

IN THE ILLINOIS INDEPENDENT TAX TRIBUNAL

SEARS ROEBUCK & CO.)
)
 Petitioner,)
)
 v.)
)
 CONSTANCE BEARD, in her official capacity as)
 DIRECTOR OF THE ILLINOIS DEPARTMENT)
 OF REVENUE, and the ILLINOIS DEPARTMENT)
 OF REVENUE,)
)
 Defendants.)

No.

RECEIVED
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BY: _____
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PETITION

Petitioner, Sears Roebuck & Co. (“Petitioner”), by and through its attorneys, Horwood Marcus & Berk Chartered, complains of the Defendants, the Illinois Department of Revenue (“Department”) and Constance Beard, Director of the Department (“Director”), and alleges as follows:

PARTIES

- 1. Petitioner is an Illinois corporation located at 3333 Beverly, Hoffman Estates, IL 60179, and can be reached at 847-286-5582.
- 2. Petitioner is represented by Horwood Marcus & Berk attorneys Fred O. Marcus and Christopher T. Lutz, located at 500 West Madison St., Suite 3700, Chicago, Illinois 60661. Mr. Marcus can be reached at 312-606-3210 or fmarcus@hmblaw.com. Mr. Lutz can be reached at 312-606-3237 or clutz@hmblaw.com.
- 3. Petitioner’s Account ID is 0021-2210.
- 4. Petitioner is a multi-line retailer that provides a ware array of merchandise and services.

5. The Department is an agency of the Executive Department of the State Government and is tasked with the enforcement and administration of Illinois tax laws. 20 ILCS 5/5-15.

6. Director Beard is the current Director of the Department.

7. Director Beard is lawfully appointed by the Governor of the State of Illinois to execute the powers and discharge the duties vested by law in the Director of the Department. 20 ILCS 5/5-20.

NOTICES

8. On June 5, 2018, the Department issued a Notice of Tax Liability for Retailer's Occupation Tax ("Notice") for the periods from January 1, 2013 through December 31, 2015 ("Periods in Issue") in the amount of \$923,769.24, inclusive of \$0 in penalties and \$119,186.24 in interest. The Notice is attached hereto as Exhibit A.

9. Although the Notice assesses only \$923,769.24, the Department, in its Notice, states that it adjusted Petitioner's tax liability by a protestable amount of \$1,062,109.24. The difference between these two figures appears to result from the Department's application of subsequent prepayments of use tax on fixed assets and expenses to the contested liability.

JURISDICTION

10. Petitioner brings this action pursuant to the Illinois Independent Tax Tribunal Act ("Tribunal Act"), 35 ILCS 1010/1-1 to 35 ILCS 1010/1-100.

11. This Tribunal has jurisdiction over this matter pursuant to Sections 1-15, 1-45, and 1-50 of the Tribunal Act because Petitioner timely filed this Petition within 60 days of the Notice.

BACKGROUND

12. Petitioner operates retail stores across the country that sell home merchandise, apparel, and automotive products and services.

13. The company's segments are comprised of full-line stores and specialty stores, home services and direct response credit, and electronic commerce activities.

14. In the regular course of its business, Petitioner sells appliances or other types of tangible personal property which may require installation in purchasers' homes.

15. In cases where appliances require installation, Petitioner will enter into construction contracts whereby it engages third party contractors to build the property into the purchasers' homes.

16. In the course of such installation, Petitioner may remove cabinets, molding, or other permanent fixtures in order to install the purchased items.

17. Petitioner may hook up items to plumbing or electrical systems.

18. Petitioner may rebuild the frame around the purchased item so the item is built into the purchaser's home.

19. Installation may also include painting, installation of drywall, or caulking.

20. Installation of certain items may require the item to be affixed to property by use of tacks, staples, or wood stripping filled with nails.

21. Installation may include cement, glue, or some other type of adhesive.

22. Removing the items once incorporated into the real property will often likely result in some damage to the real property into which the items were installed.

23. In the course of incorporating tangible personal property into real estate, Petitioner remitted use tax on its cost of acquiring the tangible personal property.

