

TAX TRIBUNAL

1. The Notice was issued by the Department on December 11, 2019, assessing Use Tax in the amount of \$390,024.00, penalty in the amount of \$78,005.00 and interest in the amount of \$70,243.03 in interest for the taxable periods July 1, 2014 through December 31, 2016 (the “Audit Period”).
2. Petitioner is a corporation with its principal place of business in Oakbrook, Illinois. Petitioner is located at 3305 S. York Road, Oak Brook, Illinois, and its telephone number is (708)598-2300.
3. Petitioner’s Illinois account number is 4056-8571.

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

7. Director Harris 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.

8. 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.

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

10. Petitioner's basis for its Petition is the Department's failure to exclude from the taxable base purchases of cranes which were acquired by Petitioner outside of Illinois, and which were used by Petitioner's Lessees outside of Illinois. The Use Tax statute provides that purchases of tangible personal property which are used outside of the state, when possession is obtained by the buyer outside of the state, are not subject to the tax imposed by ILCS Title 86, Part 150.

BACKGROUND AND RELEVANT FACTS

9. Petitioner was incorporated in 2009 in the State of Illinois, and first began operations in 2011.

10. Petitioner is engaged in the sale and rental of cranes used for the development of commercial real estate, general construction services, and refinery operations.

11. Petitioner conducts operations in Illinois, as well as in other states and internationally.

12. During the Audit Period, Petitioner purchased 9 cranes. A list of the cranes

purchased during the Audit Period, with two exceptions, can be found on the last page of the Notice of Audit Results issued on November 6, 2019.

13. Item No. 10, Unit 627BC, the Tadano TriQXL, was purchased outside of the Audit Period, on June 10, 2010.

14. Item No. 2, Unit 177BC, the Grove GMK5165-2SN, was purchased outside of the Audit Period, on May 13, 2019.

15. When Petitioner purchased the cranes it did not pay sales tax, as the cranes were purchased for resale.

16. When leasing the cranes as an interim use prior to their sale, the leases are short-term, on a month-to-month basis.

17. Under the terms of Petitioner's lease agreements, the Lessee is responsible for the payment of use tax, if applicable. A copy of an exemplar lease is attached as Exhibit 5.

18. When Petitioner leased its cranes, the Lessee was responsible for the payment of use tax in the jurisdiction in which the crane was used by the Lessee.

19. The Department performed an audit of Petitioner for Sales, Use, and Excise Taxes and Fees.

20. On December 11, 2019, the Department issued a Notice of Tax Liability assessing Petitioner use tax for all the cranes purchased during the Audit Period.

21. Petitioner timely appeals the Notice.

APPLICABLE LAW

22. ICLS §105/2 Definition of "use" for purposes of imposing Illinois use tax.

23. ICLS §105/3 Imposition of use tax: A tax is imposed upon the privilege of using in this State tangible personal property purchased at retail from a retailer.

24. ICLS §105/2 Definition of "Sale at retail" means any transfer of the ownership of

or title to tangible personal property to a purchaser, for the purpose of use, 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: Provided that the property purchased is deemed to be purchased for the purpose of resale.

25. Ill. Admin. Code 86 § 130.605(c) Exemption from use tax: The tax does not extend to gross receipts from sales in which the seller is obligated, under the terms of his or her agreement with the purchaser, to make physical delivery of the good from a point in Illinois to a point outside of Illinois, not to be returned to a point within Illinois.

26. Sales of the type described in Ill. Admin. Code 86 §130.605(c) are deemed to be within the protection of the Commerce Clause of the Constitution of the United States.

27. Ill. Admin. Code 86 §130.605(e): During the audit period, the regulations provided that the place at which title to the property passes to the purchaser is immaterial. The place at which the contract of sale or contract to sell is negotiated and executed and the place at which the purchaser resides are also immaterial.

COUNT I – ASSESSMENT OF USE TAX ON CRANES PURCHASED OUTSIDE OF THE AUDIT PERIOD

28. The Department assessed use tax on a crane that was purchased on June 16, 2010, which transaction predated the Audit Period and for which the statute of limitations has expired.

29. The Department assess use tax on a crane purchased in 2019, which is outside of the audit period and on which use tax was paid on the sale of such crane on May 3, 2019.

30. Pursuant to ILCS Chapter 35 §105/12, no Notice of Tax Liability can be issued on and after each July 1 and January 1 covering tax due with that return during any month or period more than six years before that July 1 or January 1, respectively.

31. The Notice of Tax Liability issued on December 11, 2019, exceed the limitation contained in ILCS Chapter 35 §105/12.

32. Contrary to the Department's audit determination, these cranes are not subject to Illinois use tax.

33. The failure of the Department to exclude from the tax base the cranes which were acquired and used outside of the state is contrary to the use tax statute and the Department's regulations.

