

**ILLINOIS INDEPENDENT TAX TRIBUNAL  
CHICAGO, ILLINOIS**

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<b>TYSON FOODS, INC. &amp; SUBSIDIARIES,</b>	)	
<b>Arkansas companies</b>	)	
	)	
<b>Petitioners,</b>	)	
<b>v.</b>	)	<b>15-TT-139</b>
	)	
<b>ILLINOIS DEPARTMENT OF</b>	)	
<b>REVENUE,</b>	)	
	)	
<b>Respondent.</b>	)	

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**NOTICE OF FILING**

TO: Scott J. Heyman  
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Chicago, IL 60603  
(312) 853-7000

PLEASE TAKE NOTICE, that on December 24, 2015, the undersigned representative for the Illinois Department of Revenue (the "Department") filed the Department's Answer to Tyson Foods, Inc. & Subsidiaries' petition with the Illinois Tax Tribunal, located at 160 North LaSalle Street, Room N506, Chicago, IL 60601.

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**ANSWER**

NOW COMES the Department of Revenue of the State of Illinois (“Department”), through its attorney, Lisa Madigan, Attorney General of and for the State of Illinois, and for its Answer to GModelo Corporation, Inc.’s (“Petitioner”) Petition, respectfully pleads as follows:

**NATURE OF ACTION**

1. This is a petition requesting that the Tribunal review certain aspects of the determination of the Illinois Department of Revenue (the "Department") as to Tyson's Illinois Corporation Income and Personal Property Tax Replacement Income Tax (collectively, "Corporate Income Tax") liability for its 52-53 week taxable years ended on or about September 30, 2005 and on or about September 30, 2007 through September 30, 2011 (hereinafter, FY 2005, and FY 2007 - FY 2011) (the "Audit Period"). The Department issued a Notice of Deficiency ("NOD") to Tyson for each of FY 2005, FY 2007, FY 2008 and FY 2011 (attached hereto as Exhibit A). The Department further issued Notices of Denial to Tyson, denying Tyson's refund claims for FY 2005, FY 2007, FY 2008, FY 2009 and FY 2010 (attached hereto

as Exhibit B).

**ANSWER:** Department admits it issued Tyson Foods Inc. and Subsidiaries (hereafter “Tyson” or “Petitioner”) Notices of Deficiency ("NOD") for Tax Year Ending (“TYE”) 2005, TYE 2007, TYE 2008 and TYE 2011. Department admits it issued Notices of Denial to Tyson for TYE 2005, TYE 2007, TYE 2008, TYE 2009 and TYE 2010. Department admits the audit period included TYE 2005, 2007, 2008, 2009, 2010 and 2011.

2. Tyson Foods, Inc. ("TFI"), during the Audit Period, was the common parent of the members of a group of unitary corporations filing combined Illinois income tax returns on Form IL-1120 under the name Tyson Foods, Inc. and Subsidiaries (for each year, the "Tyson Unitary Business Group," or "Tyson"). The Tyson Unitary Business Group, as is pertinent here, included Tyson Sales & Distribution, Inc. ("TSD") and Tyson Fresh Meats, Inc. ("TFM"). Tyson seeks relief from this Tribunal with respect to two issues.

**ANSWER:** Department admits the factual allegations in paragraph 2.

3. First, Tyson seeks relief with respect to the Department's erroneous assessment of Tyson related to the Illinois sales of its subsidiary, TSD. The Department determined that TSD had nexus in Illinois, and included TSD's Illinois sales in Tyson's numerator for Illinois sales apportionment purposes, based upon the erroneous conclusion that TSD's actions in Illinois exceeded allowable activities under 15 U.S.C. § 381 (P.L. 86-272). TSD did not have Illinois nexus during these periods and its sales were properly excluded from the numerator of Tyson's Illinois sales factor. The Department has never identified – and cannot identify -any activity of TSD during the relevant tax years that exceeded the solicitation of sales under PL 86-272.

**ANSWER:** Department admits that its auditor determined that Tyson Sales and Distribution (“TSD”) had nexus with Illinois. Department admits that its auditor determined that TSD's activities in Illinois exceeded activities protected by 15 U.S.C. § 381 (P.L. 86-272).

Department admits that Department included TSD's Illinois sales in Tyson's Illinois sales factor numerator. The Department denies the other factual allegations in paragraph 3 and demands strict proof thereof.

4. Tyson seeks relief with respect to the Department's erroneous denial of Tyson's refund claims, and refusal to remove from Tyson's Illinois sales factor certain sales made by another Tyson subsidiary, TFM. The Department determined that the mere fact of TFM's use of a freight forwarding warehouse in Ottawa, Illinois to consolidate shipments originating outside Illinois and destined for delivery to customers outside Illinois constituted shipments "from" a "place of storage" in Illinois. This determination is contrary to law and the Department's own rulings. The Department should be ordered to refund Tyson the overpaid tax monies related to this issue.

**ANSWER:** Department admits that its auditor determined that certain sales by Tyson Fresh Meats ("TFM") shipped from the Ottawa, Illinois warehouse should be included in the numerator of Tyson's Illinois sales factor because the sales met the statutory definition of sales "in this state" in Illinois Income Tax Act ("IITA") Section 304(a)(3)(B)(ii). 35 ILCS 5/304(a)(3)(B)(ii). Department denies the remaining factual allegations in paragraph 4.

