax Type: SALES TAX
Issue: Undisclosed Principal/Agent Controversy

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

THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS	)	
	)	**Docket #**
v.	)	
	)	**IBT #**
TAXPAYER	)	**NTL #**
	)	
	)	**Barbara S. Rowe**
Taxpayer	)	**Administrative Law Judge**

RECOMMENDATION FOR DISPOSITION

Appearances:

Mr. Tad Armstrong, Armstrong Law Offices, attorney for TAXPAYER d/b/a TAXPAYER (the "Taxpayer"); Charles Hickman, Special Assistant Attorney General, for the Illinois Department of Revenue (the "Department")

Synopsis:

The Department audited the taxpayer and issued a Notice of Tax Liability (the "Notice") in the amount of $104,674.00 for January 1990 through December 1992. The taxpayer timely protested the notice and requested a hearing. The issues, addressed at the hearing and in supplemental briefs, were whether the taxpayer owed Retailer's Occupation Tax on sales of goods owned by the taxpayer himself and goods he sold on consignment. The taxpayer argues that the Department's rule which requires a principal to be disclosed at or prior to an auction is unconstitutional or in the alternative,

misconstrued by the Department. At the hearing and in the supplemental brief, the taxpayer requested that this matter be decided by an order of declaratory judgment. Declaratory judgment is untimely and inappropriate in this matter. It is recommended that the matter be decided in favor of the Department.

Findings of Fact:

1. The *prima facie* case of the Department, consisting of the Correction of Returns/Determination of tax due, was established by the admission into evidence of Department's Ex. No. 1.

2. The Department audited the taxpayer's business for the period of January 1990 through December 1992 and issued a Notice of Tax liability on August 2, 1993, for a total amount of $104,674.00, which established tax due of $65,167.00, penalties of $19,550.00 and interest of $19,957.00. (Dept. Ex. No. 1)

3. The Department stipulated that the computations had been revised and the correct amount of tax liability for the period in question is $56,424.00 with a 30% penalty of $16,927.00 and interest in the amount of $30,986.00 for a total liability of $104,337.00. (Tr. pp. 6-9)

4. Of the $56,424.00 of tax due, $20,000 represents taxes calculated on tangible personal property sold by the taxpayer that was owned by the taxpayer. (Tr. p. 10)

5. The balance of $36,424.00 in tax is attributable to assessments on consignment sales done by the taxpayer. (Tr. p. 10)

6. The taxpayer runs an auction company that is in the business of selling household merchandise. The taxpayer obtains the

merchandise from estates, storage lockers or buildings, or the merchandise is sold on consignment. (Tr. p. 11-14)[1]

7. The taxpayer is responsible for the books and records of the business. He, or his representative, transports the goods to and from the building, assigns lot numbers to the goods sold at auction, receives collection of the money, retains the commission and disburses the balance. (Tr. pp. 12-13, 20)

8. The taxpayer hired and paid independent contractors to act as auctioneers at the auction barn. The auctioneers were acting in behalf of the taxpayer. (Tr. pp. 12-13, 20-21, 25)

9. Neither the taxpayer, nor his representatives, orally announced to prospective bidders the names or addresses of the owners of the goods sold during the taxable period in question. (Tr. pp. 14-15, 24)[2]

10. The taxpayer did not post on the wall of his auction barn a list of the names and addresses of the owners of the merchandise sold during the audit period, nor did he distribute hand bills with the names and addresses of the consignors. (Tr. pp. 20, 24)

11. The taxpayer is in the business of selling tangible personal property. (Tr. p. 22)

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[1]. The taxpayer, "in his memory", never sold goods that were purchased from a person who deals in that type of goods, when he bought the goods for sale. (Tr. p. 14) Regarding the consignment sales, the taxpayer, "to his knowledge", never sold goods of persons who were in the business of dealing in that particular type of goods, when the consignment goods were sold at the auction barn. (Tr. pp. 14, 22-23)

