



TAX TRENDS

The newsletter of the Illinois State Bar Association's Section on State & Local Taxation

Editor's note

By Stanley R. Kaminski

This issue of *Tax Trends* has a review of two different cases. The first is by Bill Seitz, who summarizes the Illinois Appellate Court's decision in *American Airlines v. Illinois Department of Revenue*, (No. 08-2985), issued on December 18, 2009. This case concerns the filing of an amended refund claim and whether it was barred under the applicable statute of limita-

tions. David J. Kupiec and Natalie M. Martin reviewed the second case, *Nancy Kean v. Wal-Mart Stores, Inc.*, Docket No. 107771 (November 19, 2009). This Illinois Supreme Court decision upheld the decision of the Illinois Appellate Court and involved the taxation of shipping charges under the Illinois Retailers' Occupation Tax and Use Tax. ■

A review of *American Airlines v. Illinois Dept. of Revenue*

By Bill Seitz

On December 18, 2009, the First District issued its decision in *American Airlines v. Illinois Department of Revenue* (No. 08-2985).

At issue in this appeal is whether the statute of limitations had expired on refund claims filed by American. Specifically, the question presented was whether the claim was an amendment to a timely filed claim for a tax refund within the statute of limitations under section 21 of the Illinois Use Tax Act (UTA) (35 ILCS 105/21), or a new claim filed after it had expired.

The Circuit Court, Cook County (Judge Alexander P. White), had found that the claim was timely, as an amendment to timely filed refund claim. The Department appealed.

The 1st District reversed the judgment of the trial court. The Court found that American was not seeking an amendment of a timely filed claim, but rather the filing of a separate claim outside of the three year statute of limitations mandated under section 21 of the UTA. Reviewed on this basis, the second claim was time barred.

FACTS

American Airlines loads aviation fuel on its planes in Illinois flights to and from locations in

other countries around the world. The UTA specifically exempts fuel used by an airline on international flights.

Based on a new IRS interpretation of flights that qualify for international or foreign trade, American Airlines was deemed to have more international flights. In response, American filed amended returns with the Illinois Department of Revenue (IDOR) seeking a refund of jet fuel paid on those additional flights.

American Airlines had filed an original claim and then filed an amended claim for refunds of use tax paid during the months of July 2000 through December 2000.

For this time period, the statute of limitations for filing new refund claims for use taxes paid would have ran on January 1, 2004 (claim for credit or refund must be filed with the IDOR less than three years prior to January 1, 2004). (35 ILCS 105/21))

The original refund claim was filed on October 2, 2003. It was not disputed that this was timely.

The second refund claim was filed on May 9, 2005. This was the disputed claim at issue in the case.

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The IDOR considered the second claim to be time barred by the statute of limitations set forth in section 21 of the UTA. They contended that the second refund claim was not an amendment but rather a separate claim, based upon different transactions with different factual and legal predicates.

American contended that the second claim was a mere amendment to the original refund claims, as it did not raise any factual or legal issues, but merely sought a larger dollar amount for the same type of exemptions.

STANDARD OF REVIEW

The IDOR argued for that the appellate court's review involved a mixed question of law and fact, and that the clearly erroneous standard should apply. Had the Court reviewed this case on this basis, the IDOR's decision would have been difficult to overturn.

American Airlines argued that the issue at hand is purely a legal one, and that therefore *de novo* review is appropriate. The court ended up deciding the case without deference to the IDOR on its statutory interpretation, while given the IDOR deference on the facts.

The court found that to the extent they looked to the facts in the record to determine the substance of the two claims, they will de-

fer to the findings of the IDOR, reviewing its determination under a manifest weight of evidence standard.

The court agreed with American Airlines that the issue of the applicability of the statute of limitations or the relation back doctrine of section 2-616(b) of the Code of Civil Procedure to the provisions of UTA is purely a legal one, involving statutory interpretation. The Court found, therefore, *de novo* review to be appropriate.

DECISION

In rejecting American's position, the court made the following findings:

(1) Section 21 should be strictly construed, such that American's claim was filed outside of the three-year statute of limitations, and therefore is time-barred.

The court found that the second claim was not premised on the same legal predicate as the first. Therefore, the second claim was time-barred.

(2) The relation back doctrine under section 2-616(b) of the Code of Civil Procedure does not trump the statutory provisions of the Use Tax Act, so as to permit late amendment to a timely filed claim.

The Court found that the UTA provisions preempt those provisions. Specifically, the Court found that the UTA fully regulates the procedures for the filing of refund claims, and more specifically the time requirements for the filing of such claims, so as to preclude the late filing sanctioned under section 2-616(b) of the Civil Practice Law.