#### **PARTIES**

5. TFI, a Delaware corporation headquartered in Springdale, Arkansas, is the parent corporation for both TSD and TFM, also both headquartered in Springdale, Arkansas. TSD is a Delaware corporation that is engaged in the business of marketing and distributing poultry products. TFM is a Delaware corporation that is engaged in the business of manufacturing beef and pork products.

**ANSWER:** Upon information and belief, Department admits the allegations in paragraph 5.

6. The Illinois Department of Revenue is the Illinois agency charged with the administration and enforcement of Illinois' Corporate Income Tax.

**ANSWER:** Department admits the Department is an agency of the State of Illinois and that it administers and enforces the Illinois Income Tax Act, including the Illinois Corporate Income Tax and the Illinois Personal Property Replacement Tax. Department denies the remaining factual allegations in paragraph 6.

### **JURISDICTION**

7. The Tribunal has jurisdiction over Tyson and this petition pursuant to 35 ILCS 1010/1-45 and 35 ILCS 5/908, 909 and 910.

**ANSWER:** Paragraph 7 contains a legal conclusion. Pursuant to Illinois Independent Tax Tribunal Regulation ("Rule") 310(b)(2) (86 Ill. Adm. Code §5000.310), allegations other than allegations of material fact do not require an answer.

### **BACKGROUND**

#### **A. The Department's Audits of Tyson**

8. The Department has conducted three separate audits of Tyson with relevance to this Petition. First, on July 16, 2009, the Department initiated an audit covering FY 2005-2007 ("FY 2005-2007 Audit"). The Department completed that audit, and issued Tyson a Notice of Proposed Deficiency on July 24, 2012 (the "July 24, 2012 Notice of Proposed Deficiency," attached hereto as Exhibit C). Second, on August 1, 2011, while still conducting the FY 2005-2007 Audit, the Department initiated an audit of Tyson for FY 2008-2009 ("FY 2008-2009 Audit"). The Department concluded that audit, and issued Tyson a Notice of Proposed Deficiency on October 18, 2012 (the "October 18, 2012 Notice of Proposed Deficiency," attached hereto as Exhibit D). Finally, on September 5, 2013, the

Department initiated an audit of Tyson covering FY 2010 and 2011 ("FY 2010-2011 Audit"), which concluded with the Department issuing a Notice of Proposed Tax Liability and Claim Denial to Tyson on April 3, 2014 (the "April 3, 2014 Notice," attached hereto as Exhibit E). Collectively, these three audits shall be referred to herein as the "Audits," and the October 1, 2004 to September 30, 2011 period covered by those audits known as the "Audit Period."

**ANSWER:** Admit.

**B. TSD's alleged activities in Illinois and the Department's audit thereof.**

9. TSD is headquartered in Springdale, Arkansas and conducted sales in Illinois during the Audit Period through both salespeople and independent brokers. TSD sold products to both independent distributors and end-customers in Illinois. All TSD sales were accepted at TSD's headquarters in Arkansas.

**ANSWER:** The Department admits that TSD is headquartered in Springdale, Arkansas and conducted sales in Illinois during the Audit Period through both salespeople and independent brokers. Whether TSD's sales were accepted at TSD's headquarters in Arkansas is a legal conclusion, and therefore the Department is not required to answer. The Department lacks sufficient information to either admit or deny the remaining factual allegations contained in Paragraph 9 and demands strict proof thereof.

10. During the audit period, TSD salesmen and independent representatives, subject to any potential de minimis exceptions, engaged solely in the solicitation of sales and ancillary activities as permitted by P.L. 86-272; TSD did not own or lease an office in Illinois; TSD did not own or lease any tangible personal property in Illinois other than computers, printers and fax machines assigned to salesmen who worked from their homes; TSD had no inventory in Illinois; and TSD shipped or delivered product from

outside Illinois to customers in Illinois.

**ANSWER:** Whether TSD's salesmen and independent representatives engaged solely in the solicitation of sales and ancillary activities as permitted by P.L. 86-272 and whether such activities were *de minimis* are legal conclusions, and therefore the Department is not required to provide an answer. The Department lacks sufficient information to either admit or deny the factual allegations contained in Paragraph 10 and demands strict proof thereof.

11. In the "Explanation of Adjustments" in the Notices of Proposed Deficiency for FY 2005-2007 and FY 2008-2009 (Exhs. D & E), the Department stated: "Tyson Sales and Distribution-company has nexus per audit." The Department did not explain in that document why it believed TSD had nexus in Illinois, it merely cited "IAC 100.9720(c)(2)(A)," without further explanation. That subsection of the regulations provides: "If a nonresident taxpayer's activities exceed 'mere solicitation', as set forth in subsection (a) of PL 86-272 (subsection (c)(1)(A) of this Section), it obtains no immunity under [PL 86-272]."

**ANSWER:** The proposed notices are not the subject of the instant litigation, and therefore are not relevant to the instant matter. The Notices of Proposed Deficiency speak for themselves. Further, the Department admits the existence, force and effect of the public act and regulation cited in paragraph 11 and states that such public act and regulation speak for themselves.

12. On December 17, 2012, Tyson filed a Request for Informal Conference Board ("ICB") Review covering FY 2005-2009. (Dec. 17, 2012 ICB Review Request, attached hereto as Exhibit F.) In the portion of its ICB Review Request addressing the

Department's erroneous nexus determination, Tyson made clear that it "has not been made aware of the specific basis on which it was determined that TSD was subject to tax in Illinois. As a result, it is not possible for Tyson to provide specific arguments in response to the imposition of tax on TSD."

