

IN THE ILLINOIS INDEPENDENT TAX TRIBUNAL  
COOK COUNTY, ILLINOIS

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INNOPHOS HOLDINGS INC.,	)	
Petitioner,	)	
	)	
	)	
v.	)	
	)	
ILLINOIS DEPARTMENT OF REVENUE,	)	
Respondent.	)	

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**RECEIVED**  
AUG 19 2016  
BY: XMC  
No. 16TT166

**PETITION OF THE TAXPAYER**

Innophos Holdings, Inc. (“Innophos”), by its attorneys of record, Reed Smith LLP, pursuant to Section 1-50 of the Illinois Independent Tax Tribunal Act of 2012 [ 35 ILCS 1010/1-5 *et seq.*], complains of the Illinois Department of Revenue (the “Department” or “IDOR”), as follows:

**Jurisdiction and Venue**

1. This timely petition involves two Notices of Deficiency (“NOD”) that each assesses an amount in excess of \$15,000.00 in tax, penalty and interest under a tax law identified in Section 1-45 of the Tax Tribunal Act; therefore, the Tax Tribunal has jurisdiction over this petition.
2. Innophos accepts the Tax Tribunal’s designation of its office in Cook County to conduct the hearing in this matter.

**Facts Common to all Counts**

**The Parties**

3. Innophos is a corporation maintaining its principal office at 259 Prospect Plains Road, Building A, Cranbury, New Jersey 08512-8000.

4. Innophos is a leading producer of specialty grade phosphate for the food, pharmaceutical and industrial market segments. Within these segments, Innophos' products cover a broad range of applications including water, paper and metal treatment, agriculture, electronics, textiles, tablets, meat preservation and detergents.
5. The Illinois Department of Revenue is an executive agency authorized, among other functions, to administer and enforce the provisions of the Illinois Income Tax Act. 35 ILCS 5/101 *et seq.*

#### **Innophos' Locations in North America**

6. Innophos' corporate headquarters is located in New Jersey.
7. Innophos has manufacturing facilities located in Illinois, Louisiana, Tennessee, and Utah.<sup>1</sup>
8. Innophos also has manufacturing sites in Canada and Mexico.

#### **Innophos' Illinois Locations**

9. Innophos has two manufacturing plants located in Illinois: one in Chicago Heights, Illinois and the other in Chicago, Illinois.
10. Innophos owns a distribution center in Chicago Heights, Illinois (the "XPO Center").<sup>2</sup>
11. While owned by Innophos, a third-party under contract to Innophos is responsible for the XPO Center operations and employs its own personnel.

#### **Innophos' Inventory Management**

12. More than half of Innophos' products are routed through the XPO Center.
13. Products made in the United States, Mexico and Canada are routed through the XPO Center.

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<sup>1</sup> Innophos' Utah manufacturing facility was acquired in 2011.

<sup>2</sup> The Chicago Heights distribution center was previously referred to as the "Jacobson Center," however, it is now referred to as the "XPO Logistics Center."

14. Purchase orders for Innophos' products are received and processed in New Jersey.
15. Innophos produces, or purchases small quantities, of inventory to fill expected customer demand, in anticipation of purchase orders.
16. Innophos uses a business forecast model to predict its customers' order volume in the near future, usually 3 months to a year out.
17. The business forecast relies on the order history of Innophos' customers and is based on the customers' quantity, product, and grade order history.
18. The business forecast model determines the amount of inventory that is stocked at any given time at the XPO Center, so that product is already on-site and ready to be shipped to customers as purchaser orders are received and processed in New Jersey.
19. Products are shipped and stored in the XPO Center even if ultimately they may not be sold or delivered to Illinois customers.
20. Most of the products produced in Illinois and shipped to the XPO Center, along with the products produced elsewhere that are shipped to the XPO Center, are sold to customers outside of Illinois.
21. The XPO Center uses a "pick ticket" authorization system to ship its inventory.
22. When an order is received and processed in New Jersey, a ticket instruction is then sent to the third-party manager of the XPO Center to fulfill the ticket. The third-party has no decision making ability; it only picks and ships the products (on a pallet basis<sup>3</sup>) that it is told to ship.

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<sup>3</sup> Sometimes, the warehouse may be instructed by business management in New Jersey to break-up a pallet to fulfill a customer order.

### **The Illinois Income Tax Act**

23. The Illinois Income Tax Act (the “IITA”) imposes a tax on the net income of every individual, corporation, trust and estate for the privilege of earning or receiving income in or as a resident of Illinois. 35 ILCS 5/101 *et seq.*
24. For a taxpayer that sells tangible personal property, like Innophos, the Illinois corporate income tax is imposed on the taxpayer’s “base income,” as defined in the IITA (federal taxable income after statutory addition and subtraction modifications) that is: (A) “non-business income” as defined in the IITA which is allocable to Illinois; and (B) “business income” as defined in the IITA (all income other than nonbusiness income) which is “apportionable” to Illinois according to the ratio of Illinois sales to total sales everywhere. That ratio is commonly referred to as the “sales factor” or the “apportionment formula.”

### **The Department’s Audit**

25. The Department’s audit staff and management requested and received access to Innophos’ books and records supporting its Illinois state tax returns.
26. The Department’s audit of Innophos included the taxable periods ending December 2011 and December 2012 (the “Years at Issue”).
27. The Department’s auditor (the “Auditor”) determined a total deficiency for the tax period ending December 2011 of \$1,289,688.92 (the “2011 Deficiency”).
28. The 2011 Deficiency resulted from (i) the Auditor’s adjustment of Innophos’ sales factor by adding to the numerator, as “Illinois sales”, those sales shipments that originated in Illinois and were delivered to states in which the auditor determined Innophos was not subject to tax; and (ii) the Auditor’s adjustment of Innophos’ “sales factor to include all

business receipts on federal 1120, Lines 1 through 10, to the extent not expressly excluded from the sales factor.”

