

ST 11-03
Tax Type: Sales Tax
Issue: Delivery Charges

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

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

v.

**ABC CORPORATION, INC.,
Taxpayer**

**No. 00-ST-0000
Account ID 0000-0000
Letter ID XXXXXXXX
Period 1/05-12/07**

**Ted Sherrod
Administrative Law Judge**

RECOMMENDATION FOR DISPOSITION

Appearances: Special Assistant Attorney General Shepard Smith on behalf of the Illinois Department of Revenue; Henry Becker, Esq. on behalf of ABC Corporation, Inc.

Synopsis:

This matter comes on for hearing pursuant to a protest of the Department of Revenue's Notice of Tax Liability ("NTL") Letter ID number XXXXXXX filed by ABC Corporation, Inc. ("taxpayer") on November 6, 2009. The NTL at issue is dated September 11, 2009 and covers Retailers' Occupation Tax and related taxes for the period January 1, 2005 through December 31, 2007 (the "tax period"). The tax liability assessed by the Department of Revenue ("Department") is \$197,323.47, including penalties and interest, and arises primarily as a result of the Department's assessment of tax on unreported delivery charges imposed by the taxpayer on all purchases of meals and beverages from the taxpayer during the tax period. The taxpayer contends that tax should not be imposed on these delivery charges because they constitute non-taxable services and were separately contracted for with each customer.

A hearing to consider the taxpayer's objections to the Department's determination was held on December 22, 2010. During this hearing, the taxpayer presented documentary evidence as well as testimony of two witnesses. The Department also presented documentary evidence along with the testimony of Jemal Everett, the auditor that made the assessment determination in dispute. Following the submission of all evidence and a review of the record, it is recommended that this matter be resolved in favor of the Department. 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 the Department's Notice of Tax Liability ("NTL") Letter ID number XXXXXX showing a total liability due and owing in the amount of \$197,323.47 including statutory interest and penalty. Department Exhibit ("Ex.") No. 1. The liability assessed by the Department is for the taxable period January 1, 2005 through December 31, 2007. *Id.*
2. ABC Corporation, Inc., an Illinois corporation having its sole place of business in Anywhere, Illinois, commenced business operations in September 2000. Tr. p. 9; Department Ex. 2 (Auditor's Comments). The taxpayer's president is, and was during the tax period at issue, John Doe ("John Doe"). Tr. p. 9.
3. During the period January 1, 2005 through December 31, 2007 at issue in this case, the taxpayer was engaged in the retail sale of meals in connection with its operation of a food purchase, resale and delivery business; the taxpayer purchased prepared meals at a discount from their retail selling price from over 100 restaurants located in Illinois and resold and delivered meals it purchased to Illinois customers. Tr. pp. 9, 10, 27, 28. The price charged

each customer for delivered meals included a charge for each delivery of \$6.95; the taxpayer charged this amount on all deliveries and did not charge a different delivery fee depending on the customers to whom it sold meals or the restaurants from which meals were ordered. Taxpayer's Ex. 1. The delivery charge was listed as a separate item on internet orders and the taxpayer's customer service representative indicated the delivery charge as a separate charge when orders were placed by phone. Tr. pp. 10, 11, 17, 18. It was also indicated as a separate item in all of the taxpayer's printed materials and on all customer invoices. Tr. pp. 11, 50. Customers were not allowed to place orders with the taxpayer without paying the taxpayer's delivery charge. Tr. pp. 21-23.

