ILLINOIS INDEPENDENT TAX TRIBUNAL

WAYFAIR LLC, Petitioner, v. ILLINOIS DEPARTMENT OF REVENUE, Respondent.	)))))))))	Case No.: 21-TT-114 Judge Brian F. Barov

THE ILLINOIS DEPARTMENT OF REVENUE'S BRIEF IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT AND IN RESPONSE TO THE PETITIONER'S MOTION FOR SUMMARY JUDGMENT

The Respondent, Illinois Department of Revenue (the "Department"), files its brief in support of its cross-motion for summary judgment, and in response to the Petitioner Wayfair LLC's ("Wayfair") motion for summary judgment, and states as follows:

INTRODUCTION

On August 18, 2021, the Department issued a Notice of Tax Liability ("NTL") to Wayfair assessing tax and statutory interest (as of the notice date) in the amount of $392,348.17. On or around October 1, 2021, Wayfair filed its timely protest to the NTL in which it only contests the portion of the NTL attributable to certain pre-nexus sales. The parties prepared a joint Stipulation of Agreed Facts ("Stipulation") pursuant to Tribunal Rule 5000.340, which was filed on July 24, 2022. On October 6, 2022, Wayfair filed its motion for summary judgment.

In response to Wayfair's motion, the Department brings its cross-motion for summary judgment. In support of its motion, the Department relies on portions of the Stipulation and its records filed under the Certificate of the Director. The Department asks this Tribunal to deny Wayfair's motion, grant its motion, and to enter judgment in the Department's favor upholding the NTL in total.

BACKGROUND

The facts surrounding Wayfair's selling activity at issue are not in dispute and are accurately set forth in the Stipulation. As to the facts surrounding the audit and assessment, the Department has attached copies of its notices and records, which are presented under the Certificate of the Director of the Department pursuant to sections 4 and 8 of the Retailers' Occupation Tax Act,[1] and made applicable to this proceeding under section 12 of the Use Tax Act.[2] The Department's notices and records, designated as the Department's Group Exhibit A, consists of the following records:

A-1 – Notice of Audit Initiation
A-2 – Notice of Audit Expansion
A-3 – Audit Narrative
A-4 – Schedule 1 Summary Analysis
A-5 – Global Taxable Exceptions Detailed Report
A-6 – Projected Data Result
A-7 – EDA-105-R
A-8 – Notice of Tax Liability

[1] All references to sections of the Retailers" Occupation Tax Act are to those found in 35 ILCS 120/1 *et seq*.
[2] All references to sections of the Use Tax Act are to those found in 35 ILCS 105/1 *et seq*.

Wayfair's Selling Activities in Illinois

Wayfair is an online retailer with a principal place of business in Boston, Massachusetts. (Stip. ¶ 10.) Illinois customers purchased tangible personal property from Wayfair's website, and at all relevant times those orders were fulfilled from inventory located outside Illinois. (Stip. ¶ 28, 31.) When a customer placed an order with Wayfair, their payment information was collected and approved, but their payment was not processed until the inventory was fulfilled and shipped. (Stip. ¶ 30.)

Prior to February 1, 2016, Wayfair was not a "Retailer maintaining a place of business in Illinois." (Stip. ¶ 36.) On February 1, 2016, Wayfair leased a facility in Carol Stream, Illinois, to house a cross dock facility. (Stip. ¶ 14, 32.) Wayfair opened the Carol Stream facility on February 19, 2016. (Stip. ¶ 15.)

The Department's Audit

Beginning with the February 2016 reporting period, Wayfair has reported its sales monthly on the Form ST-1 Sales and Use Tax return. (Stip. ¶ 3; Dept. Ex. A-3 at 3.) On June 21, 2018, the Department notified Wayfair that it has initiated an audit of its Sales/Use Tax returns for tax periods February 2016 through March 2018 (the "Audit"). (Dept. Ex. A-1.) The Audit was later expanded on July 3, 2019, to include Sales/Use Tax periods through March 2019. (Dept. Ex. A-2.) The Audit examined Wayfair's retail sales to Illinois customers, and its purchases of fixed assets and consumable supplies. (Dept. Ex. A-3.) As a result of the Audit, adjustments to tax were proposed for underreported sales and for unsupported bad