29. The Auditor proposed an additional late-payment penalty because Innophos “did not pay the amount required to be shown due on your return by the due date for payment. Once an audit has been initiated, the late payment penalty is assessed at 15 percent of the late payment. Failure to pay the amount due or invoke protest rights within 30 days from the ‘Date of Issuance’ on Form IL-870, Waiver of Restrictions, will result in this penalty increasing to 20 percent.”
31. The Auditor determined a total deficiency for the tax period ending December 2012 of \$572,611.75 (the “2012 Deficiency”).
32. The 2012 Deficiency resulted from the Auditor adjusting Innophos’ sales factor “by including in the numerator sales of tangible personal property originating in Illinois and delivered to customers in states in which you are not taxable.”
34. The Auditor imposed the additional late-payment penalty because Innophos “did not pay the amount required to be shown due on your return by the due date for payment.”

### **The Controversy**

35. On June 23, 2016, the Department issued to Innophos two Notices of Deficiency for the tax periods ending December 2011 and December 2012. For 2011, there was assessed total deficiencies of \$1,289,688.92, comprised of \$198,673.60 of late-payment penalty, \$97,647.32 of interest, and \$993,368 of tax; and for 2012, a total deficiency of \$572,611.75, comprised of \$89,865.08 of late-payment penalty, \$33,421.67 of interest, and \$449,325.00 of tax. Copies of the Notices of Deficiency for the tax periods ending

December 2011 and December 2012 are attached hereto as Exhibit 1 and Exhibit 2, respectively.

### COUNT I

**P.A. 98-0478 Rendered the “Throwback” Rule in IITA Section 304(a)(3)(B) Inapplicable to Returns for Tax Years Ending on or After December 31, 2008**

36. Innophos incorporates by this reference and realleges paragraphs 1 through 35 as though fully-set forth herein.
37. The Department’s Auditor used the so-called “throwback rule” found in IITA Section 304(a)(3)(B) to increase the portion of Innophos’ total business income apportioned to and taxed by Illinois.
38. IITA Section 304(a)(3)(B) provides that a taxpayer’s sales of tangible personal property made to states in which the taxpayer is not subject to tax are to be treated instead as sales in Illinois (*i.e.*, added to the numerator of the Illinois apportionment sales factor).
39. On August 16, 2013, Public Act 98-0478 amended, effective January 1, 2014, the Illinois Income Tax Act with retroactive application to tax years ending on or after December 31, 2008, concerning the apportionment of business income.
40. As amended by Public Act 98-0478, Section 304(f) of the IITA provides that for taxable years ending on or after December 31, 2008, if the apportionment provisions of the IITA do not “fairly represent the market for the person’s goods, services or other sources of business income,” a person may petition for, or the Director may, without a petition, permit or require (i) separate accounting; (ii) exclusion of any one or more factors; (iii) the inclusion of one or more additional factors; or (iv) the employment of any other method to effectuate an equitable allocation and apportionment of the person’s business income. 35 ILCS 5/304(f), as amended.

41. To throwback and add a sale to the Illinois numerator of the sales factor pursuant to IITA Section 304(a)(3)(B) a taxpayer must first determine that the sale was not made to the Illinois market, *i.e.* that the item sold had a final delivery destination in a market other than Illinois.
42. The application of Section 304(a)(3)(B) to a tax year ending on or after December 31, 2008, which results in a sale to another state being added to the Illinois numerator, is directly at odds with IITA Section 304(f) as amended by P.A. 98-0478, because the knowing addition of a non-Illinois sale to the Illinois numerator of the sales factor knowingly does not “fairly represent the [Illinois] market for the person’s goods, services or other sources of business income.”
43. After January 1, 2014, the effective date of P.A. 98-0478, IITA Section 304(a)(3)(B) of the IITA can only be reconciled with IITA Section 304(f) when: (A) it is applied to a tax year ending before December 31, 2008, or (B) the Department, using its authority under IITA Section 304(f) and thus bearing the burden of proof thereunder, determines the application of the throwback rule to a tax year ending on or after December 31, 2008, is necessary to “fairly represent the market for the person’s goods, services or other sources of business income.”
44. On November 17, 2015, this Court in a related case (*Innophos Holdings Inc. v. Illinois Department of Revenue*, 14 TT 214 (the “Related Case”)) granted the Department’s Motion for Summary Judgment on this identical Count/argument. Therefore, Innophos has included this Count in this related case only to preserve its appeal rights.

**WHEREFORE**, Innophos prays that the Tax Tribunal find and determine that P.A. 97-0478 has rendered IITA Section 304(a)(3)(B) not applicable to tax years ending on or after

December 31, 2008, and therefore, that the Department's adjustment to include non-Illinois sales of Innophos in the Innophos Illinois sales factor numerators for 2011 and 2012 is not authorized by the IITA.

## **COUNT II**

### **For Tax Years Ending on or after December 31, 2008, a Throwback Adjustment must be Proposed Pursuant to Section 304(f) of the IITA, and the Proponent must Bear the Burdens of Proof and of going Forward with Evidence**

45. Innophos incorporates by this reference and realleges paragraphs 1 through 44 as though fully-set forth herein.

46. The Department's regulation implementing IITA Section 304(f) provides that:

#### **Section 100.3390 Petitions for Alternative Allocation or Apportionment (Section 304(f) of the IITA)**

\* \* \*

(c) . . . The party (the Director or the taxpayer) seeking to utilize an alternative apportionment method has the burden of going forward with the evidence and proving by clear and cogent evidence that the statutory formula results in taxation of extraterritorial values and operates unreasonably and arbitrarily in attributing to Illinois a percentage of income out of all proportion to the business transacted in this State. In addition, the party seeking to use an alternative apportionment formula must go forward with the evidence and prove that the proposed alternative apportionment method fairly and accurately apportions income to Illinois based upon the business activity in this State. . .

86 Ill. Admin. Code § 100.3390(c) (emphasis added).

47. Because P.A. 98-0478 renders IITA Section 304(a)(3)(B) applicable to tax years ending before December 31, 2008, the Department's adjustment to add non-Illinois sales to the Illinois sales factor numerators of Innophos for 2011 and 2012 is permissible only if, pursuant to IITA Section 304(f) and Section 100.3390 of the Department's regulations,



the Department meets the burden of going forward with evidence that proves by clear and cogent evidence that:

a. not throwing back to the Illinois numerator the Innophos sales to states in which it is not subject to income taxation “results in the taxation of extraterritorial values and operates unreasonably and arbitrarily by attributing to Illinois a percentage of income which is out of all proportion to” the market in this State; and,

b. that using the throwback method to increase the Innophos Illinois numerator by throwing back to the numerator the sales of states in which Innophos is not subject to tax does “fairly and accurately apportion income to Illinois based upon” the market in this State.