**ANSWER:** The Department admits that Tyson filed a petition covering fiscal years 2005 through 2009 with the Department's Informal Conference Board. The information provided to ICB and ICB's Action Decision are not relevant to the instant matter. Therefore, pursuant to Rule 310(b)(2), the Department is not required to answer. Department lacks sufficient information to either admit or deny the allegations in paragraph 12 because Department does not have access to Petitioner's ICB Review Request. See 86 Ill. Admin. Code § 215.120(e).

13. In its Action Decision, the ICB found that "Tyson Sales & Distribution, Inc. (TSD) has Illinois nexus since there are sufficient activities in Illinois which are not protected by P.L. 86-272." (Jan. 14, 2015 ICB Action Decision, Exh. G hereto.) But, as with its Notice of Proposed Deficiency, the ICB did not identify any such "sufficient activities" that purportedly exceeded the protections of PL 86-272.

**ANSWER:** The ICB Action Decision is not relevant to the instant matter. The Department admits that ICB, in its Action Decision, stated that "Tyson Sales & Distribution, Inc., (TSD) has Illinois nexus since there are sufficient activities in Illinois which are not protected by P.L. 86-272." The Department's lacks sufficient knowledge to admit or deny whether ICB, at any time during the ICB process, identified any such "sufficient activities" that purportedly exceeded the protection provided by P.L. 86-272 because, pursuant to Regulation 86 Ill. Admin. Code § 215.120(e), [r]ecommendations, notes, memoranda and other records of the ICB with

respect to issues raised in pending ICB matters *are not subject to disclosure and do not become part of the audit file.*” 86 Ill. Admin. Code § 215.120(e) (emphasis added).

14. The Department issued its final NOD's between May 13 and 19, 2015, covering FY 2005, 2007, and 2008. (Exh. A.) These NOD's provide no additional explanation regarding the basis for the Department's nexus determination. The NOD for FY 2011 stated: "We adjusted your sales factor to include in the numerator the Illinois destination sales of those companies in your unitary business group with Illinois nexus. [Public Law 86-272]." The Department failed to provide any formal explanation as to why it believed TSD (the entity presumably responsible for this adjustment) had nexus in Illinois during FY 2011.

**ANSWER:** The Department admits that it issued Notices of Deficiency on:

- a. May 13, 2015 for tax year ending September 30, 2005;
- b. May 13, 2015 for tax year ending September 30, 2007;
- c. May 19, 2015 for tax year ending September 30, 2008;
- d. May 15, 2015 for tax year ending September 30, 2011.

Each Notices of Deficiency identified above speaks for itself. The Department admits that the NOD for FY 2011 states that “We adjusted your sales factor to include in the numerator the Illinois destination sales of those companies in your unitary business group with Illinois nexus.” The Department denies that it failed to provide any formal explanation as to why it believed TSD had nexus in Illinois during FY 2011 and demands strict proof thereof. Further, whether the Department provided any formal explanation is a legal conclusion, and therefore the Department is not required to respond.

15. Informal exchanges with the auditor and the ICB conferee indicate that the Department did not conclude that the activities of TSD's salesmen and independent representatives exceeded solicitation of sales, but rather focused on the facts that TSD had

"property and payroll" in the state.

**ANSWER:** The Department admits the auditor reviewed the activities of TSD's salesmen to determine whether such activities exceeded solicitation of sales. However, the results of the auditor's review were inconclusive because the Petitioner did not provide all of the documents the auditor requested. The Department lacks sufficient information to either admit or deny what, if any, information the ICB conferee shared with the Petitioner because "[r]ecommendations, notes, memoranda and other records of the ICB with respect to issues raised in pending ICB matters *are not subject to disclosure and do not become part of the audit file.*" 86 Ill. Admin. Code § 215.120(e) (emphasis added).

16. It is uncontested that TSD had salesmen who lived in Illinois and therefore were treated as Illinois payroll. The presence of salesmen in the state does not violate P.L. 86-272 so long as the salesmen were engaged only in the solicitation of sales and ancillary activities. There is no indication that either the auditor or the ICB determined that the salesmen engaged in activities not protected by P.L. 86-272.

**ANSWER:** The Department admits that TSD had salesman who lived in Illinois. Whether the presence of salesmen in the state violates P.L. 86-272 so long as the salesmen are engaged only in the solicitation of sales and ancillary activities is a legal conclusion, and therefore the Department is not required to respond. The auditor could not determine whether the salesmen actually engaged only in activities protected by P.L. 86-272 because Petitioner failed to provide all the documents the auditor requested. The Department denies all other factual allegations in paragraph 16 and demands strict proof thereof.

17. For FY 2005 – FY 2009, TSD on its books made an allocation to Illinois of trucks that it used, subject to any potential de minimis exceptions, to either deliver goods from outside Illinois to customers in Illinois or that passed through Illinois without making any delivery of goods. TSD's books reflected no other property, and the auditor's findings appear to focus on the presence of TSD's trucks in Illinois.

**ANSWER:** The Department lacks sufficient information to either admit or deny the allegations contained in paragraph 17 and demands strict proof thereof.

18. Owning trucks that are used to deliver goods from outside Illinois to Illinois customers (or that pass through Illinois with no delivery of goods) is expressly protected by P.L. 86-272 and does not give rise to nexus.

**ANSWER:** Paragraph 18 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). Department admits the existence, force and effect of 15 U.S.C. § 381.