[2]. The taxpayer testified that the names and addresses of the consignors were available at the time of sale, but the paperwork was lost in the flood. (Tr. pp. 15-18, 23-24)

12. The taxpayer owned the goods purchased from estates and storage lockers at the time of the auction sale. (Tr. p. 22)

13. The taxpayer was not registered with the Illinois Department of Revenue at the time of the audit. (Tr. p. 29)

14. The taxpayer was unable to produce books and records for the audit period because he lost all his paperwork when the auction barn was flooded. (Tr. p. 18)

15. The taxpayer submitted checks issued by the business to various entities during 1993, 1994 and 1995. (Taxpayer's Ex. No. 4)

16. The taxpayer relied upon Departmental Informational Bulletin FY 91-94 and the Illinois Department of Revenue release dated May 1, 1990, to determine whether or not he owed taxes on the sales. (Tr. pp. 16, 23-24, 28; Taxpayer's Ex. Nos. 2 and 3)

Conclusions of Law:

The Retailers' Occupation Tax Act (the "Act") imposes a tax on retailers in the State of Illinois pursuant to 35 **ILCS** 120/2:

> Tax imposed. A tax is imposed upon persons engaged in the business of selling at retail personal property....

In the definition section of the Act, found at 35 **ILCS** 120/1, a sale at retail:

> means any transfer of the ownership of or title to tangible personal property to a purchaser, for the purpose of use or consumption, and not for the purpose of resale in any form as tangible personal property to the extent not first subjected to a use for which it was purchased, for valuable consideration:....

The issue in this case is the interpretation of the Department rule found at 86 Admin. Code ch. I, Sec. 130.1915, entitled

"Auctioneers and Agents." The Department promulgated the rule pursuant to authority granted by the legislature. *See* 35 **ILCS** 120/12 86 Admin. Code ch. I, Sec. 130.1915 states:

> a) When Persons Act As Agent
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> 1) Every auctioneer or agent, acting for an unknown or undisclosed principal, or entrusted with the possession of any bill of lading,...for delivery of any tangible personal property, or entrusted with the possession of any such personal property for the purpose of sale, is deemed to be the owner thereof, and upon the sale of such property to a purchaser for use or consumption, he is required to file a return of the receipts from the sale and to pay to the Department a tax measured by such receipts.
> 2) The receipts from any such sale, when made by an auctioneer or agent who is acting for a known or disclosed principal, are taxable to the principal, provided the principal is engaged in the business of selling such tangible personal property at retail....
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> b) When Principal is Disclosed
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> For the purposes for this Section, a principal is deemed to be disclosed to a purchaser for use or consumption only when the name and address of such principal is made known to such purchaser at or before the time of the sale and when the name and address of the principal appears upon the books and records of the auctioneer or agent.

The taxpayer testified that he received two communications from the Department during the audit period regarding the rule and yet did not file or pay Retailer's Occupation Tax. The communications warned auctioneers to be diligent regarding disclosure of sources of inventory prior to the auctions, otherwise the auctioneer would be liable for collecting, reporting and paying sales tax.

I find the argument of the taxpayer, requesting that this matter be handled based upon his motion for declaratory judgment, to be inappropriate, untimely and duplicative. The purpose of the Declaratory Judgment Act was not to replace, but to add to existing

remedies. Gibraltar Ins. Co. v. Varkalis, 115 Ill.App.2d 130 (1969), *aff'd* 46 Ill.2d. 481 The taxpayer has an satisfactory existing remedy in the administrative hearing process, a procedure that the taxpayer has availed himself of by timely protesting the Notice of Tax Liability. The taxpayer must exhaust the remedies available through the Administrative Procedures Act, wherein the taxpayer has an adequate remedy at law. *See* Dock Club, Inc. v. Illinois Liquor Control Commission, 83 Ill.App.3d 1034 (1980)

The Illinois Supreme Court has stated:

> Although the existence of another remedy does not ordinarily preclude bringing an action for declaratory judgment, in revenue cases it is the rule, applying general equitable principles, that relief by way of declaratory judgment is not available if the statute provides an adequate remedy at law. People ex. rel. Fahner v. AT&T Co., 86 Ill.2d 479, 485 (1981)

The taxpayer's motion for declaratory judgment is denied.