48. Generally, under Section 904 of the IITA the Department’s Notices of Deficiency are *prima facie* correct and shall be *prima facie* evidence of the correctness of the amount of tax and penalties due.
49. The Department’s Notices of Deficiency are, without more, insufficient to establish a *prima facie* case of alternative apportionment under Section 304(f) of the IITA where the Department is the proponent of the alternative method and therefore, has the burden to prove by clear and cogent evidence that the statutory formula applied by the taxpayer does not fairly and accurately apportion income to Illinois.
50. On November 17, 2015, this Court in the Related Case granted the Department’s Motion for Summary Judgment on this identical Count/argument. Therefore, Innophos has included this Count in this related case only to preserve its appeal rights.

**WHEREFORE**, Innophos prays that the Tax Tribunal find and determine:

A. that, for adjustments made after January 1, 2014, the Department bears the burden of going forward with evidence that proves by clear and cogent evidence that, for tax years ending on or after December 31, 2008, the statutory apportionment formula's exclusion of non-Illinois sales from the Illinois sales factor numerator does not "fairly represent the market for [Innophos'] goods," and also has the burden to prove that the adjustment proposed by the Department, to include non-Illinois sales in the Illinois sales factor numerator, indeed does "fairly represent the market for [Innophos'] goods" and,

B. that the Department's Notices of Deficiency for 2011 and 2012 are, without more, insufficient to meet the Department's burden under Section 304(f) of the IITA and Section 100.3390 of the Department's regulations.

### **Count III**

**In the alternative, Throwback Violates the Supremacy Clause of the United States Constitution because it causes the Illinois Income Tax Burden to Rise in Direct Relation to the Protection Afforded by U.S. Public Law 86-272**

51. Innophos incorporates by this reference and realleges paragraphs 1 through 50 as though fully-set forth herein.

52. U.S. Public Law 86-272 provides in pertinent part:

No State, or political subdivision thereof, shall have power to impose, . . . a net income tax on the income derived within such State by any person from intrastate commerce if the only business activities within such State by or on behalf of such a person during the taxable year are either, or both, of the following . . .

1. The solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside of the State; . . . and

2. The solicitation of orders by such a person, or his representative, in such State in the name of or for the benefit of a prospective customer of such a person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in

15 U.S.C. § 381.

53. In summary, Congress intended for P.L. 86-272 to provide clear guidance to multistate business enterprises, and to thereby relieve them of undue state income tax compliance and economic burdens, by providing immunity from state income taxation to businesses that limited their activities in a state to those specified in the federal law.

54. Article VI, Cl. 2 of the United States Constitution provides, in pertinent part, that:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; . . .

55. The Department's decision to increase the Illinois tax by the inclusion in the Illinois sales factor numerator of Innophos sales to states in which P.L. 86-272 relieves Innophos of an income tax burden, frustrates the design and intent of Congress by increasing the burdens on interstate commerce in direct relation to the protection conferred by Congress.

**WHEREFORE,** Innophos prays that the Tax Tribunal determine and find that the Department's adjustment to increase Innophos' Illinois sales factor numerator by adding thereto the sales made to states where Innophos enjoys the protection of Federal Public Law 86-272 violates the Supremacy Clause of the United States Constitution because it frustrates the intent and design of the federal law by increasing the Illinois tax burden in direct relation to the burden relieved by the application of the federal law.

#### Count IV

**In the alternative, if Section 304(a)(3)(B) Required an Increase to the Numerators for 2011 and 2012, it was Impossible for Innophos to Petition for Relief upon the now Available Basis that the Increase did not Fairly and Accurately Represent the Market for Innophos' Goods, and Innophos Would be Deprived of Due Process if such Relief is not now Granted**

56. Innophos incorporates by this reference and realleges paragraphs 1 through 55 as though fully-set forth herein.
57. Because of the retroactive application of Public Act 98-0478, Innophos could not have, prior to January 1, 2014, petitioned under Section 304(f) of the IITA to avoid throwback on the basis that Section 304(a)(3)(B) of the IITA did not fairly and accurately reflect the market for Innophos' goods.
58. In 2011 and 2012 Innophos believed, as it does now, that the returns including only its Illinois destination sales in its Illinois sales factor numerator reflected its Illinois market.
59. However, at the time of filing its original 2011 and 2012 Illinois income tax returns, Innophos' belief regarding whether the Illinois apportionment formula fairly and accurately reflected the market for its goods was irrelevant, because from 1969 through January 1, 2014 – during which years Illinois had a three-factor property payroll and sales apportionment formula, then a four factor (double-weighted sales) formula, and finally a single sales factor formula – Section 304(f) of the IITA provided relief if the statutory apportionment formula did not “fairly represent the extent of a person's business activity in this State” and did not concern itself with a fair representation of the market for a person's goods.
60. At the time of filing its 2011 and 2012 Illinois returns Section 304(f) of the IITA would not have informed Innophos that relief from the throwback rule of Section 304(a)(3)(B)

of the IITA was available upon the basis that it did not fairly reflect the market for Innophos' goods.

61. The application of throwback in 2014 to the 2011 and 2012 Innophos returns without the retroactive opportunity to obtain relief under the current version of Section 304(f) of the IITA deprives Innophos of due process.
62. On November 17, 2015, this Court in the Related Case granted the Department's Motion for Summary Judgment on this identical Count/argument. Therefore, Innophos has included this Count in this related case only to preserve its appeal rights.

**WHEREFORE**, Innophos prays that the Tax Tribunal find and determine that Innophos would have been eligible for IITA Section 304(f) relief had it been available when Innophos filed its 2011 and 2012 Illinois income tax returns, that Innophos would be deprived of Due Process if it is now denied the opportunity to obtain relief under Section 304(f) of the IITA from the adjustment to its Illinois sales factor numerator which does not fairly and accurately reflect the Illinois market for its goods.