debt deductions. (Dept. Ex. A-3 at 5-8.) The sales adjustments were further separated into pre- and post-nexus categories, with pre-nexus sales defined as those orders placed before but shipped after February 1, 2016. (Dept. Ex. A-3 at 6). The pre-nexus sales were scheduled as an exception in the amount of $2,634,295.36, giving rise to an adjusted tax liability in the amount of $164,643.46. (Dept. Ex. A-4 and A-6 at 4.) This adjustment was reported by the auditor under Tax Code 11 as a "UT/SUT Receipts Adjustment." (Dept. Ex. A-5.) Adjustments were also made to post-nexus sales in the net amount of $130,095.37 and Use Tax on Wayfair's purchases in the amount of $39,503.76. (Dept. Ex. A-4.) The results of the Audit were processed on Form EDA-105-R, ROT and E911 Surcharge Audit Report (Dept. Ex. A-7), and on August 18, 2021, the Department issued an NTL for the Audit in the amount of $334,242, including tax and statutory interest. (Stip. Ex. B, Dept. Ex. A-8.)

Wayfair's Protest

Wayfair now objects solely to the $164,646.46 tax portion of the NTL assessment attributable to sales that were accepted on Wayfair's website prior to February 1, 2016, but where payment was processed, and the items shipped to customers after Wayfair has established nexus. (Stip. ¶ 18.)

STANDARD OF REVIEW

Summary judgment is proper only where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as

a matter of law." *Rogers v. Ill. Dept. of Rev.*, 2017 IL App (1st) 151449, ¶ 30. While the filing of cross-motions does not necessarily establish the lack of an issue of material fact, it does indicate that the parties agree that the case involves a matter of law and that they invite the court to decide that issue. *Shared Imaging, LLC v. Hamer*, 2017 IL App (1st) 152817, ¶ 13.

ARGUMENT

Wayfair makes two principal arguments in its brief. First, Wayfair argues that the Department has issued an assessment for Retailers' Occupation Tax, a tax for which, based upon its selling activities in Illinois as set forth in the Stipulation, it cannot be liable. Second, Wayfair argues that even if the assessment is "revised after-the-fact" as an assessment under the Use Tax Act, it was not required to collect Use Tax from customers for any sales it accepted from Illinois customers prior to February 1, 2016.

As to Wayfair's first argument, the Department agrees. Wayfair is not liable for Retailers' Occupation Tax—which is precisely why the Department has issued an assessment pursuant to the Use Tax Act. As to its second argument, Wayfair is incorrect; Use Tax is incurred at the time of delivery. Finally, while the Stipulation filed in this case does make several references to "Retailers' Occupation Tax," its use of that term is errant, inconsistent, and cannot override the clear evidence that the assessment at issue is for Use Tax required to be collected by an out-of-state retailer maintaining a place of business in Illinois. Because the Department has properly assessed Use Tax that was required to be collected by Wayfair on retail

sales delivered to Illinois customers after Wayfair established nexus, the NTL should be upheld.

I. The Department's NTL is prima facie valid.

The Department's *prima facie* case can only be rebutted if a taxpayer presents competent evidence, closely identified with its books and records, of the incorrectness of the Department's NTL. *Chak Fai Hau v. Dep't of Revenue*, 2019 IL App (1st) 172588, ¶¶ 52-56; *Copilevitz v. Dep't of Revenue*, 41 Ill.2d 154, 156-57 (1968). Wayfair is not challenging the sufficiency of the Department's, and its relevant selling activities have been stipulated. All that remains is a legal question regarding Wayfair's liability under the Use Tax Act for the identified pre-nexus sales.

II. The Department's assessment was made under the Use Tax Act.

What is commonly referred to as Illinois "Sales Tax" is really the application of two complementary taxes—Retailers' Occupation Tax and Use Tax. Retailers' Occupation Tax is a tax on the retailer, while Use Tax is a tax on the purchaser. However, retailers are required to collect the Use Tax from customers. Both taxes are satisfied by a single payment to the Department. Out-of-state retailers may still be required to collect Sales Tax from its Illinois customers, but that obligation may arise solely under the Use Tax. Wayfair is in fact such an out-of-state retailer. However, this fact is obscured by a defective Stipulation.