4. The delivery service provided each customer by the taxpayer consisted of sending an employee of the taxpayer to the restaurant to check the customer's order for accuracy, pick up the customer's order and transport the order to the customer. Tr. pp.17, 18. Employees used their personal vehicles to make deliveries and were reimbursed by the taxpayer for their vehicle usage costs. Tr. pp. 18, 19. The aggregate delivery fees collected from customers did not cover the aggregate cost of providing delivery services (i.e. the cost of employee salaries and the cost of reimbursing employees for the costs of using their own vehicles to make deliveries). Tr. pp. 18, 19; Taxpayer's Ex. 2.
5. Taxpayer did not collect tax on its delivery charges to its customers, and did not report its receipts from delivery fees on its sales tax returns filed for the tax period at issue. Tr. pp. 24, 49, 50; Department Ex. 2 (Auditor's Comments). However, taxpayer did collect sales tax from its customers on the cost to customers of food its customers ordered and it remitted all of the taxes it collected to the State. Tr. p. 49; Department Ex. 2 (Auditor's Comments).

6. In 2009, Everett audited the books and records of the taxpayer for the period January 1, 2005 through December 31, 2007. Department Ex. 2 (Auditor's Comments). After reviewing the taxpayer's books and records for the tax period at issue (Tr. p. 50), Everett determined that the taxpayer "was charging ...customers an additional charge [for] deliveries [.] These charges [were] mandatory and customers [did] not have any options including picking up these orders from [taxpayer's] office building to avoid these fees[.] Therefore, these fees [were deemed] to be taxable ...[.]" Department Ex. 2. (Auditor's Comments)
7. At the conclusion of his audit, Everett determined that the taxpayer owed more tax than it had reported as being due on its returns for the tax period at issue. Tr. p. 51; Department Ex. 2. This determination was primarily based upon Everett's determination that the taxpayer had failed to collect, report or remit tax on any of its delivery charges charged to customers in connection with each delivery of food ordered by customers during the tax period at issue. *Id.* The auditor also assessed additional tax on consumable supplies purchased by the taxpayer. Department Ex. 2.¹
8. After the Department determined that the taxpayer had underpaid its correct Illinois sales and use tax liabilities during the audit period, it assessed penalties for late payment, as well as interest on the tax and penalty amounts, at rates pursuant to amendments made to Illinois' Uniform Penalty and Interest Act ("UPIA"). Department Ex. 2 (Auditor's Comments). See also 35 ILCS 735/3-2, 3-3 (UPIA) (as amended by P.A. 93-0026). The Department's auditor also determined that the taxpayer's return for May, 2005 was filed after the due date. *Id.* Thus, the auditor determined that the taxpayer also owed a late filing penalty in the amount of \$76. *Id.*

¹ The taxpayer is not contesting the additional tax on consumable supplies indicated in the auditor's narrative and work papers. See Department Ex. 2.

Conclusions of Law:

During the tax period at issue in this case, the taxpayer was engaged in the sale and delivery of tangible personal property, namely restaurant meals and beverages, in Illinois. Department Ex. 1, 2; Taxpayer's Ex. 1. The taxpayer classified itself as a retailer subject to the mandates of the Illinois Retailers' Occupation Tax Act ("ROTA"), which imposes a tax upon persons engaged in the business of selling tangible personal property at retail. 35 ILCS 120/2. It complied with the ROTA by collecting and remitting tax on all of its food sales. Tr. pp. 9, 10, 29; Department Ex. 2.

The Department audited the taxpayer for the period January 1, 2005 through December 31, 2007, and determined a liability for unreported and unpaid taxes of over \$140,000 representing over \$1,500,000 in unreported gross receipts from delivery charges. Department Ex. 1, 2 (Auditor's Comments). The taxpayer paid tax on all of its food sales, but never identified any of its gross receipts from delivery charges as taxable gross receipts on its monthly Retailers' Occupation Tax ("ROT") returns. Tr. pp. 49, 50; Department Ex. 1 (Auditor's Comments).

During the hearing, the taxpayer admitted that the portion of its receipts resulting from its retail sales of meals and beverages were indeed subject to retailers' occupation tax. Tr. pp. 9, 10, 29, 55. It, nevertheless, maintains that the audit determination was in error because, it contends, the Department's auditor included in the measure of taxable sales gross receipts from delivery charges that did not constitute the sale of tangible personal property. Taxpayer's Brief, pp. 2-4.

