

IN THE ILLINOIS INDEPENDENT TAX TRIBUNAL

BROOSTERS CHICKEN OF DARIEN INC., )  
 )  
 Petitioner, )  
 )  
 )  
 v. )  
 )  
 ILLINOIS DEPARTMENT OF REVENUE, )  
 )  
 Defendant. )

No.

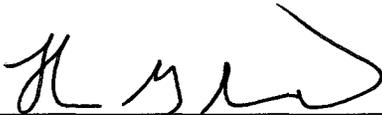
RECEIVED  
JUN 29 2015  
BY: \_\_\_\_\_

15 TT 131

CERTIFICATE OF SERVICE

TO: Illinois Department of Revenue  
Office of Legal Services  
100 W. Randolph Street, 7-900  
Chicago, IL 60601

I, Lehn G. Shepherd, an attorney, certify that I caused a copy of the attached Petition before the Illinois Independent Tax Tribunal to be served upon the Illinois Department of Revenue at the address set forth above, by hand delivery before the hour of 5 p.m. on Monday, June 29, 2015.

  
\_\_\_\_\_  
Lehn G. Shepherd

Anthony Calandriello, Esq.  
Lane M. Gensburg, Esq.  
Dale & Gensburg, P.C.  
200 West Adams Street, Suite 2425  
Chicago, Illinois 60606  
T – 312-263-2200  
F – 312-263-2242  
[tcalandriello@dandgpc.com](mailto:tcalandriello@dandgpc.com)

**IN THE ILLINOIS INDEPENDENT TAX TRIBUNAL**

BROOSTERS CHICKEN OF DARIEN INC.,	)	
	)	
Petitioner,	)	
	)	
	)	No.
v.	)	
	)	
ILLINOIS DEPARTMENT OF REVENUE,	)	
	)	
Defendant.	)	

**PETITION**

Petitioner, Broosters Chicken of Darien Inc. (“Petitioner”), by and through its attorneys, Dale & Gensburg, P.C., for its Petition before the Illinois Independent Tax Tribunal (the “Tribunal”) hereby complains of the Defendant, the Illinois Department of Revenue (the “Department”), and alleges as follows:

**PARTIES**

1. Petitioner is an Illinois corporation located at 1010 Plainfield Road, Darien, Illinois 60561-4604, and can be reached at 708-769-0199.
2. Petitioner is represented by attorneys Anthony Calandriello and Lane M. Gensburg of Dale & Gensburg, P.C., located at 200 West Adams Street, Suite 2425, Chicago, Illinois 60606. Anthony Calandriello can be reached at 312-263-2200 or [tcalandriello@dandgpc.com](mailto:tcalandriello@dandgpc.com). Lane M. Gensburg can be reached at 312-263-2200 or [lgensburg@dandgpc.com](mailto:lgensburg@dandgpc.com).
3. Petitioner’s Illinois Business Tax number is 2883-0946.

4. 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. See 20 ILCS 5/5-15.

### **NOTICE**

#### **Retailers Occupation/Use Tax**

5. On May 7, 2015, the Department issued a Notice of Tax Liability (the “NTL”) to Petitioner asserting a total Retailers Occupation Tax/Use Tax (“ROT”) liability of \$54,232.79, covering the period January 1, 2010 through December 31, 2013 (the “period at issue”). The total liability consists of \$42,492 in tax due, \$8,554 in late payment and late filing penalties, and \$3,186.79 in interest. A copy of the NTL is attached hereto as **Exhibit A**.

### **JURISDICTION**

6. Petitioner brings this action pursuant to the Illinois Independent Tax Tribunal Act (the “Tribunal Act”), 35 ILCS 1010/1-1 *et seq.*

7. The 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 issuance of the NTL.

### **BACKGROUND**

8. Petitioner is a chicken restaurant located in Darien, Illinois. The Department audited Petitioner’s books and records for the period at issue.