24. On audit, the Department determined that Petitioner was acting as a retailer and should have collected Retailers' Occupation Tax from its customers on the retail purchase price of the tangible personal property.

25. As a result of the Department's audit, it issued its Notice reflecting the tax liability associated with the difference between the use tax Petitioner remitted and the amount due under the Retailers' Occupation Tax.

COUNT I

Petitioner was not subject to Retailers' Occupation Tax when it Affixed Tangible Personal Property to Realty

26. Petitioner realleges and incorporates by this reference the allegations made in paragraphs 1 through 25, inclusive, hereinabove.

27. The Illinois Retailers' Occupation Tax is "imposed upon persons engaged in the business of selling at retail tangible personal property[.]" 35 ILCS 120/2.

28. Sales of real property are not subject to the Retailers' Occupation Tax.

29. Similarly, contracts to improve real estate, including by incorporating tangible personal property into real property, do not constitute taxable sales under the Retailers' Occupation Tax Act. 35 ILCS 120/1.

30. Here, Petitioner transferred tangible personal property to its customers by incorporating that property into its customers' real property.

31. The Retailers' Occupation Tax Act therefore does not impose tax on Petitioner's contracts to improve real property, and the Department's Notice should therefore be withdrawn.

WHEREFORE, Petitioner prays that the Tribunal enter an order that:

- (a) Petitioner's contracts consisted of agreements to improve real property by permanently incorporating tangible personal property into real property;

- (b) Petitioner was not subject to Retailers' Occupation Tax on its transfers of tangible personal property;
- (c) Petitioner remitted the correct amount of use tax on its purchases of tangible personal property sold to its customers which it permanently affixed to its customers' real property;
- (d) enters judgment in favor of Petitioner and against the Defendants and cancels the Notice;
- (e) grants such further relief as the Tribunal deems appropriate under the circumstances.

COUNT II

Petitioner's Transfers of Tangible Personal Property were Subject to Use Tax Because Petitioner was acting as a Construction Contractor

32. Petitioner realleges and incorporates by this reference the allegations made in paragraphs 1 through 31, inclusive, hereinabove.

33. Persons who permanently affix tangible personal property to real estate as construction contractors incur Use Tax liability on their cost price of tangible personal property they physically incorporate into realty. 86 Ill. Admin. Code 130.1940.

34. A construction contractor may also, at times, function as a retailer. Construction contractors who sell items "over-the-counter" or sell items that remain tangible personal property when installed, are acting as retailers and incur Retailers' Occupation Tax liabilities. *See* 35 ILCS 120/1; Illinois Dept. of Rev. General Information Letter No. ST 02-0162-GIL.

35. For the sales at issue, Petitioner functioned as a construction contractor, affixing the tangible personal property it sold to its customers' real property.

36. Because construction contractors are subject to use tax on their purchase price of property and are not required to collect Retailers' Occupation Tax on such sales, Petitioner remitted the correct amount of tax on its purchases of the property.


37. The Department's assessment of Retailers' Occupation Tax against Petitioner for its construction contract sales was erroneous and the Notice should accordingly be withdrawn.

WHEREFORE, Petitioner prays that the Tribunal enter an order that:

- (a) Petitioner's sales of tangible personal property qualified as construction contractor sales;
- (b) Petitioner was not subject to Retailers' Occupation Tax on its transfers of tangible personal property pursuant to its construction contracts;
- (c) Petitioner remitted the correct amount of use tax on its purchases of tangible personal property sold to its customers which it permanently affixed to its customers' real property;
- (d) enters judgment in favor of Petitioner and against the Defendants and cancels the Notice;
- (e) grants such further relief as the Tribunal deems appropriate under the circumstances.

Respectfully submitted,

SEARS ROEBUCK & CO.
Petitioner

By: 

One of Petitioner's Attorneys

Fred O. Marcus (fmarcus@hmblaw.com)
Christopher T. Lutz (clutz@hmblaw.com)
Horwood Marcus & Berk Chartered
500 W. Madison Street, Suite 3700
Chicago, IL 60661
(312) 606-3200

CERTIFICATE OF SERVICE

Undersigned counsel of record hereby certifies that he caused a copy of the foregoing **PETITION** to be served upon other counsel of record herein by causing the same to be delivered by email before the hour of 5:00 p.m. on July 31, 2018.