The Stipulation filed jointly by the parties on or around July 26, 2022, is not without significant flaws and ambiguities. In general, stipulations with this

Tribunal are governed by Tribunal Rule 5000.340. Stipulations entered under Tribunal Rule 5000.340 generally bind the parties, and cannot be otherwise qualified, changed, or contradicted unless permitted by the Tribunal, which should be allowed where justice requires. Several paragraphs of the Stipulation contain factual inaccuracies that are contradicted by the documents attached. The affected paragraphs include ¶¶ 1, 3, 4, 5, 9, and 18.[3] Each affected paragraph mischaracterizes various aspects of the Wayfair's tax reporting, the Department's Audit, and the NTL in relation to "Retailers' Occupation Tax."

These mischaracterizations can be broken down into several categories. At the most basic level there are statements that are facially impossible. Paragraph 3 of the Stipulation asserts that Wayfair filed "Retailers Occupation Tax returns," however, there is no such return. Wayfair, like most retailers, reports their sales on Form ST-1 Sales and Use Tax and E911 Surcharge returns.

The next category includes statements that are inconsistent with the documents directly attached to the Stipulation as Exhibits A through D. Paragraphs 4, 5, and 9, all describe the Department's total proposed assessment and NTL as being for "Retailers' Occupation Tax." However, this is inconsistent with the Exhibits attached to the Stipulation, which clearly show liability for Use Tax. Specifically, Exhibit A to the Stipulation identifies six specific categories of

[3] The Department has purposely omitted ¶ 8. The Department concedes that the Informal Conference Board's ("ICB") Action Decision does reference Retailers' Occupation Tax. This is clearly an error on the part of the ICB. The binding effect of an ICB Action Decision under 86 Ill. Admin. Code § 215.120(f) arises only where the ICB directs to change some portion of the audit. *See* TC 15-01, *available at* https://tax.illinois.gov/content/dam/soi/en/web/tax/research/legalinformation/hearings/tc/documents/tc15-01.pdf. Here, the ICB found that no adjustment was required. (Stip. ¶ 8.)

adjustment. None of those six items are described as "Retailers' Occupation Tax." Four are identified as "Sales Receipts." Two are identified as "Use Tax" adjustments. Similarly, Stipulation Exhibit D specifies corrections to "Use Tax." These inconsistencies within the Stipulation create ambiguity surrounding the use throughout the document of the phrase "Retailers' Occupation Tax." Clearly the identified portion of the assessment for Use Tax on Wayfair's purchases cannot also be described as "Retailers' Occupation Tax." In all instances, if the phrase "Sales and Use Tax" is substituted wholesale for the phrase "Retailers' Occupation Tax," these internal inconsistencies are not only fully resolved, but the substance of the Stipulation is unchanged.[4]

The final category includes those paragraph that are directly contradicted by the Department's audit records. The Audit Narrative makes it clear that Wayfair was being examined for Use Tax required to be collected from its Illinois customers. (Dept. Ex. A-3 at 7.) Furthermore, Stipulation Exhibit A, the Department Exhibit A-4 *Schedule 1 – Summary Analysis* shows that the "Sales Receipts Pre-Nexus" adjustment was made under audit "Tax Code 11." The Department's audit records clearly show that adjustments made under "Tax Code 11" are Use Tax adjustments. (Dept. Ex. A-5.)

Whether to allow such alterations to the Stipulation is in the discretion of the Tribunal. Tribunal Rule 5000.340(c) does not specify under what standard the Tribunal should evaluate such a request. However, its language is substantially

[4] This, of course, makes sense since this was an audit of Wayfair's Sales and Use Tax returns.

similar to United States Tax Court Rule 91(e), and therefore federal cases discussing the application of Rule 91(e), while not binding, are instructive. While stipulations are not to be cast aside lightly, courts have broad discretion in determining whether to bind a party to a stipulation. *Blohm v. Commissioner*, 994 F.2d 1542, 1553 (11th Cir. 1993). A court is not bound by stipulations of either law or fact that are contrary to facts disclosed by the record. *Mead's Bakery, Inc. v. Commissioner*, 364 F.2d 101, 106 (5th Cir. 1966). Therefore, a court should approve a modification to a pre-trial stipulation to conform to the evidence provided in the record. *See Wakefield v. Commissioner*, No. 15383-09, 2015 Tax Ct. Memo LEXIS 7, at *25 (T.C. Jan. 7, 2015); *citing Jasionowski v. Commissioner*, 66 T.C. 312, 318 (1976).