#### **COUNT V**

**In the Alternative, Innophos' Failure to Pay the Alleged Additional Tax was due to Reasonable Cause**

63. Innophos incorporates by this reference and realleges paragraphs 1 through 62 as though fully-set forth herein.
64. For both tax periods ending December 2011 and December 2012, the Department imposed a late-payment penalty pursuant to Section 3-3(b-20)(2) of the UPIA.
65. Section 3-8 of the UPIA provides that penalties, other than a fraud penalty, "shall not apply if the taxpayer shows that his failure to . . . pay tax at the required time was due to reasonable cause." 35 ILCS 735/3-8.

66. Innophos made a good faith effort to determine the correct reporting of its sales and use tax liability through the exercise of ordinary business care and prudence.
67. Innophos acted with reasonable cause and therefore, under section 3-8 of the UPIA, no penalties should apply to the audit deficiencies that the Department assessed against Innophos.

**WHEREFORE**, Innophos prays that the Tax Tribunal find and determine that the penalties assessed against Innophos violate section 3-8 of the UPIA and must therefore be cancelled or withdrawn.

### **COUNT VI**

#### **IITA Section 304(a)(3)(B)(ii) Violates the Uniformity Clause of the Illinois Constitution**

68. Innophos incorporates by this reference and realleges paragraphs 1 through 67 as though fully-set forth herein.
69. The Tax Tribunal's order of November 17, 2015 in the Related Case established that sales shipments of tangible personal property that originated in Illinois and were delivered to a purchaser in another state are "in this State" under IITA § 304(a)(3)(c) for purposes of computing the Illinois numerator of the sales factor if the taxpayer is not subject to a tax on or measured by income in the state of the purchaser, notwithstanding the retroactive effect of the amendment to Section 304(f) by P.A. 98-0478 (the "Law of this Case").<sup>4</sup>
70. Article IX, Section 2 (the "Uniformity Clause") of the Illinois Constitution of 1970 states:
- In any law classifying the subjects or objects of non-property taxes or fees, the classes shall be reasonable and the subjects and objects within each class shall be taxed uniformly. Exemptions, deductions, credits, refunds and other allowances shall be reasonable.

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<sup>4</sup> Assuming this Tribunal will rely on such ruling in the present matter, Innophos argues accordingly.

71. To survive a uniformity challenge, “a non-property tax classification must (1) be based on a real and substantial difference between the people taxed and those not taxed, and (2) bear some reasonable relationship to the object of the legislation or to public policy.” *Arangold Corp. v. Zehnder*, 204 Ill. 2d 142, 153 (2003) (internal citations omitted).
72. The uniformity clause “was intended to be a broader limitation on legislative power to classify for non-property tax purposes than the limitation of the equal protection clause” and “[w]hen faced with a good-faith uniformity challenge, the taxing body bears the initial burden of producing a justification for the classification.” *Id.*
73. Thus, “a party bringing a uniformity clause challenge need not negate every conceivable basis that might justify the classification.” *Searle Pharmaceuticals, Inc. v. Dep’t of Rev.*, 117 Ill. 2d 454, 468 (1987). Therefore, “a good-faith challenge to a tax classification requires the taxing body to justify the classification.” *Primeco Personal Communications L.P. v. Ill. Commerce Comm’n*, 196 Ill. 2d 70, 85 (2001).
74. Under the Law of this Case, taxpayers who sell tangible personal property and are required to apportion their income to Illinois under IITA § 304(a) are, unlike taxpayers required to apportion income under IITA § 304(b), (c), & (d), singled out to have their Illinois apportionment numerator increased based solely on whether they are subject to tax in the state where they delivered their products.
75. Taxpayers that sell insurance, financial services or transportation services do not have additional income subject to Illinois’ income tax based solely on whether such activities or services were subject to tax in the states in which the taxpayers’ customers received such services. *See* IITA § 304(b), (c) and (d), respectively.

76. There is no real and substantial difference reasonably related to the Constitutional requirement of fair apportionment between taxpayers that sell tangible personal property and taxpayers that sell insurance, transportation services, or financial services.
77. Relative to the Constitutional requirement of fair apportionment, there is no real and substantial difference between a taxpayer that sells tangible personal property and taxpayers that sell insurance, transportation services or financial services, that would justify the differential treatment being proposed by the Law of this Case. The State's false policy of "full apportionment" (that a taxpayer be taxed on no more and no less than 100% of its income) discriminates against a taxpayer that sells tangible personal property as compared to those taxpayers that sell insurance, transportation services, or financial services because of the failure to throw back sales of taxpayers in the insurance, transportation services, or financial services industry can result in less than 100% of those taxpayers' incomes being subject to taxation.
78. The Law of this Case is that IITA § 304(f) alternative apportionment, whether petitioned by a taxpayer or required by a Director, requires clear and cogent evidence of "gross distortion," therefore insurance, transportation services, and financial organization taxpayers who are not subject to tax in another state or states are not for that reason required by the Director to use alternative apportionment to assure no more and no less than 100% of such taxpayer's income is subject to state taxation, while taxpayers that sell tangible personal property are required by IITA § 304(a)(3)(B)(ii) to throwback to Illinois their sales to such other non-tax state.
79. There being a good faith uniformity challenge, the Department has the burden of producing a justification for the differential treatment afforded tangible personal property



sellers in comparison to sellers of insurance, transportation services, and financial services.

**WHEREFORE**, Innophos prays that the Tax Tribunal find and determine that the throwback rule found in IITA §304(a)(3)(B)(ii) is unconstitutional because it violates the Uniformity Clause of the Illinois Constitution of 1970.