COUNT II – ASSESSMENT OF USE TAX ON CRANES HELD IN INVENTORY AND SOLD AT RETAIL AND FOR WHICH THERE WAS NO INTERVENING USE

34. The Department assessed use tax on five cranes which were purchased for resale, and for which an exemption from tax is provided by ICLS §105/2, as the cranes were not purchased at retail. See also Ill. Admin. Code 86 §130.120(c).

35. Contrary to the Department's audit determination, these cranes are not subject to Illinois use tax.

36. The failure of the Department to exclude from the tax base the cranes which were acquired and used outside of the state is contrary to the use tax statute and the Department's regulations.

COUNT III – ASSESSMENT OF USE TAX ON CRANES ACQUIRED AND USED OUTSIDE OF THE STATE OF ILLINOIS

37. The Department assessed use tax on 2 cranes which were purchased during the Audit Period, yet Petitioner took possession of the cranes out-of-state and the cranes were subsequently leased for use by Lessees out-of-state.

38. For these cranes, title did not pass in Illinois.

39. For these cranes, Petitioner did not take possession in Illinois.

40. For these cranes, the cranes were picked up by Lessees outside of the state, and have been used by Lessees outside of the state.

41. These cranes have been, at all times, located outside of the state.

42. Contrary to the Department's audit determination, these cranes are not subject to Illinois use tax.

43. The assessment of use tax on cranes which were picked up by the lessees, and used during the audit period outside of the state are not subject to use tax.

44. The failure of the Department to exclude from the tax base the cranes which were acquired and used outside of the state is contrary to the use tax statute and the Department's regulations.

COUNT IV – ASSESSMENT OF TAX ON CRANE ON WHICH USE TAX WAS PAID

45. The Department assess use tax on Item 3, Unit 175BC, on which use tax was paid at the time of the sale.

46. The assessment of use tax on a crane on which use tax was paid is in error.

COUNT V - ABATEMENT OF LATE PAYMENT PENALTY DUE TO REASONABLE CAUSE

47. Petitioner incorporates paragraphs 1 through 20 above as if herein fully stated.

48. In its Notice, the Department assessed late payment penalties in an amount of \$78,005.00.

49. Illinois law provides that penalties do not apply if a taxpayer shows that its failure to pay tax at the required time was due to reasonable cause. 35 ILCS §734-8.

50. The most important factor to be considered in making a determination to abate a penalty will be the extent to which the taxpayer made a good faith effort to determine its proper tax liability and to pay its proper tax liability in a timely fashion. 86 Ill. Admin. Code §700.400(b).

51. A taxpayer will be considered to have made a good faith effort to determine and pay its proper tax liability if it exercised ordinary business care and prudence in doing so. 86 Admin. Code §700.400(b).

48. The majority of the cranes at issue during the Audit Period were used outside the state by its Lessees.

49. Petitioner, relying on Illinois law and regulations, exercised ordinary business care and prudence when it reasonably determined that it did not owe Illinois use tax on the cranes purchased because the cranes qualified for a sales for resale exemption, or, in the alternative, that use tax would be responsibility of the Lessee, payable to the jurisdiction in which the Lessee used the cranes, if applicable.

50. The Department's determination that Petitioner owes penalties on late payment of tax is not supported by fact or law.

CONCLUSION AND RELIEF REQUESTED

WHEREAS, Petitioner requests

- a) that the Notice of Tax Liability be modified to remove use tax assessed upon cranes for which possession by Petitioner occurred outside of the state and for which the use or lease of the cranes occurred outside of the state for the reasons contained herein;
- b) that the Notice of Tax Liability be modified to remove the related late payment penalty imposed on use tax assessed upon cranes acquired and used outside the state;
- c) that the Tribunal enjoins the Department from taking any action to assess, lien, levy, offset, or in any other way prosecute and collect the amount of tax, interest and penalty contained in the Notice;

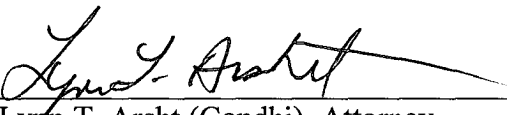
- d) that the Tribunal grants such further relief as the Tribunal deems appropriate under the circumstances; and
- e) that the Tribunal enters an order in accordance with a) – e) above.

[Signature on following page]

Respectfully submitted,

BOHNE CRANE RENTAL & SALES INC.

Dated: February 7, 2020

By: 
Lynn T. Arsht (Gandhi), Attorney
Representing Petitioner.

Representatives:

Lynn T. Arsht (Gandhi)

Honigman LLP

660 Woodward Avenue

Detroit, MI 48226-3506

313-465-7646

ARDC# 6195852

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