While Illinois courts generally have less discretion in granting relief from a stipulation than this Tribunal has under Tribunal Rule 5000.340(c), Illinois law supports the Department's position. First and foremost, the Illinois Supreme Court has held that parties should be relieved from a stipulation when the matter stipulated to is untrue. *Brink v. Indus. Com.*, 368 Ill. 607, 609 (1938) (*citing City of Chicago v. Drexel*, 141 Ill. 89, 104 (1892)); *Greig v. Griffel*, 49 Ill. App. 3d 829, 835 (1977). As all the references in the Stipulation highlighted above use the phrase "Retailers' Occupation Tax" in a manner which is demonstratively untrue based upon its own attached exhibits as well as the evidence submitted by the Department. It must be set aside.

Illinois law would also permit this Tribunal to set aside the Stipulation due to its internal contradictions and ambiguity. Under Illinois law, stipulations are interpreted like contracts, so therefore it "must be clear, certain and definite in its material provisions." *Scott v. Dreis & Krump Mfg. Co.*, 26 Ill. App. 3d 971, (1975). In construing a contract, the primary objective is to give effect to the intention of the parties, and a court will first look to the language of the contract to determine the parties' intent. *Gallagher v. Lenart*, 226 Ill. 2d 208, 232-233 (2007). A contract must be construed as a whole, viewing each provision in light of the other provisions. *Id*. The parties' intent will not be determined by viewing a clause or provision in isolation. *Id*. If the language of the contract is susceptible to more than one meaning, it is ambiguous. *Thompson v. Gordon*, 241 Ill. 2d 428, 441 (2011). If the contract language is ambiguous, a court can consider extrinsic evidence to determine the parties' intent. *Id.*

The use of the phrase "Retailers' Occupation Tax" in the Stipulation conflicts directly with the attached exhibits which reference Use Tax, rendering the phrase ambiguous. Therefore, the Tribunal can look to extrinsic evidence—evidence that clearly shows that the Departments assessment was made pursuant to the Use Tax Act.

Finally, permitting the Department to modify the Stipulation as set forth above will not unduly burden Wayfair for two reasons. First, Wayfair is a sophisticated national retailer, represented by sophisticated tax counsel.[5] They

[5] *See South Dakota v. Wayfair, Inc.,* 138 S. Ct. 2080 (2018), in which Wayfair was represented by counsel of record in this proceeding.

either knew, or should have known, of the ambiguities regarding the characterization of the assessment in the Stipulation.[6] Wayfair has even gone so far as to accuse the Department of trying to qualify the Stipulation before it could even file a response. (Wayfair Br. at 6.)

Second, maybe sensing weakness in their reliance on the Stipulation to win on a virtual technicality, Wayfair has already briefed the merits of the timing question raised under the Use Tax Act. (Wayfair Br. at 6-8.) Therefore, Wayfair will not be unduly prejudiced by this Tribunal's decision to decide the case solely on the legal merits of the assessment under the Use Tax Act.

III. Retailers are obligated to collect Use Tax at the time of delivery.

As the challenged portion of the NTL was clearly issued under the Use Tax Act, this Tribunal must next determine when Wayfair's obligations under that act did arise. At issue here is the retailer's obligation to collect Use Tax on sales. Pursuant to section 3-45 of the Use Tax Act:

> The tax imposed by this Act shall be collected from the purchaser by a retailer maintaining a place of business in this State or a retailer authorized by the Department under Section 6 of this Act, and shall be remitted to the Department as provided in Section 9 of this Act, except as provided in Section 3-10.5 of this Act.