### **COUNT VII**

#### **IITA Section 304(a)(3)(B)(ii) Violates the Due Process Clause of the Illinois Constitution and the Due Process Clause of the United States Constitution**

80. Innophos incorporates by this reference and realleges paragraphs 1 through 79 as though fully-set forth herein.
81. At all times relevant hereto, the IITA provided that “[s]ales of tangible personal property are in this state if: (i) the property is delivered or shipped to a purchaser other than the United States government, within this State regardless of the f.o.b. point or other conditions of sale.” 35 ILCS 5/304(a)(3)(B)(i).
- 82: At all times relevant hereto, the IITA provided, in pertinent part, that “Sales of tangible personal property are in this state if: (ii) The property is shipped from an office, store, warehouse, factory or other place of storage in this State and . . . the person is not taxable in the state of the purchaser.” 35 ILCS 5/304(a)(3)(B)(ii).
83. As amended by Public Act 98-0478, Section 304(f) of the IITA provides that for taxable years ending on or after December 31, 2008, if the apportionment provisions of the IITA do not “fairly represent the market for the person’s goods, services or other sources of business income,” a person may petition for, or the Director may, without a petition, permit or require (i) separate accounting; (ii) exclusion of any one or more factors; (iii) the inclusion of one or more additional factors; or (iv) the employment of any other

method to effectuate an equitable allocation and apportionment of the person's business income. 35 ILCS 5/304(f), as amended.

84. P. A. 98-0478 did not affect the application of IITA Section 304(a)(3)(B)(i).
85. Due Process requires that P.A. 98-0478 limit the application of IITA Section 304(a)(3)(B)(ii) to tax years ending before December 31, 2008.
86. The Tax Tribunal's order of November 17, 2015 in the Related Case established the Law of this Case – that sales shipments of tangible personal property that originated in Illinois and were delivered to a purchaser in another state are “in this State” if the seller was not taxable in the state of the purchaser, within the meaning of IITA Section 304(a)(3)(B)(ii), notwithstanding the retroactive effect of the amendment to Section 304(f) by P.A. 98-0478.
87. For tax years ending before December 31, 2008, Section 304(f) of the IITA did not provide for a taxpayer or for the Director of Revenue to deviate from the statutory apportionment formula within Section 304 unless the statutory formula applicable to a given taxpayer did not “fairly represent the extent of a person's business activity in this State.”
88. An Illinois taxpayer's fulfillment of a sales order to an out-of-state purchaser by the shipment of tangible personal property from a location in Illinois to the purchaser's destination outside of Illinois is business activity within Illinois which, for tax years ending before December 31, 2008: (a) was not considered to render the sale of the shipped item to be “in this State” if the Illinois taxpayer was not subject to a tax on or measured by net income in the purchaser's state; and (b) was not considered to be a sale “in this State” if the Illinois taxpayer was subject to a tax on or measured by net income

in the purchaser's state and actually filed a return and paid the tax due on such return; but (c) it was considered a sale "in this State" if the Illinois taxpayer was subject to a tax on or measured by net income but did not file a return in that state.

89. For tax years ending on or after December 31, 2008, Section 304(f) of the IITA did not provide for a taxpayer or for the Director of Revenue to deviate from the statutory apportionment formula within Section 304 unless the statutory formula does not "fairly represent the *market* for the person's goods, services or other sources of business income." 35 ILCS 5/304(f), as amended by P.A. 98-0478 (emphasis added).
90. An Illinois taxpayer's fulfillment of a sales order to an out-of-state purchaser by the shipment of tangible personal property from a location in Illinois to the purchaser's destination outside of Illinois, becomes part of the market for the person's goods and services in the state of the purchaser rather than the market for the person's goods and services in this State.
91. The Illinois Constitution of 1970 provides as follows: "No person shall be deprived of life, liberty or property without due process of law . . . ." Ill. Const. art. I, § 2.
92. The United States Constitution provides as follows: "No state . . . shall any state deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1.
93. The Law of this Case, under which IITA Section 304(a)(3)(B)(ii) includes as a sale "in this State," a sale that is delivered to a purchaser outside this State, violates the Due Process clauses of the Illinois and the United States constitutions, respectively, for tax years ending on or after December 31, 2008.

94. Under the Law of this Case, for tax years ending on or after December 31, 2008, a sale shipped from Illinois to a purchaser in either Germany or Iowa is an Illinois “market” sale if the taxpayer is subject to tax in Germany or Iowa but does not file a tax return in that jurisdiction.
95. For tax years ending before December 31, 2008, both the sale to Germany and to Iowa represented Illinois *business activity*, the fair representation of which was policed under Section 304(f), but for tax years ending on or after December 31, 2008, Section 304(f) polices the fair representation of the *market* and neither the sale to Germany nor the sale to Iowa represent the Illinois *market*.
96. Due Process protects against capricious legislation, which is either arbitrary or unreasonable as a matter of substance rather than procedure.
97. To arbitrarily declare that sales from Illinois to, say Germany or Iowa, are Illinois “market” sales based solely on (i) whether the sale is one of tangible personal property rather than of services or of intangibles, and (ii) on whether the sale is reported in a tax return in the jurisdiction of delivery of the item, is both capricious and unreasonable and contrary to the Due Process protections in the State and Federal constitutions.
98. There is no rational basis to support the discriminatory categorization of only sales of tangible personal property as being made “in this State” when they are known to be made outside Illinois based on whether the selling taxpayer has filed an income tax return in the purchaser’s state, and when sales of services or intangibles similarly made to purchasers in jurisdictions where the selling taxpayer does not file an income tax return are not deemed to be made “in this State.”

**WHEREFORE**, Innophos prays that the Tax Tribunal find and determine that the throwback rule found in IITA §304(a)(3)(B)(ii) is unconstitutional because it violates the Due Process Clause of the Illinois Constitution of 1970 and the Due Process Clause of the United States Constitution.

### **COUNT VIII**

#### **The Department's Notices of Deficiency do not Satisfy the Requirements Imposed by the Taxpayer's Bill of Rights**

99. Innophos incorporates by this reference and realleges paragraphs 1 through 98 as though fully-set forth herein.
100. The Department issued Innophos two NODs, one for the tax period ending December 2011 and one for the tax period ending December 2012.
101. Because there are only "\$0.00" entries on the Explanation of Audit Results attached to the NODs, the NODs do not explain the tax liabilities and penalties, and are contradictory to the brief descriptions of the audit adjustments which are inadequate to explain to the taxpayer what occurred.
102. Under the Taxpayers' Bill of Rights Act, 20 ILCS 2320/4, the Department has the duty to "include on all tax notices an explanation of tax liabilities and penalties."
103. The Department has failed to follow the legal requirements for issuing a Notice of Deficiency by failing to adequately explain the tax liabilities and penalties assessed against Innophos as mandated by the Taxpayers' Bill of Rights Act.