The Department of Revenue ("Department") contends that the taxpayer failed to properly report taxes due pursuant to the ROTA, and issued a Notice of Tax Liability ("NTL") for the tax period January 1, 2005 through December 31, 2007 assessing the taxpayer for additional

retailers' occupation tax, penalty and interest due in the amount of \$197,323.47 Department Ex.

1. This NTL was introduced into the record during the hearing in this case, and established *prima facie* proof of the correctness of the amount of tax due as shown therein. 35 ILCS 120/4.

As noted by the parties in their respective briefs, this case presents two issues. The first issue is whether the taxpayer was required to collect and remit retailers' occupation tax from its customers on the delivery that accompanied all of the taxpayer's sales of restaurant meals and beverages during the tax period in controversy. The taxpayer contends that its delivery of meals and beverages constituted a non-taxable service rather than a sale of tangible personal property taxable pursuant to the ROTA. Taxpayer's Brief, pp. 2-4. The second issue is whether the taxpayer was allowed to exclude its delivery charges pursuant to the Department's regulation section 130.415 which allows such an exclusion where "the seller and the buyer agree upon delivery charges separately from the selling price of tangible personal property when it is sold ...[.]" See 86 Ill. Admin. Code, ch. I, section 130.415.

Imposition of Retailers' Occupation Tax rather than Service Occupation Tax upon Delivery Charges

As previously noted, a retailers' occupation tax is imposed upon persons engaged in the business of selling at retail tangible personal property. 35 ILCS 120/2. A "sale at retail" is defined as "any transfer of the ownership of or title to tangible personal property to a purchaser, for the 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 a valuable consideration...[.]" 35 ILCS 120/1. The tax is computed based on the gross receipts from the sales of tangible personal property made in the course of business. 35 ILCS 120/2-10.

While pure services are not subject to tax in Illinois, taxpayers engaged in the sale of services are subject to the state's service occupation tax. 35 ILCS 115/3. The state's service occupation tax is imposed "upon all persons engaged in the business of making sales of service (referred to as 'servicemen') on all tangible personal property transferred as an incident of a sale of service ...[.]" 35 ILCS 115/3. A "sale of service" is defined as any transaction other than a retail sale or a sale for the purpose of resale. 35 ILCS 115/2. The tax is computed as a percentage of the cost price to the serviceman of the tangible personal property. 35 ILCS 115/3-10. Charges for services apart from the cost price of tangible personal property are not subject to this tax. *Id.* The service occupation tax ("SOT") places service providers in parity with retailers to the extent that they transfer tangible personal property as an incident to the sale of a service. Soho Club, Inc. v. Department of Revenue, 269 Ill. App. 3d 220, 229 (1st Dist. 1995).

As a general rule, the ROT applies to all sales at retail unless the taxpayer produces evidence in the form of books and records to show that the sale is not subject to ROT. H.D., Ltd. v. Department of Revenue, 297 Ill. App. 3rd 26, 34 (2d Dist. 1998). Section 4 of the ROT provides that the certified copy of the notice of tax liability issued by the Department "shall be prima facie proof of the correctness of the amount of tax due, as shown therein." 35 ILCS 120/4. Once the Department has established its *prima facie* case by submitting the notice into evidence, the burden shifts to the taxpayer to overcome this presumption of validity. A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3d 826, 832 (1st Dist. 1988). To prove its case, a taxpayer must present more than its testimony denying the accuracy of the Department's assessment. Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill. App. 3d 203, 217 (1st Dist. 1991). The taxpayer must present sufficient documentary evidence to support its claim. *Id.*

The taxpayer vigorously argues that it should be taxed in the same manner as an automobile repair service provider selling tangible personal property in connection with its performance of services. Tr. pp. 5, 6, 54-56; Taxpayer’s Brief, p. 2 (“ABC Corporation is a retailer the same way your local auto mechanic is a retailer[.] The auto mechanic provides a service – auto repair – and, at the same time, sells parts to consumers[.] That is why the mechanic is in business – to provide a service[.] It is axiomatic that the repair portion of the mechanic’s bill does not fall under ROT[.] In the instant case, the delivery provided by ABC Corporation is not repair, it is *delivery*[.]”).