9. The ROT audit liability stated in the NTL is based on projections whereby the Department: (1) multiplied Petitioner’s food purchases by a 261% average markup to project Petitioner’s total sales for the period at issue; (2) credited Petitioner for its taxable sales reported

on its sales tax returns for the period at issue; and (3) imposed a late payment penalty (and late filing penalty) on the Petitioner's ROT liability.

### **COUNT I**

#### **The Department's Audit Methodology Overstates Petitioner's ROT Liability**

10. Petitioner realleges and incorporates by reference the allegations made in paragraphs 1 through 9 above as and for this paragraph 10.

11. The 261% average markup utilized by the Department to project Petitioner's sales was arbitrary, too high and overstated those sales. Petitioner's actual markup was less than 261%.

12. The Department further erred in not allowing adjustments for spoilage and theft loss and inventories.

WHEREFORE, Petitioner prays that the Tribunal:

(a) Enters judgment in favor of Petitioner and against the Department and cancels the NTL;

(b) Enjoins the Department from taking any action to assess, lien, levy, offset, or in any other way prosecute and collect the amount due stated in the NTL; and

(c) Grants Petitioner such other and further relief as the Tribunal deems appropriate under the circumstances.

### **COUNT II**

#### **All Failure to File and Pay Penalties should be Abated for Reasonable Cause**

13. Petitioner realleges and incorporates by reference the allegations made in paragraphs 1 through 12 as and for this paragraph 13.

14. Illinois law provides that failure to file and pay penalties do not apply if a taxpayer shows that his failure to file or pay tax at the required time was due to reasonable cause. See 35 ILCS 735/3-8.

15. The most important factor to be considered in making a determination to abate a late filing or payment penalty is the extent to which the taxpayer makes a good faith effort to determine its proper tax liability and to file and pay its proper tax liability in a timely fashion. See 86 Ill. Admin. Code 700.400(b).

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

17. Petitioner's failure to timely file and pay its ROT liabilities during the period at issue was due to reasonable cause warranting abatement of the late filing and late payment penalties.

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

(a) Finds and declares that all late filing and late payment penalties should be abated for reasonable cause;

(b) Enjoins the Department from taking any action to assess, lien, levy, offset, or in any other way prosecute and collect the amount of the failure to file and failure to pay penalties stated in the NTL; and

(c) Grants such other and further relief as the Tribunal deems appropriate under the circumstances.

Respectfully submitted,

BROOSTERS CHICKEN OF  
DARIEN INC.,  
Petitioner

Anthony Calandriello, Esq.  
Lane M. Gensburg, Esq.  
Dale & Gensburg, P.C.  
200 West Adams Street, Suite 2425  
Chicago, Illinois 60606  
T – 312-263-2200  
F – 312-263-2242

By:   
\_\_\_\_\_  
One of Petitioner's Attorneys

[tcalandriello@dandgpc.com](mailto:tcalandriello@dandgpc.com)

P:\Clients\Broosters Chicken\Petition Broosters Chicken of Darien Inc 6-25-15.doc

# Notice of Tax Liability

for Form EDA-105-R, ROT Audit Report



#BWNKMGV  
#CNXX X1X1 8X41 1X46#  
BROOSTERS CHICKEN OF DARIEN INC  
ATTN: ISSA MUSA  
1010 PLAINFIELD RD  
DARIEN IL 60561-4604

May 7, 2015



Letter ID: CNXXX1X18X411X46

Account ID: 2883-0946



We have audited your account for the reporting periods January 01, 2010, through December 31, 2013. As a result we have assessed the amounts shown below.

	<u>Liability</u>	<u>Payments/Credit</u>	<u>Unpaid Balance</u>
Tax	42,492.00	0.00	42,492.00
Late Payment Penalty Increase	8,498.00	0.00	8,498.00
Late Filing Penalty Increase	56.00	0.00	56.00
Interest	3,186.79	0.00	3,186.79
<b>Assessment Total</b>	<b>\$54,232.79</b>	<b>\$0.00</b>	<b>\$54,232.79</b>

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 contest this notice by following the instructions listed below.