**WHEREFORE**, Innophos prays that the Tax Tribunal find and determine that: (i) The Department's Notices of Deficiency violate the Taxpayers' Bill of Rights Act and are not to be accorded prima facie validity under the IITA.

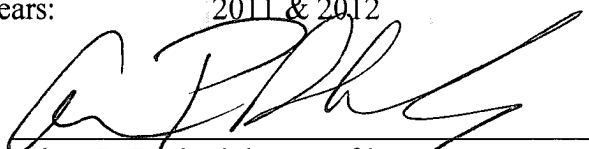
Date: August 19, 2016

Respectfully submitted,

**INNOPHOS HOLDINGS INC**

Taxpayer Account ID:	20-1380758
Taxpayer Phone No.:	(609) 495-2495
Tax Type:	ROT / UT
Tax Years:	2011 & 2012

By:

  
Adam P. Beckerink, one of its attorneys.

Michael J. Wynne  
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10 South Wacker Drive  
Chicago, IL 60606  
(312) 207-6528 (direct)  
(312) 207-6400 (facsimile)

# **EXHIBIT 1**



# Notice of Deficiency

for Form IL-1120, Corporation Income and Replacement Tax Return



June 23, 2016



Letter ID: CNXXX11382913444

REC'D JUN 30 2016

#BWNKMGV  
#CNXX X113 8291 3444#  
INNPHOS INC  
ATTN: ACCOUNTS PAYABLE  
259 PROSPECT PLAINS RD BLDG A  
CRANBURY NJ 08512-3706

Taxpayer ID: 20-1380712  
Audit ID: A297259008  
Reporting period: December 2011  
Total Deficiency: \$1,289,688.92  
Balance due: \$1,289,688.92

We have audited your account for the reporting period listed above. The attached statement explains the computation of your deficiency and the balance due. **Illinois law requires that we notify you of this deficiency and your rights.**

**If you agree to this deficiency**, pay the total balance due as soon as possible to minimize penalty and interest assessed. Make your check payable to the "Illinois Department of Revenue", write your taxpayer ID on your check, and mail a copy of this notice along with your payment.

**If you do not agree**, you may contest this notice by following the instructions listed below.

- **If the amount of this tax deficiency, exclusive of penalty and interest is more than \$15,000, or if no tax deficiency is assessed, but the total penalties and interest is more than \$15,000**, file a petition with the Illinois Independent Tax Tribunal within **60 days** of this notice. Your petition must be in accordance with the rules of practice and procedure provided by the Tribunal (35 ILCS 1010/1-1, *et seq.*).
- **In all other cases**, file a protest with us, the Illinois Department of Revenue, within **60 days** of the date of this notice. If you file a protest on time, we must reconsider the proposed deficiency, and if requested, grant you or your authorized representative and administrative hearing. An administrative hearing is a formal legal proceeding conducted pursuant to the rules adopted by the Department and is presided over by an administrative law judge. Submit your protest on Form EAR-14, Format for Filing a Protest for Income Tax, (available on our website at [tax.illinois.gov](http://tax.illinois.gov)). If we do not receive your protest within **60 days**, this deficiency will become final. A protest of this notice does not preserve your rights under any other notice.
- **In any case**, you may instead, under Sections 2a and 2a.1 of the State Officers and Employees Money Disposition Act (30 ILCS 230/2a, 230/2a.1), pay the total liability under protest using Form RR-374, Notice of Payment Under Protest (available on our website at [tax.illinois.gov](http://tax.illinois.gov)), and file a complaint with the circuit court for a review of our determination.

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.

If you have questions, call us at the telephone number shown below.

Sincerely,

Constance Beard  
Director

ILLINOIS DEPARTMENT OF REVENUE  
AUDIT BUREAU  
PO BOX 19012  
SPRINGFIELD IL 62794-9012  
(217) 558-4960

## **Bankruptcy Information**

If you are currently under the protection of the Federal Bankruptcy Court, contact us and provide the bankruptcy number and the bankruptcy court. The bankruptcy automatic stay does not change the fact you are required to file tax returns.

## **Taxpayer Bill of Rights**

- You have the right to call the Department of Revenue for help in resolving tax problems.
- You have the right to privacy and confidentiality under most tax laws.
- You have the right to respond, within specified time periods, to Department notices by asking questions, paying the amount due, or providing proof to refute the Department's findings.
- You have the right to appeal Department decisions, in many instances, within specified time periods, by asking for Department review, by filing a petition with the Illinois Independent Tax Tribunal, or by filing a complaint in circuit court.
- If you have overpaid your taxes, you have the right, within specified time periods, to file for a credit (or, in some cases, a refund) of that overpayment.

The full text of the Taxpayers' Bill of Rights is contained in the Illinois Compiled Statutes, 20 ILCS 2520/1 et seq.

# Statement

Date: June 23, 2016  
Name: INNOPHOS INC  
Taxpayer ID: 20-1380712  
Letter ID: CNXXX11382913444

The attached EDA-27, Explanation of Adjustments, details your audit adjustments.