Department regulation 130.2015(c)-(e) enumerates the performance of automobile repair services involving the transfer of tangible personal property as a type of transaction that is subject to the SOT rather than the ROT and that, as a consequence, one in which the taxpayer cannot be taxed on the portion of its bills that are charges purely for services. See 86 Ill. Admin. Code, ch. I, section 130.2015(c)-(e). Accordingly, the taxpayer’s claim that it should be taxed in the same manner as an automobile repair serviceman implicitly raises the issue whether the taxpayer was subject to the SOT rather than the ROT on its sale and delivery of meals and beverages in the instant case. Were the record in this case to support a finding that the taxpayer was subject to SOT rather than ROT, its contention that it was not subject to tax on its delivery services would be valid, since under the SOT it could only be subject to tax on tangible personal property transferred in connection with this service, and could not be taxed on charges for the service itself. 35 **ILCS** 115/3-10.²

The taxpayer argues that its sale of food is secondary and incidental to its main business activity which is delivery. Taxpayer’s Brief, pp. 2-4. It asserts that the Department’s auditor

² While the taxpayer reported taxes for the tax period at issue as a retailer and filed monthly retailers’ occupation tax returns with the Department, I do not find the taxpayer’s characterization of itself as a retailer subject to the ROTA dispositive of the legal issues presented in this case.

admitted this in his audit comments wherein he describes the taxpayer's business as "a service company". Taxpayer's Brief, p. 3. The taxpayer states that, because the sale of a service is the principal function of its business, its transfer of tangible personal property (meals and beverages) should be considered incidental to its delivery service. Taxpayer's Brief, pp. 2-4. If these contentions were supported by the record in this case, the SOT, rather than the ROT, would properly be assessed in this matter and the taxpayer's charges for the service of delivery would be properly excludable from taxation. 35 ILCS 115/3.

In support of the taxpayer's claim, the taxpayer's president testified that the taxpayer's customers retain the taxpayer only when they want to receive delivery service. Tr. pp. 21-23, 27-29. Based only upon this premise, the taxpayer infers that it operates as a service company that provides food as a function of its service activities. Tr. pp. 2-4.

As noted above, in order to come within the SOT, a taxpayer's transfer of tangible personal property must be incidental to its performance of a service. 35 ILCS 115/3. The taxpayer's contention that its sales or meals and beverages are only incidental to its delivery service business is not supported by the record in this case. Specifically, the record indicates that the taxpayer's revenues from food sales always exceeded its revenues from delivery since the minimum order it would accept was \$15 while the delivery charge was always \$6.95. Taxpayer's Ex. 1. Moreover, taxpayer's president and its accountant both testified that the taxpayer lost money on its performance of delivery services. Tr. pp.19, 33-36. See also Taxpayer's Ex. 2. This evidence indicates that the amount of revenue the taxpayer received from food sales was far more significant to this company's finances than its revenues from services and strongly supports the conclusion that food sales rather than the performance of services was the company's principal business purpose.

Moreover, the taxpayer's claim that its business is analogous to an automobile repair business for tax purposes is not supported by Illinois case law. Specifically, the Illinois Supreme Court has repeatedly stated that a transfer of property is properly considered to be incidental to the performance of a service, and subject to SOT rather than ROT, when the customer receiving the service purchased the service in reliance upon a service provider's unique skill or expertise in performing the service. J.H. Walters & Company v. Department of Revenue, 44 Ill. 2d 95 (1969); Caterpillar Tractor Co. v. Department of Revenue, 29 Ill. 2d 564 (1963); Velten & Pulver, Inc. v. Department of Revenue, 29 Ill. 2d 524 (1963); American Brake Shoe Co. v. Department of Revenue, 25 Ill. 2d 354 (1962). This basis for distinguishing between a retail sale and a transaction subject to the service occupation tax is clearly set forth in Pierce v. Pacini, 127 Ill. App. 2d 1 (1st Dist. 1970). In this case, the court distinguishes between the purchase of items requiring no special skill to deliver and items used by automobile maintenance and repair service providers, stating as follows:

When a customer contracts for the restoration of a motor vehicle's function and relies upon the experience and skill of the serviceman in the performance of this task, the serviceman is engaged in the sale of a service. If in the course of repair it becomes necessary to replace a part, and the serviceman chooses the part and installs it, the transfer is incidental to the service. The repairman is liable for the service occupation tax based upon the cost price of the item to him. On the other hand, when a customer purchases from a service station an item such as seat covers for his automobile and makes the selection and the sales does not obligate the seller to install them, then, even though the seller does install them, the transaction is a sale at retail, and taxable under the Retailers' Occupation Tax Act.

Pierce, *supra* at 7.

In the present case, no claim has been made that the delivery service the taxpayer provides requires a special skill which the taxpayer's customers seek to obtain when they purchase food from the taxpayer. Moreover, the record in this case does not support a finding that the delivery service the taxpayer provided involved any unique or special skill or any

expertise comparable to that possessed by an automobile mechanic. Therefore, unlike services provided by an automobile mechanic that the courts have found involve special and unique skills that are sought by their customers (Pierce, supra), there is no basis for concluding that the delivery services at issue in this case warrant a similar legal classification. Accordingly, while the case law supports according to an automobile repairman the status of a serviceman subject to SOT, there is no similar legal basis for according this status to persons engaged in the delivery of restaurant meals and beverages.

The taxpayer's contentions also fail when measured by the standard that has been developed by the Illinois Supreme Court to determine whether a business is a service or retail occupation. In Colorcraft Corporation, Inc. v. Department of Revenue, 112 Ill. 2d 473 (1986), a case holding that photofinishing constitutes a service transaction rather than retailing, the court indicates this test:

If the article sold has no value to the purchaser except as a result of services rendered by the vendor and the transfer of the article to the purchaser is an actual and necessary part of the service rendered, then the vendor is engaged in the business of rendering service and not in the business of selling at retail. If the article sold is the substance of the transaction and the service rendered is merely incidental to and an inseparable part of the transfer to the purchaser of the article sold, then the vendor is engaged in the business of selling at retail. [citations omitted]
Colorcraft, supra at 482. See also Spagat v. Mahin, 50 Ill. 2d 183, 189 (1971).

In amplifying upon the reasoning underlying the distinction drawn by this test, the court states as follows:

In Spagat, the issue was whether the sale and installation of custom wall-to-wall carpeting was a retail occupation or a service occupation. Thus the court held that "it is the carpeting which is the substance of the transaction, and the services involved in laying the carpeting wall-to-wall, no matter how skillfully performed, are 'merely incidental to and an inseparable part of the transfer.' ...We believe that the article sold in the instant case, the finished prints, have no value to the customer except as a result of the services rendered by Colorcraft. ...[A]lthough the transfer of prints ...is an actual and necessary

part of the service rendered, it is the service of creating prints which is the essence of the transaction.”

Colorcraft, *supra* at 483.

In the present case, the retail value of meals and beverages the taxpayer sells is separated from the taxpayer’s charge for delivery in the taxpayer’s advertising brochures used to place orders for food deliveries and on the taxpayer’s invoices. Tr. p. 50; Taxpayer’s Ex. 1. This retail value to customers exists whether or not they agree to have food orders delivered to them by the taxpayer. For the reasons enumerated in Colorcraft noted above, the fact that the taxpayer’s delivery service adds no real value to the product the customer purchases from the taxpayer clearly indicates that the substance of the transaction at issue in this case is the customer’s purchase of food and not the purchase of the taxpayer’s delivery service. Consequently, under the test enumerated in Colorcraft, the taxpayer is properly subject to retailers’ occupation tax.