35 ILCS 105/3-45. For all the transactions comprising the disputed portion of the assessment, the customer placed their order with Wayfair prior to Wayfair

[6] Undersigned counsel for the Department was not involved in the drafting of the Stipulation, but given the similarities between the language in Wayfair's petition and the Stipulation one could reasonably infer that Wayfair primarily drafted the Stipulation. It could hardly be considered unfair to construe those ambiguities against the drafter. *See Cent. Ill. Light Co. v. Home Ins. Co.*, 213 Ill. 2d 141, 153 (2004).

establishing a physical presence in Illinois, but all orders were charged and shipped to the customer after that date. The ultimate issue here is timing. When is Use Tax incurred, thereby triggering Wayfair's obligation to collect the tax from the purchaser? Wayfair has argued that the date in which the customer places the order is determinative, and Wayfair can have no liability for orders placed prior to its nexus date, regardless of when those order were delivered. (Wayfair Br. at 6.)[7] This position is not supported by the statute.

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. While this is a tax that would normally fall on the purchaser of that property, a "retailer maintaining a place of business in the State"[8] is required to collect the Use Tax from the purchaser. 35 ILCS 105/3-45; *Performance Mktg. Ass'n v. Hamer*, 2013 IL 114496, ¶ 4. This burden is imposed on retailers due to the impracticability from collecting Use Tax from the individual purchasers. *Brown's Furniture v. Wagner*, 171 Ill. 2d 410, 418 (1996).

A purchaser of tangible personal property at retail cannot be subject to Use Tax until such purchaser is in possession of such property for actual use within the State. Therefore, it must be understood that a retailer's obligation to collect and report such tax can only arise upon delivery to the customer. For most retail sales, purchase and delivery occur simultaneously, and the retailer's obligation to collect

[7] As Wayfair states in its brief, "[o]nly retailers who maintain a place of business in Illinois at the time of the taxable transaction are obligated to collect the Use Tax from Illinois customers."
[8] "Retailer maintaining a place of in the State" is defined under sec. 2 of the Use Tax Act. The parties are stipulated that Wayfair has been this definition since February 2016.

the Use Tax occurs at the point of sale. However, with out-of-state sales made over the internet to Illinois customers, there will always be some delay between purchase and delivery. Where such delay exists, the Department has in place administrative rules that make it clear that Use Tax is to be collected and reported at the time of delivery. These rules have the same force and effect of law as the provisions of the Use Tax Act. *See Best Buy Stores, L.P. v. Dep't of Revenue*, 2020 IL App (1st) 191680, ¶ 15. Pursuant to section 150.115, the Use Tax liability incurred on a retail sale "shall be computed by applying, to the selling price of such sale, the tax rate in effect as of the date of delivery of such property." 86 Ill. Adm. Code § 150.115(a) (*emphasis added*).[9] Similarly, IDOR has adopted rules dealing with new taxes. As set forth in section 150.120:

> When something that has been exempted becomes liable as to purchases that are made on and after some particular date, the date of purchase for this purpose shall be deemed to be the date of the delivery of the property. This is true even if such delivery is made under a contract that was entered into before the effective date of the new tax.

86 Ill. Adm. Code § 150.120 (e*mphasis added*).

While the Use Tax Act itself does not specifically state that the tax is incurred upon delivery, it can be inferred that this is in fact the intent of the legislature for two reasons. First, the rules cited above tying the effective rate to the time of delivery have been in effect for over 50 years.[10] If the legislature did not intend this result, they have had ample time to make a clarifying change to the

[9] This section includes an exception to the delivery rule for certain contractual purchases, where payment is made before delivery pursuant to section 130.430. Because Wayfair has stipulated that customers where not charged until orders shipped, this exception is inapplicable.
[10] Both sections 150.115 and 150.120 have been in effect since September 9, 1969.

statute. Second, the legislature clearly recognizes how to deviate from this rule. This is evident from the portion of the Use Tax Act relating to the rate applicable to Sales Tax Holiday items. Section 3-6(b)(7) addresses the applicable rate with respect to orders and back orders of qualifying items, and states:

> (7) Order date and back orders. For the purpose of a sales tax holiday, eligible property qualifies for the reduced rate of tax if: (i) the item is both delivered to and paid for by the customer during the Sales Tax Holiday Period or (ii) the customer orders and pays for the item and the seller accepts the order during the Sales Tax Holiday Period for immediate shipment, even if delivery is made after the Sales Tax Holiday Period. The seller accepts an order when the seller has taken action to fill the order for immediate shipment. Actions to fill an order include placement of an "in date" stamp on an order or assignment of an "order number" to an order within the Sales Tax Holiday Period. An order is for immediate shipment when the customer does not request delayed shipment. An order is for immediate shipment notwithstanding that the shipment may be delayed because of a backlog of orders or because stock is currently unavailable to, or on back order by, the seller.