## Computation of deficiency

Reporting period: 31-Dec-2011

Income or loss	
Federal taxable income	\$51,814,333.00
Net operating loss deduction	\$0.00
Income tax and replacement tax deduction	\$592,397.00
Illinois bonus depreciation addition	\$34,193,276.00
Other additions	\$0.00
Base income or loss	
Illinois bonus depreciation subtraction	\$9,287,089.00
Total subtractions	\$9,287,089.00
Base income or net loss	\$77,312,917.00
Income allocable to Illinois	
Non-business income or loss	\$0.00
Non-unitary partnership bus. income or loss	\$0.00
Business income or loss	\$77,312,917.00
Apportionment formula	
Total sales everywhere	\$530,310,256.00
Total Illinois sales	\$144,419,632.00
Apportionment factor	0.272330
Business income/loss apportionable to IL	\$21,054,627.00
Nonbusiness income/loss allocable to IL	\$0.00
Non-unitary part. business income app. to IL	\$0.00
Base income or net loss allocable to IL	\$21,054,627.00
Net income	
Base income or net loss	\$21,054,627.00
IL net loss deduction (NLD)	\$0.00
Net income	\$21,054,627.00
Net replacement tax	
Replacement tax	\$526,366.00
Recapture of investment credits	\$0.00
Replacement tax before credits	\$526,366.00
Replacement tax investment credits	\$0.00
Net replacement tax	\$526,366.00
Net income tax	
Income tax	\$1,473,824.00
Recapture of investment credits	\$0.00
Income tax before credits	\$1,473,824.00

# Statement

Date: June 23, 2016  
Name: INNOPHOS INC  
Taxpayer ID: 20-1380712  
Letter ID: CNXXX11382913444

## Computation of deficiency

Reporting period: 31-Dec-2011

Income tax investment credits	\$0.00
Net income tax	\$1,473,824.00
Refund or balance due	
Net replacement tax	\$526,366.00
Net income tax	\$1,473,824.00
Total net income and replacement tax due	\$2,000,190.00
Minus tax previously assessed	-\$1,006,822.00
Total tax deficiency	\$993,368.00
UPIA-5 late-payment penalty (Audit)	\$198,673.60
Plus interest on tax through June 23, 2016	\$97,647.32
Total deficiency	* \$1,289,688.92
If you intend to pay under protest, you must pay this total deficiency amount.	

## Computation of balance due

Reporting period: 31-Dec-2011

Balance due	* \$1,289,688.92
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# Explanation of Audit Adjustments

## Income Tax



#BWNKMGV  
#CNXX X2X1 3X84 3X40#  
INNOPHOS INC  
ATTN: ACCOUNTS PAYABLE  
259 PROSPECT PLAINS RD BLDG A  
CRANBURY NJ 08512-3706

June 23, 2016



Letter ID: CNXXX2X13X843X40

Taxpayer ID: 20-1380712

Account ID: 05154-78016

Audit ID: A297259008

Reporting period: December 2011

### Explanation of adjustments for tax period ending 12/31/2011

We adjusted your sales by including in the numerator sales of tangible personal property originating in Illinois and delivered to customers in states in which you are not taxable. [86 IL Adm. Code 100.3370(c)(1)(F); 86 IL Adm. Code 100.3200]

### Return Impact

\$71,897,403.00

### Tax impact

\$0.00

We adjusted your sales factor to include all business receipts on federal 1120, Lines 1 through 10, to the extent not expressly excluded from the sales factor. [86 IL Adm. Code 100.3370(a)(1)]

\$1,265,552.00

\$0.00

Interest on tax has been computed as allowed by Illinois law. [35ILCS 735/3-2]

We are imposing a penalty because you did not pay the amount required to be shown due on your return by the due date for payment. Once an audit has been initiated, the late payment penalty is assessed at 15 percent of the late payment. Failure to pay the amount due or invoke protest rights within 30 days from the "Date of Issuance" on Form IL-870, Waiver of Restrictions, will result in this penalty increasing to 20 percent. [35 ILCS 735/3-3 (b-20)(2)]



# **EXHIBIT 2**

# Notice of Deficiency

for Form IL-1120, Corporation Income and Replacement Tax Return



June 23, 2016



Letter ID: CNXXX18951986X83

#BWNKMGV  
#CNXX X189 5198 6X83#  
INNPHOS INC  
ATTN: ACCOUNTS PAYABLE  
259 PROSPECT PLAINS RD BLDG A  
CRANBURY NJ 08512-3706

Taxpayer ID: 20-1380712  
Audit ID: A297259008  
Reporting period: December 2012  
Total Deficiency: \$572,611.75  
Balance due: \$572,611.75

We have audited your account for the reporting period listed above. The attached statement explains the computation of your deficiency and the balance due. **Illinois law requires that we notify you of this deficiency and your rights.**

**If you agree to this deficiency**, pay the total balance due as soon as possible to minimize penalty and interest assessed. Make your check payable to the "Illinois Department of Revenue", write your taxpayer ID on your check, and mail a copy of this notice along with your payment.

**If you do not agree**, you may contest this notice by following the instructions listed below.

- **If the amount of this tax deficiency, exclusive of penalty and interest is more than \$15,000, or if no tax deficiency is assessed, but the total penalties and interest is more than \$15,000**, file a petition with the Illinois Independent Tax Tribunal within **60 days** of this notice. Your petition must be in accordance with the rules of practice and procedure provided by the Tribunal (35 ILCS 1010/1-1, *et seq.*).
- **In all other cases**, file a protest with us, the Illinois Department of Revenue, within **60 days** of the date of this notice. If you file a protest on time, we must reconsider the proposed deficiency, and if requested, grant you or your authorized representative and administrative hearing. An administrative hearing is a formal legal proceeding conducted pursuant to the rules adopted by the Department and is presided over by an administrative law judge. Submit your protest on Form EAR-14, Format for Filing a Protest for Income Tax, (available on our website at [tax.illinois.gov](http://tax.illinois.gov)). If we do not receive your protest within **60 days**, this deficiency will become final. A protest of this notice does not preserve your rights under any other notice.
- **In any case**, you may instead, under Sections 2a and 2a.1 of the State Officers and Employees Money Disposition Act (30 ILCS 230/2a, 230/2a.1), pay the total liability under protest using Form RR-374, Notice of Payment Under Protest (available on our website at [tax.illinois.gov](http://tax.illinois.gov)), and file a complaint with the circuit court for a review of our determination.

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.

If you have questions, call us at the telephone number shown below.

Sincerely,

Constance Beard  
Director

ILLINOIS DEPARTMENT OF REVENUE  
AUDIT BUREAU  
PO BOX 19012  
SPRINGFIELD IL 62794-9012  
(217) 558-4960



## **Bankruptcy Information**

If you are currently under the protection of the Federal Bankruptcy Court, contact us and provide the bankruptcy number and the bankruptcy court. The bankruptcy automatic stay does not change the fact you are required to file tax returns.