19. For FY 2010-2011, TSD erroneously recorded on its books inventory owned and stored in Illinois that was in fact owned and stored by its affiliate, TFM. During the Department's audit of Tyson for FY 2010-2011, Tyson, in response to an inquiry from the Department's auditor, Haven Willis, provided the following explanation of the erroneous entries:

The inventories and rental for FY 2010 and FY 2011 were recorded on the wrong company. The inventory amount of \$174,308 for FY 2010 belonged to Tyson Poultry, Inc. (TPI) and Tyson Farms, Inc. (TFA). This is inventory that is being custom processed by a 3<sup>rd</sup> party in Fairmont City. TPI and TFA only used this custom processor for a three month period at the end of FY2010, and did not use them at any other time. It was reported on TSD in error. The inventory amount of \$316,385 for FY2011 belonged to Tyson Fresh Meats, Inc. (TFM). This inventory came from TFM's Kansas location to be further processed by a 3<sup>rd</sup> co-packer in Chicago. The inventory was reported on TSD in error. The rentals of \$9,656 for FY2011 were cold storage expenses related to TFM's inventory

previously mentioned. It was reported on TSD in error. [Feb.24, 2014 Letter, attached hereto as Exh. H].

**ANSWER:** The Department admits that Petitioner sent the auditor the letter attached as Exhibit H to the Petitioner's petition. The Department lacks sufficient information to either admit or deny whether an entry recorded on TSD's books and records was erroneous and demands strict proof thereof.

20. Despite this explanation, on February 27, 2014, the auditor emailed Mr. Argo an "IDR-5C Apportionment IL Audit Adjustments Detail" (Feb. 27, 2014 email, with relevant attachment, attached hereto as Exh. I), in which the auditor wrote:

The taxpayer has exceeded mere solicitation because there is property and payroll allocable to the state of Illinois. The taxpayer recorded an amount for Illinois property in the Apportionment Data workpaper provided with IDR-5C for Tyson Sales and Distribution. The taxpayer response to IDR-4C stated that the facts are the same for TSD and the taxpayer position is the same from the prior audits in ICB to this current audit. The taxpayer asserts that TSD has no nexus because of PL 86-272. The property amount in the current audit is listed as inventories and rentals. Based on the information gathered for the prior cycles, the audit position is that Tyson Sales and Distribution has nexus in Illinois because the company goes beyond mere solicitation by having property and payroll in Illinois. The Illinois sales factor reflects the inclusion of TSD.

**ANSWER:** The Department admits that the Department's auditor sent Mr. Argo an IDR-5C Apportionment IL Audit Adjustments Detail containing the statement quoted in paragraph 20.

21. The auditor's determination of nexus is improper because it relies solely on the presence of property (that was either not TSD's or constituted trucks operating within the

protection of P.L. 86-272) and the bare fact of payroll with no determination that the employees in question engaged in any activities not protected by P.L. 86-272.

**ANSWER:** Paragraph 21 contains legal conclusions, not material allegations of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). The Department denies all allegations of fact contained in paragraph 21 and demands strict proof thereof.

22. Nevertheless, on April 3, 2014, the Department issued Tyson a Notice of Proposed Tax Liability and Claim Denial for the audit period October 1, 2009 to September 30, 2011 (Exh. E hereto). And, on May 15, 2015, the Department issued Tyson an NOD for FY 2011 (Exh. A), stating: “We adjusted your sales factor to include in the numerator the Illinois destination sales of those companies in your unitary business group with Illinois nexus. [Public Law 86-272].”

**ANSWER:** With respect to the Notice of Proposed Tax Liability and Claim Denial for the audit period October 1, 2009 to September 30, 2011, this allegation has been asked and answered. See the Department’s answer to paragraph 8, which the Department incorporates herein by reference. The Department admits that it issued Tyson an NOD for FY 2011 on May 15, 2015. The NOD is required to be submitted with this petition and such document speaks for itself.

**C. TFM’s Shipment of Product Through Its Freight Forward Warehouse**

23. TFM is headquartered in Springdale, Arkansas, and operates thirteen beef and pork processing plants in the Midwest. It operates multiple plants in each of Iowa, Kansas and Nebraska, and one plant each in Illinois and several other states.

**ANSWER:** The Department admits that TFM was headquartered in Springdale, Arkansas and that TFM has one or more meat processing plants in Illinois. The

Department lacks sufficient information to admit or deny the other factual allegations contained in paragraph 23 and demands strict proof thereof.

24. TFM products generally are delivered to customers in one of three ways. First, a customer may send trucks to a TFM plant to pick up its order. Second, if there is a full – or near-full – truckload of product, TFM may ship an entire order directly to a customer. Third, if a customer does not send its own truck to the plant, and it orders less than a full truckload of product, shipment may be made from the plant through one of TFM’s freight forward warehouses.

**ANSWER:** The Department lacks sufficient information to admit or deny the factual allegations contained in paragraph 24 and demands strict proof thereof.

25. With relevance to the present dispute, one of TFM’s freight forward warehouses is located in Ottawa, Illinois (the “Ottawa FWH”). All goods arriving at the Ottawa FWH have already been sold to customers and are, as is pertinent here, in transit to customers in interstate commerce. No uncommitted goods were sent to the Ottawa FWH.

**ANSWER:** The Department admits that one of TFM’s freight forward warehouses is located in Ottawa, Illinois. Further, whether goods are in transit in interstate commerce and were uncommitted are legal conclusions, not material allegations of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). The Department lacks sufficient information to admit or deny the other factual allegations contained in paragraph 25 and demands strict proof thereof.