35 ILCS 105/3-6(b)(7). Under this section, qualifying orders that a seller "accepts" during the Sale Tax Holiday Period will qualify for the reduced rate even if delivery is made after the Sales Tax Holiday Period. Under Wayfair's interpretation of the Use Tax Act where the relevant triggering event is order acceptance, and not delivery, this entire paragraph would be surplusage. Wayfair's construction of section 3-45 therefore violates the rule of statutory construction where the entirety of the Use Tax Act should be construed as a whole in a manner such that no term is rendered meaningless or superfluous. *Stroger v. Reg'l Transp. Auth.*, 201 Ill. 2d 508, 524 (2002).

As mentioned above, what is colloquially referred to as Illinois Sales Tax is really the application of the complementary Retailers' Occupation Tax and the Use

Tax. However, out-of-state retailers with a mere physical presence in Illinois, like Wayfair, are only subject to the collection requirements under the Use Tax Act, and that direct connection to the Retailers' Occupation Tax is severed. However, the construction of the complementary nature of the Use Tax Act and the Retailers' Occupation Tax Act remains. Therefore, the Use Tax Act must still be construed in a manner consistent with the Retailers' Occupation Tax Act. Wayfair seems to suggest that Retailers' Occupation Tax *could* be imposed on a retailer that accepts an order before, but delivers the product after, it has acquired nexus for Retailers' Occupation Tax, but that same retailer would not have liability under the Use Tax Act. (Wayfair Br. at 4.). This deconstructs the complementary nature of the Retailers' Occupation Tax and Use Tax and must be rejected as it throws the two taxes completely out of balance. Under this construction, a sale and delivery straddling a rate change would require a retailer to collect one amount from the customer and to pay a different amount to the Department. Assume a situation where the rate decreases. Pursuant to section 8 of the Use Tax Act, the retailer could fully satisfy the higher Use Tax liability by simply paying the lower Retailers' Occupation Tax owed on that transaction, and then pocket the difference. When construing a statute, it must be presumed that the legislature did not intend "absurdity, inconvenience or injustice." *Carver v. Sheriff of La Salle Cty.*, 203 Ill. 2d 497, 508 (2003).

Finally, Wayfair suggests that the Department is required to observe the terms of its agreement with customers, including its initial calculation of any taxes

required to be paid. (Wayfair Br. at 4.) If Wayfair has engaged in sale transactions with customers that do not permit it to collect the proper amount of tax required under 3-45 then there is indeed a problem, but it is Wayfair's problem. Wayfair argues that by collecting the Use Tax from the seller, it is simply acting as an agent to make payment to the Department of the purchaser's obligation. (Wayfair Br. at 7.) This is wrong. Section 3-45 imposes an unqualified duty on the retailer to collect the Use Tax from the purchaser. Whether the terms of the sale include collection of the Use Tax by the retailer does not mitigate that duty. This is clear under section 8 of the Use Tax Act, which states:

> Any retailer required to collect the tax imposed by this Act shall be liable to the Department for such tax, whether or not the tax has been collected by the retailer, except when the retailer is relieved of the duty of remitting the tax to the Department by virtue of having paid a tax imposed by the Retailers' Occupation Tax Act upon his or her gross receipts from the same transactions.

35 ILCS 105/8 (emphasis added). Because Wayfair failed to collect the Use Tax when so obligated, the Department can hold it liable for the tax. *Town Crier v. Dep't of Revenue*, 315 Ill. App. 3d 286, 291 (2000).