(3) The original refund claim was not a "protective claim" under *Dow Chemical Co. v. IDOR* (a 1993 income tax case), so as to permit the tolling of the statute of limitations for an amendment to such claim.

The Court found there to be a new claim, not an amendment to an already filed claim. Therefore, the Court rejected American's contention that equitable concerns compel the permission of its second claim outside of the statute of limitations.

(4) The IDOR's denial of American's second refund claim did not deny American of its right to due process of law, allowing for an equitable tolling of the limitation statute.

The Court found that American's due process rights could not have been violated because all of the events cited for that contention occurred after the statute of limitations for filing refund claims expired. ■

Illinois Supreme Court holds Wal-Mart properly charged sales tax on shipping charges applied to customers' Internet purchases of tangible personal property

By David J. Kupiec JD, CPA and Natalie M. Martin JD of Kupiec & Martin, LLC.

On November 19, 2009, The Illinois Supreme Court issued an opinion holding that shipping charges for certain Internet purchases of tangible personal property are subject to the Illinois sales tax pursuant to the Retailers' Occupation Tax Act ("ROTA") and Use Tax Act thereby affirming the judgment of the Appellate Court affirming the dismissal of Plaintiffs' complaints, *Nancy Kean, Appellant (Chip Russell, Intervenor-Appellant), v. Wal-Mart Stores, Inc., et al., Appellees (Illinois Department of Revenue et al., Intervenors-Appellees)*, Docket No. 107771

(November 19, 2009).

The underlying purchases were placed and executed through Wal-Mart Store, Inc.'s Internet store and included Kean's September 9, 2006 purchase of a trampoline and Russell's December 5, 2006 purchase of Leapfrog Leapster Learning System. The Internet purchases consisted of the following steps on <www.walmart.com>: 1) select the item to be purchased at the listed price; 2) click a button agreeing to add the item to the 'electronic shopping cart'; 3) upon receipt of shopping cart subtotal confirming item and

price proceed to 'checkout'; 4) once in 'checkout,' select destination for item purchased; 5) after destination entered, select at listed costs one of three third-party shipping options—standard shipping, two- to three-day shipping or one-day shipping; and 6) customer concludes transaction by paying for the item purchased with a single payment that includes the price of the item, third-party delivery costs and Illinois sales tax. At no time during this Internet purchase process was the customer provided the option to select an alternative form of receiving the item

purchased other than the third party delivery provided by <www.walmart.com>.

At issue in this case is whether shipping charges for certain Internet purchases of tangible personal property were either: 1) separately agreed upon and not part of Wal-Mart's "selling price" and thus not subject to sales tax or 2) "an inseparable part of a single transaction" subject to the Illinois sales tax pursuant to the ROTA and Use Tax Act. Plaintiff and Plaintiff-Intervenor ("Plaintiffs") filed complaints in Illinois Circuit Court alleging that Defendant incorrectly charged Illinois sales tax on shipping charges for goods purchased using Wal-Mart's Web site. Specifically, the Plaintiffs' complaints: 1) alleged that the Defendant violated the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/2, by collecting an unauthorized tax on the shipping price; 2) alleged that the Defendant was unjustly enriched if it had not remitted the taxes collected at issue to the State and Defendant should be disgorged of any such taxes collected and not remitted; and 3) requested an injunction requiring the Defendant to stop collecting the sales tax on shipping charges. The Illinois Department of Revenue and State Treasurer filed a motion to intervene as party defendants and for leave to file a motion to dismiss Plaintiffs' complaints. The Circuit Court dismissed Plaintiffs' complaints finding that the shipping charges at issue were subject to Illinois sales tax as a matter of law.

The Appellate Court reviewed Plaintiffs' claims that "both the language of the relevant taxing statutes and the Department of Revenue Regulations interpreting that language demonstrate that shipping charges cannot be considered part of the 'total selling price' of the goods sold, so as to be subject to sales tax." The Appellate Court explained that "if the shipping charges at issue can be considered part of the 'selling price' of the item purchased through Wal-Mart's Web site, they are part of Wal-Mart's 'gross receipts' under the ROTA and therefore subject to sales tax." The Appellate Court added that the Illinois courts "have ruled that the crucial issue is whether there is an 'inseparable link' between the sale of goods and the associated shipping charges." The Appellate Court affirmed the Circuit Court's Judgment as the Defendant "in its current Web site setup has created a necessary link between online consumers' purchase of goods and purchase of shipping services, ... [without providing the customer the option of picking up goods at

the seller's location], that is sufficient to render those shipping charges subject to sales tax."