26. The primary purpose of shipping orders through the Ottawa FWH was to allow products produced by multiple plants destined for a single customer or the same geographic area to be consolidated on a single truck and shipped more economically than if they were shipped

separately direct from each of the various plants. TFM shipped the products through the Ottawa FWH to accommodate further shipping to a predetermined destination. The work TFM performed at the Ottawa FWH involved consolidating shipments from TFM's various plants to the same customer or geographic area. In most instances, it took less than a day for the product to be consolidated with other shipments and to continue on to the customer. No modification changes or alterations were made to any of the product while at the Ottawa FWH, and all goods at the Ottawa already were committed to customers – they were not held at the Ottawa FWH for some indeterminate future sale, use or distribution. These goods were therefore in transit from the time they left the respective plants until delivery to TSD's customers.

**ANSWER:** Whether the goods were in transit from the time they left their respective plants until delivery to TSD's customer is a legal conclusion, not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). The Department lacks sufficient knowledge to either admit or deny the factual allegations contained in paragraph 26 and demands strict proof thereof.

27. During the Audit, Tyson discovered that the “ship to/ship from” reports received from TFM personnel, and used for determining TFM's sales for state income tax apportionment purposes, showed all shipments that flowed through the Ottawa FWH as “shipped from” Illinois – even for those shipments originating at plants outside of Illinois. As a result, for FY 2005-2010, TFM, in computing its Illinois sales factor numerator, mistakenly threw back to Illinois those sales originating at non-Illinois plants that were shipped through the Ottawa FWH.

**ANSWER:** The Department lacks sufficient knowledge to either admit or deny the factual allegations contained in paragraph 27 and demands strict proof thereof.

28. Tyson requested that the auditor remove these sales from the Illinois sales factor numerator in computing its Illinois apportionment. The auditor declined.

**ANSWER:** The Department admits that the auditor included in the numerator of the Petitioner's Illinois sales factor sales derived from products shipped from TFM's Ottawa FWH to purchasers in states where TFM was not subject to taxation. The Department's denies all other factual allegations contained in paragraph 28 and demands strict proof thereof.

29. Accordingly, Tyson filed amended returns for FY 2005, 2007, 2008, 2009 and 2010. It removed from its sales factor numerator for each of those years TFM sales that were shipped through the Ottawa FWH. Tyson sought refunds as a result of each of its amended filings in the following amounts: \$834,173 for FY 2005, \$813,644 for FY 2007, \$289,746 for FY 2008, \$634,848 for FY 2009 and \$2,410,308 for FY 2010. In Footnote 3, Petitioner stated that:

Tyson has subsequently determined that its refund claims for FY 2008, FY 2009 and FY 2010 were overstated. The correct amounts that Tyson overpaid in each of those years are \$220,698 for FY 2008, \$423,720 for FY 2009, and \$1,609,645 for FY 2010. These adjustments stem from the fact that Tyson inadvertently excluded from the throw back calculations in its amended returns for those years all sales that flowed through the Ottawa FWH, even those originating from TFM's Joslin, Illinois manufacturing facility. Adding back in those sales flowing through the Ottawa FWH that originated from the Joslin plant, results in decreased refund claims for each of these three fiscal years.

**ANSWER:** The Department admits that the Petitioner filed amended returns for FY 2005, 2007, 2008, 2009 and 2010 to remove from its sales factor numerator TFM sales that were shipped from the Ottawa FWH and that Petitioner claimed the following amounts as refunds on its amended returns:

<u>FY</u>	<u>Refund claimed</u>
2005	\$834,173

2007	\$813,644
2008	\$289,746
2009	\$634,848
2010	\$2,410,308

The Department denies all other factual allegations contained in paragraph 29 and demands strict proof thereof.

30. On December 17, 2012, Tyson filed a Request for ICB Review regarding, *inter alia*, the auditor's refusal to remove the sales flowing through the Ottawa FWH from TFM's Illinois sales factor numerator. (Exh. F).

**ANSWER:** Admit.

31. In its January 2015 Action Decision (Exh. H), the ICB found that "No change is warranted to the Tyson Fresh Meats, Inc. (TFM) throwback sales adjustment with respect to sales shipped from the Ottawa Illinois freight forwarding warehouse because under *Filterek, Inc. v. Department of Revenue*, 186 Ill. App. 3d 208, 541 N.E.2d 1385, any storage, regardless of immediate shipment, was sufficient to meet the statutory requirement of shipment from an Illinois place of storage."

**ANSWER:** Admit.

32. In May 2015, the department issued Notices of Denial for Tyson's refund claims for the 2005, 2007, 2008, 2009 and 2010 tax years. (Exh. B).

**ANSWER:** Admit.

33. For FY 2011, Tyson changed its reporting and removed from the numerator of its sales factor those sales flowing through the Ottawa FWH. However, during the FY 2010-2011 Audit, the auditor determined that those sales should have been thrown back to Illinois. As a result, in the NOD issued to Tyson for FY 2011, the Department adjusted Tyson's sales factor by including an additional \$573,392,058 in the numerator.

**ANSWER:** The Department admits that Tyson removed sales from its sales factor numerator for fiscal year 2011 and that the Department included an additional \$573,392,058 in Tyson's sales factor numerator, and thereafter issued Tyson an NOD for FY 2011.