In its brief and through testimony at the hearing, the taxpayer has asserted that 86 Admin. Code ch. I, Sec. 130.1915 is either unconstitutional or misinterpreted by the Department. 86 Admin. Code ch. I, Sec. 130.1915 is simply a codification of basic business law and the common law of agency which requires the necessity of the disclosure of a principal prior to a sale if the agent is to avoid liability. Rosen v. DePorter-Butterworth Tours, Inc., 62 Ill.App.3d 762 (1978)

The Notice of Tax liability is *prima facie* correct and the burden is on the taxpayer to rebut that presumption. The statutes impose the responsibility on every person engaged in the business of selling tangible personal property to maintain adequate books and records. 35 **ILCS** 120/7 Oral testimony at a hearing, without books

and records to substantiate the assertions, is insufficient to overcome the Department's *prima facie* case. 35 **ILCS** 120/4; Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill.App.3d 203 (1991)

I find that the taxpayer's assertion that he knew all of the principals, and that knowledge, in his opinion, was sufficient to negate any responsibility to register with the Department and/or disclose the principals prior to a sale to be neither legally supportable nor in keeping with the information that the taxpayer had in his possession during the audit period. The very nature of an auction is the sale of tangible personal property by an auctioneer. The sale is either of goods belonging to someone else or of goods owned by the auctioneer. Why the fact that the principal is known to the auctioneer, and that fact would remove the responsibility of disclosure to third parties as required by law, is incongruous to me.

The communications from the Department (Taxpayer's Ex. 2 and 3) clearly notified auctioneers that the Department considered disclosure of the principals necessary in order for an auctioneer to escape liability for taxation purposes. The taxpayer's assertion that the communications state otherwise, I find is an incorrect interpretation of the language of the bulletins.

The taxpayer testified that his books and records were lost in the flood. He submitted bank records and checks for a time period not at issue. I find, however, that those bank records and checks are irrelevant to the issues in this matter.

Certain books and records do have import in an audit of this type. The taxpayer is correct that the responsibility of disclosure can be accomplished by keeping names and addresses of his consignors

in his books and records and disclosing those names and addresses prior to a sale. Such disclosure relieves an auctioneer of the liability of collecting and remitting tax when the principal or consignor is not in the business of selling tangible personal property. The legislature enacted the law and the Department promulgated the rule so that an auditor can trace a sale at an auction. The taxpayer's assertion that "prior disclosure is preposterous" and "prior disclosure is an unconstitutional ruse having no purpose or meaning whatsoever" are simply conclusions of the taxpayer and are unsupported by any legal authority.

The taxpayer also requests an abatement of the penalties for reasonable cause. The Retailer's Occupation Tax Act, Ill. Rev. Stat. ch. 120, para. 440 *et seq.*[3] (1989, 1991) has a provision for abatement of the penalties at issue at ch. 120 ¶444. The Department promulgated rules in conjunction with the Uniform Penalty and Interest Act, 35 **ILCS** 735 *et seq.*, effective January 1, 1993, that explain what may be considered reasonable cause for an abatement of penalties. A review of the pertinent regulations, found at 86 Admin. Code ch. I, Sec. 700.400, fails to provide any penalty relief for reasonable cause for the taxpayer.

I find that the taxpayer's lack of filing history with the Department, his strained interpretation of the rules and statutes at issue, his lack of books and records, and lack of disclosure of principals at auction do not comport with a determination that an abatement of the penalties is warranted.

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[3]. Currently, 35 **ILCS** 120 *et. seq.*

It is recommended that the tax, interest and penalties, as stipulated, be upheld.

Respectfully Submitted,

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Barbara S. Rowe
Administrative Law Judge

March 24, 1997