- If the amount of this tax liability, exclusive of penalty and interest, is more than \$15,000, or if no tax liability 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 that do not fall within the jurisdiction of the Illinois Independent Tax Tribunal, file a protest with us, the Illinois Department of Revenue, and request an administrative hearing within 60 days of the date of this notice, which is July 06, 2015. Submit your protest on Form AH-4, Protest and Request for Administrative Hearing with the Illinois Department of Revenue (available on our website at tax.illinois.gov). Mail form AH-4 along with a copy of this notice to the address on the form. If you do not file a protest within the time allowed, you will waive your right to a hearing, and this liability will become final. 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. A protest of this notice does not preserve your rights under any other notice.
- Instead of filing a petition with the Illinois Independent Tax Tribunal or a protest with us, the Illinois Department of Revenue, 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), 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 to satisfy your liability.

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.

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

217 785-6579



# Penalties and Fees

For detailed information on penalties and rates in effect for specific periods on or after January 1, 1994, see Publication 103.

- 1 **Late-filing or Nonfiling penalty** - You owe this penalty if you do not file a return by the due date, including any extended due date, or you file a return that is not processable and you do not correct it within 30 days of the date we notify you.
- 2 **Late-payment penalty for underpayment of estimated or quarter-monthly tax** - You owe this penalty if you were required to make estimated or quarter-monthly tax payments and failed to do so, or if you failed to pay the required amount by the payment due date.
- 3 **Late-payment penalty for regular tax payments** - You owe this penalty if you did not pay the tax you owed by the original due date of the return.
- 4 **Negligence penalty** - You owe this penalty if, in preparing a return or amended return, you do not make a reasonable attempt to comply with the provisions of any tax act, including showing careless, reckless, or intentional disregard for the law or regulations.
- 5 **Fraud penalty** - You owe this penalty if any part of a deficiency is due to fraud.
- 6 **Cost of collection fee** - You owe this fee if you do not pay the total amount you owe within 30 days after a bill has been issued.
- 7 **Bad check penalty** - You owe this penalty if you send a remittance to the Department that is not honored by your financial institution.
- 8 **Failure to disclose participation in a reportable transaction penalty** - You owe this penalty if you were required to disclose your participation in an abusive tax shelter transaction and did not do so by the required due date.
- 9 **Reportable transaction understatement penalty** - You owe this penalty if you do not report and pay the full amount of your tax liability as the result of participating in an abusive tax shelter transaction.

**10 100 percent interest penalty** - You owe this penalty if you

- were contacted by the Internal Revenue Service or Illinois Department of Revenue regarding the use of a potentially abusive tax transaction for a taxable year;
- are later found to have a deficiency in that taxable year that is the result of the tax avoidance transaction; and
- did not report or pay that liability before we issued a Notice of Deficiency.

**11 Audit penalty** - You owe this penalty if you did not pay the tax you owed before the start of an audit or investigation.

**12 Nonfiling penalty for transaction return** - You owe this penalty if you are a retailer required to file a transaction return (ST-556, Sales Tax Transaction Return) by the due date, even if no tax is due on the return.

## Are penalties ever abated?

If you were unable to either timely pay the required amount of estimated or quarter-monthly payments, pay the tax you owed by the due date, or file your tax return by the extended due date because of a casualty, disaster, or other similar circumstance, you may request a waiver of penalties due to reasonable cause. To request this waiver, send us a detailed explanation of the cause of the delay and any documentation you have to support your request. Reasonable cause will be determined on a case-by-case basis according to our rules and regulations.

## How is interest figured?

Interest is calculated on your tax from the day after the original due date of your return through the date you pay the tax (for certain tax periods interest may also accrue on penalties). Interest accrues at simple rates established by the Internal Revenue Service. See Publication 103 for more information.

## 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 that 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.
- For more information about these rights and other Department procedures, you may contact us. Our contact information is on the front of this notice.