### COUNT I

**TSD's activities in Illinois exceeded mere solicitation, and therefore the Department appropriately included TSD's Illinois sales in the numerator of Petitioner's Illinois sales factor.**

34. Tyson incorporates in this Count I the allegations of paragraphs 1 – 33 of this Petition.

**ANSWER:** The Department incorporates and repeats its answers to Paragraphs 1 through 33 as if fully set forth herein.

35. The State of Illinois is prohibited, pursuant to PL 86-272 from imposing a net income tax on a nonresident taxpayer who operates primarily in interstate commerce and whose activity within Illinois is limited to the solicitation of orders that are approved outside Illinois and filled by shipment or delivery from outside Illinois. 86 Ill. Adm. Code § 100.9720(c)(1)(C) further provides:

For the purposes of subsection (c)(1)(A) of this Section, a person shall not be considered to have engaged in business activities within a state during any taxable year merely by reason of sales in such state, or the solicitation of orders for sales in such state, of tangible personal property on behalf of such person by one or more independent contractors whose activities on behalf of such person in such state consist solely of making sales, or soliciting orders for sales, of tangible personal property.

**ANSWER:** Paragraph 35 contains legal conclusions, not material allegations of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). Further, the

Department admits the existence, force and effect of the public act and regulation cited in paragraph 35 and states that such public act and regulation speak for themselves.

36. Further, the regulations define “solicitation of orders” to mean “speech or conduct that explicitly or implicitly invites an order and activity ancillary to invitations for an order,” 86 Ill. Adm. Code § 100.9720(c)(2)(C), and states that in order to “be ancillary to invitations for orders, an activity must serve no independent business function for the seller apart from its connection to the solicitation of orders.” 86 Ill. Adm. Code § 100.9720(c)(2)(C)(i).

**ANSWER:** Paragraph 36 contains legal conclusions, not material allegations of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). Further, the Department admits the existence, force and effect of the regulation cited in paragraph 36 and states that such regulation speaks for itself.

37. The Department’s determination that TSD had nexus in Illinois during the Audit Period based on the bare fact that TSD had property and payroll in the state is erroneous and contrary to the facts.

**ANSWER:** Department denies the factual allegations contained in Paragraph 37 and demands strict proof thereof.

38. Payroll in Illinois does not cause Petitioner to become subject to tax as the activities of TSD’s employees, as described in the Background section *supra*, comprised the solicitation of sales and ancillary activities.

**ANSWER:** Paragraph 38 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b)(2).

39. Similarly, as described in the Background section *supra*, TSD’s “property” in Illinois during the Audit Period consisted solely of trucks used to deliver goods from outside

Illinois to customers in Illinois (or that passed through Illinois without delivering any goods), which is protected activity under P.L. 86-272. Specifically, P.L. 86-272 protects the filling of orders “by shipment or delivery from a point outside the state.” Use of the taxpayer’s trucks to deliver goods from outside Illinois to customers in Illinois cannot give rise to nexus. Similarly, use of the taxpayer’s trucks to deliver goods from a point outside Illinois to a customer outside Illinois that happen to pass through Illinois en route cannot give rise to nexus.

**ANSWER:** Paragraph 39 contains legal conclusions, not material allegations of fact, and therefore does not require an answer pursuant to Rule 310(b)(2).

40. To the extent the Department’s determination that TSD had nexus in FY 2011 is premised on the erroneous accounting entries of TFM inventory and storage on the books of TSD, that determination is improper. An erroneous accounting entry, explained to the auditor during the course of the audit, cannot serve as a basis for nexus.

**ANSWER:** Paragraph 40 contains legal conclusions, not material allegations of fact, and therefore does not require an answer pursuant to Rule 310(b)(2).

41. The Department has not identified, and is unable to identify, any activity engaged in by TSD personnel in Illinois that is not protected by PL 86-272.

**ANSWER:** Denied.

42. As such, the Department’s increase in Tyson’s Illinois sales factor attributable to TSD’s sales to Illinois customers by \$284,480,641 for FY 2005, \$233,305,608 for FY 2007, \$348,593,222 for FY 2008, and \$389,588,768 for FY 2011, is in error.

**ANSWER:** Denied.

WHEREFORE, the Department prays this Tribunal to:

- (a) Find that TSD's activities in Illinois during the Audit Period exceeded the protection of P.L. 86-272;
- (b) Find that TSD established nexus in Illinois during FY 2005, 2007, 2008 and 2011;
- (c) Issue an order upholding the Department's inclusion of the amounts set forth below in the numerator of Tyson's Illinois sales factor: \$284,480,641 for FY 2005, \$233,305,608 for FY 2007, \$348,593,222 for FY 2008, and \$389,588,768 for FY 2011;
- (d) Grant all other relief as is reasonable and proper.

## COUNT II

**TFM's sales shipped from the Ottawa FWH should be thrown back to Illinois, and thereafter included in numerator of Petitioner's sales factor.**

43. Tyson incorporates in this Count II the allegations of paragraphs 1 – 42 of this Petition.

**ANSWER:** The Department incorporates and repeats its answers to Paragraphs 1 through 42 as if fully set forth herein.

44. The Department's apportionment regulations provide that "sales of tangible property are considered in Illinois if the property is delivered or shipped to a purchaser within this state regardless of the f.o.b. point or other conditions of sales, or if property is shipped from an office, store, warehouse, factory or other place of storage in this state to a state where the taxpayer is not subject to income tax." 86 Ill. Adm. Code § 100.3370(c)(1).

**ANSWER:** Paragraph 44 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). Further, the Department admits the existence, force and effect of the regulation cited in paragraph 44 and states that such regulation speaks for itself.