Wayfair further complains that it could not have legally collected Use Tax from its Illinois customers until it acquired nexus within the state. (Wayfair Br. at 7-8.) This argument, besides being irrelevant in light of its obligations under Section 8, is unpersuasive. The Carol Stream facility is not something that sprouts up overnight, and likely involved planning that began months before the facility opened. The applicable provisions of the Use Tax Act and regulations cited above are in no way new, and as a sophisticated retailer, Wayfair should have known they

were risking the possibility of failing to obtain direct reimbursement for the tax from their customers. Wayfair could have registered under section 6 of the Use Tax Act, or they could have quoted the customer an estimated amount that included the Use Tax amount.[11]

A retailer's obligation to collect Use Tax on purchases is determined at the time of delivery. For all sales at issue, Wayfair has stipulated that it had a physical presence in Illinois at the time of delivery. Wayfair was therefore required to collect Use Tax from customers on those sales. Wayfair is liable for the tax regardless of whether they actually collected the tax from their customers. Therefore, the portion of the NTL associated with the sales in question should be upheld.

IV. Wayfair's claims under the Taxpayers' Bill of Rights are without merit

Finally, Wayfair makes two unsupported arguments incorporating the Taxpayers' Bill of Rights Act, 20 ILCS 2520/1 *et seq*. First, Wayfair alleges that if the Department can "reconceive its assessment" as a Use Tax assessment, it would have violated section 4(b) of the Taxpayers' Bill of Rights. (Wayfair Br. at 8.) Section 4(b) provides:

> The Department of Revenue shall have the following powers and duties to protect the rights of taxpayers:
>
> ***

[11] Despite Wayfair's protestations to the contrary, the use of estimated sales tax amounts at check-out do appear to be common in e-commerce. For example, Amazon.com provides the following explanation to customers regarding its use of estimated sales tax amount:

> [F]actors can change between the time you place an order and when your shipment is complete. As a result, the tax calculated on your order may change. We display an "Estimated Tax" to be collected at Check Out when confirming an order. The amounts displayed as estimated tax may then be updated later when your order is finalized and completed.

See https://www.amazon.com/gp/help/customer/display.html?nodeId=202036190.

> (b) To include on all tax notices an explanation of tax liabilities and penalties.

Notwithstanding the fact that, as set forth above, IDOR's assessment was clearly and deliberately made under the Use Tax act, Wayfair's undeveloped argument is wholly without merit since the NTL clearly explains the basis of the assessment as follows:

> We have audited your Sales/Use Tax & E911 Surcharge account for the reporting periods February 19, 2016, through March 31, 2019, and the liability has been processed on Form EDA-105-R, ROT and E911 Surcharge Audit Report. As a result we have assessed the amounts shown below.

All the additional information required by that section was provided on the second page of the notice. (Dept. Ex. A-8 at 2.) The Department's NTL therefore provided Wayfair with notice as required. Notwithstanding this fact, there is nothing in the Taxpayers' Bill of Rights that permits a taxpayer to invalidate an assessment due to a failure solely based upon this provision. Regardless, the Tribunal lacks jurisdiction to consider a suit against the Department brought under section 5 of the Taxpayer's Bill of Rights.

Finally, Wayfair makes a specious claim for attorneys' fees and costs under section 7 of the Taxpayer's Bill of Rights. That section provides:

> The fees for an attorney or accountant to aid a taxpayer in an administrative hearing relating to the tax liability or in court shall be recoverable against the Department of Revenue if the taxpayer prevails in an action under the Administrative Review Law and the Department has made an assessment or denied a claim without reasonable cause.

This claim should be rejected out of hand as it was not raised in the petition, nor was it developed in the motion. However, even assuming the Tribunal considers Wayfair's claim, its doesn't stand up to even the slightest scrutiny. An award under

section 7 has two requirements. First, the taxpayer must first prevail in an action "under the Administrative Review Law." Second, the taxpayer must show that the Department made an assessment "without reasonable cause." As to the first requirement, Wayfair is premature. Wayfair must first suffer an adverse decision by this Tribunal before it can seek Administrative Review in the appellate court pursuant to 35 ILCS 1010/1-75. Once there, Wayfair would be required show that the assessment, which would have necessarily been upheld at least in part by this Tribunal, was issued "without reasonable cause." Wayfair's claim for fees and costs, brought in the Tribunal, and which only alleges "delays in litigating this case" must be dismissed.

CONCLUSION

For the reasons stated above, the portion the NTL representing Use Tax on Wayfair's retails sales which were accepted prior to February 1, 2016, but delivered to Illinois customers after such date, in the tax amount of $164,643.46, plus statutory interest, should be upheld.

Dated: December 16, 2022

Respectfully submitted,

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