James R. Reynolds
Illinois Department of Revenue
Office of Legal Services
100 South Randolph Street, 7-900
Chicago, Illinois 60601
James.R.Reynolds@illinois.gov



Notice of Tax Liability



June 5, 2018



Letter ID: CNXXXX11548X1129

#BWNKMGV
#CNXX XX11 548X 1129#
SEARS ROEBUCK & CO
ATTN: SEARS ROEBUCK & CO 768 TAX B2093A
3333 BEVERLY
HOFFMAN ESTATES IL 60179-0001

Account ID: 0021-2210
Reporting period: December 31, 2015

We have audited your Sales/Use Tax & E911 Surcharge account for the reporting periods January 01, 2013, through December 31, 2015, 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.

If you agree, pay the assessment total as soon as possible to minimize additional penalty and interest. Mail a copy of this notice and your payment with the voucher on the enclosed Taxpayer Statement. By including a copy of this notice, your payment will be properly applied to the audit liability.

If you do not agree, you may protest this notice within specific time periods. See the "Protest Rights" section on the following page of this notice for additional information and instructions.

If you do not protest this notice or pay the assessment total in full, we may take collection action against you for the balance due, which may include levy of your wages and bank accounts, filing of a tax lien, or other action to satisfy your liability.

Note: If you are under bankruptcy protection, see the "Bankruptcy Information" section on the following pages of this notice for additional information and instructions.

	<u>Liability</u>	<u>Payments/Credit</u>	<u>Unpaid Balance</u>
Tax	1,629,093.00	(824,510.00)	804,583.00
Interest	202,211.00	(83,024.76)	119,186.24
Assessment Total	\$1,831,304.00	(\$907,534.76)	\$923,769.24

If you have questions, write or call us weekdays between 8:00 a.m. and 4:00 p.m. Our contact information is listed below.

**AUDIT BUREAU
TECHNICAL REVIEW SECTION
ILLINOIS DEPARTMENT OF REVENUE
PO BOX 19012
SPRINGFIELD IL 62794-9012**

217 785-6579

Taxpayer Statement



June 5, 2018

TDD 1 800 544-5304



Letter ID: CNXXXX7172261921

Account ID: 0021-2210

Total amount due: \$923,769.24

#BWNKMGV
#CNXX XX71 7226 1921#
SEARS ROEBUCK & CO
ATTN: SEARS ROEBUCK & CO 768 TAX B2093A
3333 BEVERLY
HOFFMAN ESTATES IL 60179-0001

This statement lists our most recent information about your unpaid balance, available credits, or returns you have not filed. A payment voucher is included so you may pay the balance due.

Sales/Use Tax & E911 Surcharge		You have available credits of \$1,017,894.06				Account ID: 0021-2210
Period	Tax	Penalty	Interest	Other	Payments/Credits	Balance
31-Dec-2015	4,147,533.00	-	119,186.24	-	(3,342,950.00)	923,769.24
• \$1,062,109.24 of this amount is subject to protest.						
31-Dec-2017	1,725,095.00	-	-	-	(1,979,524.06)	(254,429.06)
31-Jan-2018	1,118,130.00	-	-	-	(1,124,548.00)	(6,418.00)
31-Mar-2018	1,168,459.00	-	-	-	(1,432,124.00)	(263,665.00)
30-Apr-2018	670,902.00	-	-	-	(1,164,284.00)	(493,382.00)

SOA

P-000208

Retain this portion for your records.
Fold and detach on perforation. Return bottom portion with your payment.

Taxpayer Statement (R-12/08) (136)



Letter ID: CNXXXX7172261921
SEARS ROEBUCK & CO

Total amount due: \$923,769.24

Write the amount you are paying below.

\$ _____

Write your Account ID on your check.

Mail this voucher and your payment to:
ILLINOIS DEPARTMENT OF REVENUE
PO BOX 19006
SPRINGFIELD IL 62794-9006

\$1,062,109.24 is subject to protest.
Do not pay any Income Tax liability that you intend to protest.

000 006 019948358241 731 123199 2 0000092376924