45. The express language of the regulation makes clear that there are two instances when a sale of tangible personal property is considered to be an Illinois sale. First, if the property is delivered to the customer at a location in Illinois, and second, “if the tangible personal property is shipped from an office, store, warehouse, factory or other place of storage” in Illinois to a state where the taxpayer is not subject to tax.

**ANSWER:** Paragraph 45 contains legal conclusions, not material allegations of fact, and therefore does not require an answer pursuant to Rule 310(b)(2).

46. With respect to the first test, products shipped through the Ottawa FWH to customers in other states are neither delivered nor shipped to customers in Illinois; nor do customers take possession of the products in Illinois, as the Ottawa FWH is a TFM location, not a location associated with the customer. The Department has not asserted any disagreement with that conclusion.

**ANSWER:** Paragraph 46 contains legal conclusions, not material allegations of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). The Department denies all factual allegations contained in paragraph 46 and demands strict proof thereof.

47. With respect to the second test, sales flowing through the Ottawa FWH are not “shipped from” the Ottawa FWH, they are shipped “through” it. When a TFM plant ships product to a customer through a FWH, that shipment should be considered to be in the uninterrupted stream of commerce until it is delivered to the customer to whom it was destined when it left the plant. As a result, the products should be considered to have been shipped from the respective plans and to have remained in interstate commerce until delivered to the customer outside Illinois.

**ANSWER:** Paragraph 47 contains legal conclusions, not material allegations of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). The Department denies all factual allegations contained in paragraph 47 and demands strict proof thereof.

48. The Ottawa FWH also cannot reasonably be considered “a place of storage” under the regulation. Storage is defined as “non-transitory, semi-permanent or long-term, containment, holding, leaving, or placement of goods or materials, usually with the intention of retrieving them at a later time. It does not include the interim accumulation of a limited amount during processing, maintenance, or repair.” (*See* <http://www.businessdictionary.com/definition/storage.html>). This definition bears no resemblance whatsoever to the activity of the Ottawa FWH. Indeed, in all respects the activities at the Ottawa FWH are the opposite of this definition – as they are entirely transitory in nature, and designed not to “store” the products in question but to move them on to their destinations as quickly as possible.

**ANSWER:** Paragraph 48 contains legal conclusions, not material allegations of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). The Department denies all factual allegations contained in paragraph 48 and demands strict proof thereof.

49. The Department contends otherwise, concluding as follows in its ICB Action Decision: “No change is warranted to the Tyson Fresh Meats, Inc. (TFM) throwback sales adjustment with respect to sales shipped from the Ottawa Illinois freight forwarding warehouse because under *Filtrek, Inc. v. Department of Revenue*, 186 Ill. App. 3d 208, 541 N.E. 2d 1385, any storage, regardless of immediate shipment, was sufficient to meet the statutory requirement of shipment from an Illinois place of storage.” (ICB Action Decision, Exh. G hereto).

**ANSWER:** The Department admits that the statement set forth in paragraph 49 is contained in the ICB Action Decision, which is attached as Exhibit G to Petitioner's petition and such document speaks for itself.

50. The Department's reliance – much less its singular reliance – upon *Filterek* is misplaced. The facts of *Filterek* are readily distinguishable from TFM's situation. Indeed, *Filterek* actually supports Tyson's position.

**ANSWER:** Whether the Department's reliance on the facts of *Filterek* is misplaced and whether such facts are distinguishable are legal conclusions, not material allegations of fact, and therefore do not require an answer pursuant to Rule 310(b)(2). Further, the Department admits the existence, force and effect of the judicial decision cited in paragraph 50 and states that such judicial decision speaks for itself.

51. In *Filterek*, the taxpayer, Filterek, Inc., purchased products from an affiliate, Filterek de Puerto Rico, which manufactured products in Puerto Rico and delivered them to Filterek, Inc. in Illinois. 186 Ill. App.3d at 216. Filterek, Inc. then sold those products to out-of-state customers. *Id.* While Filterek attempted to characterize the sales as sales from Puerto Rico to non-Illinois customers that were merely “transshipped” through Illinois, the court specifically held that “the hearing officer's findings do not support this characterization.” *Id.* Rather, the court found that “Filterek purchased and held title to the products from Puerto Rico [and] Filterek was also responsible for reselling the product to out-of-State customers and for storing the product until delivery to the customers.” *Id.*

**ANSWER:** Paragraph 51 contains legal conclusions, not material allegations of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). Further, the

Department admits the existence, force and effect of the judicial decision cited in paragraph 51 and states that such judicial decision speaks for itself.

52. By contrast, title to the TFM product at issue did not change hands from the time it left the out-of-state plant until it was delivered to the out-of-state customer. There is no dispute in this case that the TFM product at issue was merely transshipped through the Ottawa FWH. This is a critical distinction. Indeed, the court in *Filterek* took pains to make clear that the findings of the hearing officer did “not support” the characterization of the *Filterek* sales as having been transshipped through Illinois. 186 Ill. App. 3d at 216. Had the court found *Filterek*’s characterization to have been accurate – that the sales merely had been transshipped through Illinois – it appears the court would have reached the opposite result. Indeed, there would be no other reason to expressly reject *Filterek*’s characterization of the facts.

**ANSWER:** Paragraph 52 contains legal conclusions, not material allegations of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). The Department denies the statement that “[t]here is no dispute in this case that the TFM product at issue was merely transshipped through the Ottawa FWH” and demands strict proof thereof. Further, the Department admits the existence, force and effect of the judicial decision cited in paragraph 52 and states that such judicial decision speaks for itself.