The Court’s discussion in Gapers, Inc. v. Department of Revenue, 13 Ill. App. 3d 199 (1st Dist. 1973) also provides guidelines that are applicable in this case. In Gapers, the issue was whether a caterer should be allowed to deduct from its gross receipts, charges for transporting food and equipment to a customer’s home. The court’s opinion in this case is based upon section 1 of the ROTA, which provides as follows:

“Selling price” or the “amount of sale” means the consideration for a sale valued in money ... and shall be determined without any deduction on account of the cost of property sold, the cost of materials used, labor or service cost or any other expense whatsoever ...[.]

35 **ILCS** 120/1

The court held that even though the transportation charges were separately contracted for, they were not deductible under the express provisions of Section 1 of the Retailers’ Occupation Tax Act. *Id.* at 202; 35 **ILCS** 120/1. In so holding, the court noted that the caterer agreed that the food and equipment would be provided at the home of the customer and that the transportation

was an “inseparable link in the chain of events leading to the completion of the sale of meals to purchasers and not merely incidental to the purpose of the taxpayer’s business of catering private parties in customer’s homes.” *Id.*

The Department, at page 5 of its brief, notes that in the instant case, “(e)very sale is inextricably coupled with delivery.” In effect, the Department avers that even though the taxpayer separately stated the delivery charges to its customers, such charges remained taxable because they were akin to the services at issue in Gapers, i.e. an “inseparable link in the chain of events leading to the completion of the sale of meals to purchasers and not merely incidental to the purpose of the taxpayer’s business of catering private parties in customer’s homes.” Gapers at 203. See also to this effect Kean v. Wal-Mart Stores, Inc., 387 Ill. App. 3d 262 (1st Dist. 2008), affirmed 235 Ill. 2d 351 (2009) (holding that delivery fees in connection with internet purchases are taxable under the ROTA),. Thus, the issue becomes one of characterization: are the delivery fees a “link in the chain of events leading to the sale of meals to purchasers” which would render them nondeductible under Gapers.

A careful review of the facts in this case reveals that the taxpayer’s delivery fees are a link in the chain of events leading to the sale of meals to purchasers and an inseparable part of the taxpayer’s food sale and delivery business. The facts in this case are clear. The taxpayer charged delivery fees on all of its transactions and these fees stemmed from services which were a part of the taxpayer’s business of selling food at retail. Tr. pp. 21-23; Taxpayer’s Ex. 1. The Appellate Court in Wal-Mart found similar evidence to be a critical factor in deciding whether delivery charges are taxable as part of retail sales, stating as follows:

We find the instant case is analogous to Gapers ...[.] Plaintiffs did not allege in their complaints that it was possible to purchase goods from Wal-Mart’s Web site without also paying for shipping; indeed, before the trial court, counsel for plaintiffs conceded that selecting a shipping option was a necessary

step in any online purchase. Under such a setup, the payment of shipping costs is a required element of the sale of tangible goods, so it is subject to sales tax under the test articulated in Gapers. Gapers, 13 Ill. App. 3d at 203 ...[.] Just as the customers in Gapers could not purchase catering services without having the food and other materials delivered to their homes ... so the customers at Wal-Mart's online site cannot purchase products without agreeing to pay shipping on their purchases.

Wal-Mart, *supra* at 269.

Moreover, in every transaction the taxpayer engaged in the charges for food greatly exceeded the charges for delivery since the delivery charge was always \$6.95 while the minimum allowable purchase was \$15. Taxpayer's Ex. 1. The fact that the taxpayer's delivery fees are never charged without there also being a greater charge for food reveals that the delivery fees were simply attendant to the provision of food.