The Supreme Court applied a *de novo* standard of review as the determination of "whether the circuit court properly dismissed Plaintiffs' complaints turns on an issue of statutory construction." The Supreme Court explained that "whether Wal-Mart property charged and collected a use tax on the shipping charges is dependent upon whether Wal-Mart was taxable under ROTA for the shipping charges. If Wal-Mart was not subject to the retailers' occupation tax for the shipping charges on Plaintiffs' Internet purchases, then the Use Tax Act does not apply." Since neither the ROTA nor the Use Tax Act explicitly provide if the shipping charges at issue are taxable, the issue is whether such charges are taxable as part of the underlying "selling price" of the purchased item.

The ROTA and Use Tax Act define "selling price" as "the consideration for a sale valued in money *** determined without any deduction on account of the cost of the property sold, the cost of materials used, labor or service cost or any other expense whatsoever." 35 ILCS 120/1 and 35 ILCS 105/2. The Supreme Court added that the treatment of shipping charges are expressly addressed in the Regulations and quoted four paragraphs from Regulation Section 130.415 titled "Transportation and Delivery Charges." The Supreme Court explained that the "primary inquiry" under Section 130.415 is "whether the parties separately contracted for shipping." Plaintiffs contend that the shipping charges were not part of the selling price and therefore not taxable.

The Supreme Court held that under the facts at issue that the "selling price" included the price of shipping as no separate agreement for transportation was entered into - "nor could it." At the time of the purchase, the Internet customers at issue never had the option of picking up the product at a Wal-Mart store. "Under section 130.415(d), this absence of choice is indicative that the shipping charges were part of the taxable selling price, rather than the subject of a separate agreement." The Supreme Court further noted that Wal-Mart's refund policy of not refunding shipping costs is not indicative of separately contracted shipping costs.

The Supreme Court also rejected the Plaintiffs' claims that the shipping costs could not be subject to the ROTA or Use Tax Act because such costs represent services which

TAX TRENDS

Published at least four times per year.

Annual subscription rate for ISBA members: \$20.

To subscribe, visit www.isba.org or call 217-525-1760

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are not taxable under the ROTA or Use Tax Act. However, the Supreme Court stated that “though no dispute exists that service occupations are beyond the reach of the ROTA, the line between the provision of nontaxable service and a taxable retail sale of tangible personal property is not always clear.” In addressing where that line is drawn, the Illinois courts have looked to “whether the service is an ‘inseparable’ or ‘indispensable’ part of the retail sale.” *Material Service Corp. v. Department of Revenue*, 98 Ill. 2d 382, 389 (1983); *Snite v. Department of Revenue*, 398 Ill. 41, 46 (1947); *Airco Industrial Gas Division, The BOC Group, Inc. v. Department of Revenue*, 223 Ill. App. 3d 386, 392 (1991); *Terrace Carpet Co. v. Department of Revenue*, 46 Ill. App. 3d 84, 89 (1977); *Gaspers, Inc. v. Department of Revenue*, 13 Ill. App. 3d 199, 203 (1973). The Supreme Court held that an “inseparable link” existed between the sale and delivery of the items Plaintiffs purchased from Wal-Mart’s Internet store as Plaintiffs were required to buy the delivery service to complete the transaction.

Accordingly, for the reasons stated above, the Supreme Court affirmed the judgment of the lower courts by holding that the shipping charges at issue were properly included in the “selling price” under the ROTA and Use Tax Act and that Wal-Mart was correct in charging and collecting sales tax on the shipping charges. ■

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Thursday, 3/04/10 – Webinar—Conducting Legal Research on Fastcase. Presented by the Illinois State Bar Association. *An exclusive member benefit provided by ISBA and ISBA Mutual. Register at: <<https://www1.gotomeeting.com/register/812110961>>. 12-1.

Friday, 3/05/10 – Chicago, ISBA Regional Office—Administrative Adjudication in the City of Chicago and other Municipalities. Presented by the ISBA Administrative Law Section. Time TBD.

Friday, 3/26/10 – Rock Island, Holiday Inn—Illinois’ New Rules of Professional Conduct. Presented by the Illinois State Bar Association. 8-12:30.

Thursday, 3/18/10- Webcast—Collaboration Tools: Paperless Communication with Clients. Presented by the ISBA Legal Technology Section. <<https://isba.fastcle.com/store/seminar/seminar.php?seminar=3563>>. 12-1.

Friday, 3/26/10 – Rock Island, Holiday Inn—Illinois’ New Rules of Professional Conduct. Presented by the Illinois State Bar Association. 8-12:30. Cap 125. ■



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 Springfield, Ill.
 Permit No. 820

TAX TRENDS
 ILLINOIS BAR CENTER
 SPRINGFIELD, ILLINOIS 62701-1779
 FEBRUARY 2010
 VOL. 53 NO. 8