## **Taxpayer Bill of Rights**

- You have the right to call the Department of Revenue for help in resolving tax problems.
- You have the right to privacy and confidentiality under most tax laws.
- You have the right to respond, within specified time periods, to Department notices by asking questions, paying the amount due, or providing proof to refute the Department's findings.
- You have the right to appeal Department decisions, in many instances, within specified time periods, by asking for Department review, by filing a petition with the Illinois Independent Tax Tribunal, or by filing a complaint in circuit court.
- If you have overpaid your taxes, you have the right, within specified time periods, to file for a credit (or, in some cases, a refund) of that overpayment.

The full text of the Taxpayers' Bill of Rights is contained in the Illinois Compiled Statutes, 20 ILCS 2520/1 et seq.

# Statement

Date: June 23, 2016  
Name: INNOPHOS INC  
Taxpayer ID: 20-1380712  
Letter ID: CNXXX18951986X83

The attached EDA-27, Explanation of Adjustments, details your audit adjustments.

## Computation of deficiency

Reporting period: 31-Dec-2012

Income or loss	
Federal taxable income	\$56,684,316.00
Net operating loss deduction	\$0.00
Income tax and replacement tax deduction	\$2,535,028.00
Illinois bonus depreciation addition	\$2,661,377.00
Other additions	\$0.00
Base income or loss	
Illinois bonus depreciation subtraction	\$6,246,277.00
Total subtractions	\$6,246,277.00
Base income or net loss	\$55,634,444.00
Income allocable to Illinois	
Non-business income or loss	\$0.00
Non-unitary partnership bus. income or loss	\$0.00
Business income or loss	\$55,634,444.00
Apportionment formula	
Total sales everywhere	\$566,095,673.00
Total Illinois sales	\$135,586,202.00
Apportionment factor	0.239509
Business income/loss apportionable to IL	\$13,324,950.00
Nonbusiness income/loss allocable to IL	\$0.00
Non-unitary part. business income app. to IL	\$0.00
Base income or net loss allocable to IL	\$13,324,950.00
Net income	
Base income or net loss	\$13,324,950.00
IL net loss deduction (NLD)	\$0.00
Net income	\$13,324,950.00
Net replacement tax	
Replacement tax	\$333,124.00
Recapture of investment credits	\$0.00
Replacement tax before credits	\$333,124.00
Replacement tax investment credits	\$0.00
Net replacement tax	\$333,124.00
Net income tax	
Income tax	\$932,747.00
Recapture of investment credits	\$0.00
Income tax before credits	\$932,747.00

# Statement

Date: June 23, 2016  
Name: INNOPHOS INC  
Taxpayer ID: 20-1380712  
Letter ID: CNXXX18951986X83

## Computation of deficiency

Reporting period: 31-Dec-2012

Income tax investment credits	\$0.00
Net income tax	\$932,747.00
Refund or balance due	
Net replacement tax	\$333,124.00
Net income tax	\$932,747.00
Total net income and replacement tax due	\$1,265,871.00
Minus tax previously assessed	-\$816,546.00
Total tax deficiency	\$449,325.00
UPIA-5 late-payment penalty (Audit)	\$89,865.08
Plus interest on tax through June 23, 2016	\$33,421.67
Total deficiency	* \$572,611.75
If you intend to pay under protest, you must pay this total deficiency amount.	

## Computation of balance due

Reporting period: 31-Dec-2012

Balance due	* \$572,611.75
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# Explanation of Audit Adjustments

## Income Tax



June 23, 2016



Letter ID: CNXXXX1895691X45

Taxpayer ID: 20-1380712

Account ID: 05154-78016

Audit ID: A297259008

Reporting period: December 2012

\_\_\_\_\_  
\_\_\_\_\_  
#BWNKMGV  
#CNXX XX18 9569 1X45#  
INNOPHOS INC  
ATTN: ACCOUNTS PAYABLE  
259 PROSPECT PLAINS RD BLDG A  
CRANBURY NJ 08512-3706

### Explanation of adjustments for tax period ending 12/31/2012

### Return Impact

### Tax impact

We excluded members from your unitary group because they use a different apportionment method from the method you are required to use.  
[35 ILCS 5/1501(a)(27)] See attached list of the members of your unitary business group.

We adjusted your sales by including in the numerator sales of tangible personal property originating in Illinois and delivered to customers in states in which you are not taxable.  
[86 IL Adm. Code 100.3370(c)(1)(F); 86 IL Adm. Code 100.3200]

\$46,118,097.00

\$0.00

We adjusted your sales factor to exclude royalties since the gross receipts from license, sale, etc., from patents did not exceed 50% of total receipts.  
[35 ILCS 5/304(a)(3)(B-2)]

-\$2,183,838.00

\$0.00

We determined that you may not use the unitary apportionment method because you do not meet the unitary business criteria.  
[35 ILCS 5/1501(a)(27), 304(a), 304(e)]

-\$5,755,287.00

\$0.00

Interest on tax has been computed as allowed by Illinois law.  
[35 ILCS 735/3-2]

We are imposing a penalty because you did not pay the amount required to be shown due on your return by the due date for payment. Once an audit has been initiated, the late payment penalty is assessed at 15 percent of the late payment. Failure to pay the amount due or invoke protest rights within 30 days from the "Date of Issuance" on Form IL-870, Waiver of Restrictions, will result in this penalty increasing to 20 percent. [35 ILCS 735/3-3 (b-20)(2)]

# Unitary Member List

Date: June 23, 2016  
Letter ID: CNXXXX1895691X45  
Name: INNOPHOS INC  
Taxpayer ID: 20-1380712  
Account ID: 05154-78016  
Audit ID: A297259008  
Reporting period: December 2012  
Tax period ending: 12/31/2012

<u>Name</u>	<u>FEIN</u>	<u>Status</u>
INNPHOS HOLDINGS INC	20-1380758	
INNPHOS INVESTMENT HOLDINGS I	20-2263414	
INNPHOS INC	20-1380712	
KELATRON CORPORATION	94-3315628	
INNPHOS INVESTMENTS II INC	37-1694330	New
AMT LABS INC	06-1227970	New