The taxpayer argues that delivery was not integral to the taxpayer's food sale transactions because its customers had the option of purchasing food without having it delivered by purchasing food directly from a restaurant rather than through the taxpayer. Tr. pp. 5, 6, 54-56. However, merely because food could have been purchased without the provision of delivery does not mean that in transactions where such services were provided the services were separate and distinct from the provision of food. In addressing a similar argument, the court in Wal-Mart, *supra* at 269-70 stated:

[P]laintiffs argue that Wal-Mart consumers could, in any event, choose to acquire their items at a brick-and-mortar Wal-Mart instead of using its online sales outlet, so there is no necessary link between the items and the shipping charges at issue. However, we are not concerned with hypothetical scenarios about how Wal-Mart could choose to conduct its online business; Wal-Mart in its current Web site setup has created a necessary link between online consumer's purchase of goods and purchase of shipping services, and as discussed above, this is sufficient to render those shipping charges subject to sales tax.

In sum, the taxpayer is in the business of selling and delivering food as a whole. The majority of its business revenues are from the provision of food. In providing such consumables,

the taxpayer also provides delivery services. Because all of the taxpayer's transactions always involved the provision of delivery services, such services must be considered a "link in the chain of events leading to the completion of the sale of meals to purchasers" and thus a nondeductible expense pursuant to section 1 of the ROTA. Gapers, supra; Wal-Mart, supra. For this reason, and for the other reasons enumerated herein, I find that the evidence the taxpayer has presented in this case is insufficient to overcome the Department's *prima facie* case that the sale of food items at issue in this case, including delivery charges attendant thereto, is subject to the retailers' occupation tax.

Exclusion of Delivery Charges Pursuant to Department Regulation 130.415

As noted above, the second issue raised by the taxpayer is whether the taxpayer could legally exclude delivery charges from retailers' occupation tax pursuant to the Department's regulation 130.415 governing the taxability of transportation charges. With respect to the second issue, the taxpayer contends that, even if it was subject to the ROTA on its sales of meals and beverages, it properly excluded charges for delivery fees in computing tax due on its sales during the tax period at issue in this case. With regard to the taxability of delivery fees, 86 Ill. Admin. Code, ch. I, §130.415 provides as follows:

130.415. Transportation and Delivery Charges.

- a) Transportation and delivery charges are considered to be freight, express, mail, truck or other carrier conveyance or delivery expenses. These charges are also many times designated as shipping and handling charges.
- b) The answer to the question of whether or not a seller, in computing his Retailers' Occupation Tax liability, may deduct, from his gross receipts from sales of tangible personal property at retail, amounts charged by him to his customers on account of his payment of transportation or delivery charges in order to secure delivery of the property to such customers, or on account of his incurrence of expenses in making such delivery himself, depends not upon the separate billing of such transportation or delivery charges or expense, but upon whether the transportation or delivery charges are included in the selling price of the property which is sold or whether the seller and the buyer contract

separately for such transportation or delivery charges by not including such charges in such selling price. In addition, charges for transportation and delivery must not exceed the costs of transportation or delivery. If those charges do exceed the cost of delivery or transportation, the excess amount is subject to tax.

c) If such transportation or delivery charges are included in the selling price of the tangible personal property which is sold, the transportation or delivery expense is an element of cost to the seller within the meaning of Section 1 of the Retailers' Occupation Tax Act, and may not be deducted by the seller in computing his Retailers' Occupation Tax liability.

d) If the seller and the buyer agree upon the transportation or delivery charges separately from the selling price of the tangible personal property which is sold, then the cost of the transportation or delivery charge is not a part of the "selling price" of the tangible personal property which is sold, but instead is a service charge, separately contracted for, and need not be included in the figure upon which the seller computes his Retailers' Occupation Tax liability. Delivery charges are deemed to be agreed upon separately from the selling price of the tangible personal property being sold so long as the seller requires a separate charge for delivery and so long as the charges designated for transportation or delivery or shipping and handling are actually reflective of the costs of such shipping, transportation or delivery. To the extent that such charges exceed the costs of shipping, transportation or delivery, the charges are subject to tax. The best evidence that transportation or delivery charges were agreed to separately and apart from the selling price, is a separate and distinct contract for transportation and delivery. However, documentation which demonstrates that the purchaser had the option of taking delivery of the property, at the seller's location, for the agreed purchase price, or having delivery made by the seller for the agreed purchase price, plus an ascertained or ascertainable delivery charge, will suffice.

86 Ill. Admin. Code, ch. I, section 130.415

The taxpayer admits that its customers were not given the option of picking up food at the taxpayer's place of business in order to avoid a delivery fee. Tr. p. 26. Indeed the record clearly indicates that this option could not have been provided the taxpayer's customers because no food was kept on any of its premises. *Id.* In lieu of keeping an inventory of food, all meal and beverage orders were fulfilled by purchasing food from restaurants immediately before being delivered. Tr. pp. 17, 18.

Regulation 130.415(d) states that if it cannot be shown that customers were given the option of picking up tangible personal property at the taxpayer's place of business in order to

avoid delivery charges, the taxpayer can establish that it is exempt from tax on delivery charges only if it presents contracts or similar documentary evidence that delivery charges were separately contracted for by its customers. See 86 Ill. Admin. Code, ch. I, section 130.415(d).

The taxpayer contends that its customers always agreed to pay a delivery charge when they ordered food from the taxpayer (Taxpayer's Brief, p. 5), but has presented no documentary evidence of any kind to corroborate this claim. The only evidence of any kind the taxpayer has presented to support this claim is evidence that delivery charges were separately enumerated when sales of food were made to the taxpayer's customers. Taxpayer's Ex.1. However, pursuant to subsection 130.415(b) of the Department's regulation at issue, the separate enumeration of charges for delivery on documents consummating sales transactions is insufficient evidence to show that the shipping charges were separately contracted for or agreed to between the taxpayer and its customers. Since evidence of the separate enumeration of these charges is the only evidence the taxpayer has presented to support its claim, I find that the taxpayer has failed to prove that its delivery charges were properly excluded from its measure of taxable retail sales on its ST-1 sales tax returns filed during the tax period in controversy.

Section 7 of the ROTA expressly sets forth the type of documentation that must be maintained to support deductions taken for exempt or non-taxable transactions, providing in part as follows:

To support deductions made on the tax return form, or authorized under this Act, on account of receipts from any 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 or 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. It shall be presumed that all sales of tangible personal property are subject to tax under this Act until the contrary

is established, and the burden of proving that a transaction is not taxable hereunder shall be upon the person who would be required to remit the tax to the Department if such transaction is taxable.

35 ILCS 120/7

Moreover, as noted above, the ROTA provides that the correction and/or determination of tax due issued by the Department is *prima facie* proof of the correctness of the amount of tax due shown in the Department's determination. 35 ILCS 120/4. It is well-settled Illinois law that in order to overcome the presumption of validity attached to the Department's corrected returns the taxpayer must produce competent evidence, in the form of books and records showing that the Department's returns are incorrect. Copilevitz v. Department of Revenue, 41 Ill. 2d 154 (1968); Masini v. Department of Revenue, 60 Ill. App. 3d 11 (1st Dist. 1978). Oral testimony alone is insufficient to overcome the *prima facie* correctness of the Department's determinations. Mel-Park Drugs, Inc., *supra*.

In the instant case, the taxpayer has failed to produce documentation sufficient to show that it separately contracted for delivery fees that were omitted from its ST-1 sales tax returns for the tax period in controversy as required in order to deduct or exclude these fees by 86 Ill. Admin. Code, ch. I, section 130.415. The taxpayer's testimony that its customers agreed to incur delivery fees is insufficient, as a matter of law, to support the taxpayer's claim and therefore rebuts neither the statutory presumption of taxable sales pursuant to section 7 of the ROTA nor the Department's *prima facie* case.

WHEREFORE, for the reasons stated above, it is my recommendation that the NTL at issue in this case be affirmed.

Ted Sherrod
Administrative Law Judge

Date: March 2, 2011