53. Providing further support for this conclusion are the Department’s own letter rulings, and analogous cases that the Department has looked to for guidance from other states adopting the Uniform Division for Income Tax Purposes Act (“UDITPA”). Just last year, the Department issued IT 14-0002 PLR (4/24/2014). There, the taxpayer (Company 3), an out-of-state retailer, sold product to its customer (Company 4) outside the state (indeed, outside the country). *Id.* at 3. Company 4 normally used affiliate (Company 5) to effectuate shipment. *Id.*

Company 5 also acted as a freight forwarder. *Id.* All product that was picked up by Company 5 was destined for delivery outside the country, but all shipments initially were shipped from Company 3's facilities to Company 5's facilities in Illinois to be consolidated with other products to be shipped to Company 4 outside the country. *Id.* Occasionally, Company 3 used a third party to ship the product from its facilities to Company 5's freight forwarding warehouse in Illinois. *Id.* No modifications, product changes or alterations were made to the product after it left Company 3's facilities. *Id.* Based upon these facts, the Department ruled:

In the instant case, the destination of Company 3's sales to Company 4 is Country. Your letter indicates that all products either picked up by Company 5, or delivered by third party carrier to Company 5 Illinois facilities, are destined for Company 4 or an affiliate's manufacturing facilities in Country. You also represent that neither Company 5 nor another person makes any modifications, product changes, or alternations to the property. Rather, the property is merely stored in Illinois by Company 5 for short periods of time, less than 2 days or perhaps only a few hours, in order to be consolidated with other products to be shipped to Country. Assuming these facts are true, shipment of the property does not terminate in Illinois. The products are shipped to Illinois merely to accommodate further shipping to a predetermined destination in Country, and the taxpayer is not engaged in a warehouse function in Illinois. Accordingly, the sales to TEMA are not sales within this State under the provisions of IITA Section 304(a)(3)(B)(i). See Matter of the Appeal of Mazda Motors of America (Central), Inc., 1994 WL 776168 (Cal. St. Bd. Eq. 1994) and Visiocorp USA, Inc. v. Mich. Dep't of Treas., 2011 WL 1938386 (Mich. Tax Tribunal 2011).

**ANSWER:** Paragraph 53 contains legal conclusions, not material allegations of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). Further, the Department admits the existence, force and effect of the PLR cited in paragraph 53 and states that such PLR speaks for itself. However, PLR IT 14-0002 was not issued to Petitioner or any of its subsidiaries. Pursuant to 2 Ill. Admin. Code § 1200.110(a), private letter rulings are binding on the Department only as to the taxpayer who is the subject of the request for ruling.

54. The same result should apply here. The shipment of TFM product to non-Illinois customers “does not terminate in Illinois.” Rather, TFM’s “products are shipped to Illinois merely to accommodate further shipping to a predetermined destination.” TFM’s products also are destined for delivery out-of-state before they ever enter Illinois, are in Illinois only “for short periods of time, less than 2 days or perhaps only a few hours, in order to be consolidated with other products to be shipped,” to the same customer or geographic area, and no one makes any modifications, product changes, or alternations to the product from the time it leaves the plant to the time it is delivered to the out-of-state customer. As such, TFM – through its use of the Ottawa FWH – similarly “is not engaged in a warehouse function in Illinois,” but is engaged in a shipping function in Illinois.

**ANSWER:** Paragraph 54 contains legal conclusions, not material allegations of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). Further, the Department admits the existence, force and effect of the PLR cited in paragraph 53 and states that such PLR speaks for itself. However, PLR IT 14-0002 was not issued to Petitioner or any of its subsidiaries. Pursuant to 2 Ill. Admin. Code § 1200.110(a), private letter rulings are binding on the Department only as to the taxpayer who is the subject of the request for ruling.

55. The Michigan Tax Tribunal case cited by the Department in the PLR also supports the same result. *Visiocorp USA, Inc. v. Mich. Dep’t of Treas.*, 2011 WL 1938386 (Mich. Tax Tribunal 2011), the Tribunal held:

[T]he Tribunal determines that Petitioner’s sales are not in the State of Michigan and are therefore not subject to SBT. First, when Petitioner ships products to the purchaser the shipping is completed in two distinct steps. Initially, Petitioner ships the product to a cross dock facility in Michigan where they are held before shipment to the final destination outside of Michigan. Respondent would like the Tribunal to believe that when the product is first shipped to the cross dock facility

the shipment is complete and the sale was therefore in Michigan. However, the product is ultimately shipped to the purchaser, an out-of-state entity. The mere fact that the product is first transported to a cross dock facility in Michigan for consolidation of shipment does not render the sale of the property within Michigan and thus subject to SBT. The sale of the product was made to a purchaser outside of Michigan and the property was ultimately shipped to the out-of-state purchaser.

**ANSWER:** Paragraph 55 contains legal conclusions, not material allegations of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). Further, the Department admits the existence, force and effect of the judicial decision cited in paragraph 55 and states that such judicial decision speaks for itself.

56. The United States Supreme Court determined decades ago that when products leave a plant destined for a customer, the shipment is considered to be in transit (interstate commerce) until the property is delivered to the customer, even where those products pause during shipment at a freight warehouse or while awaiting other transportation logistics. *See e.g., Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 567 (1943); *Dahnke-Walker Co. v. Bondurant*, 257 U.S. 282 (1921); *Joy Oil Co. v. State Tax Commission*, 337 U.S. 286, 290-91 (1949).

**ANSWER:** Paragraph 56 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). Further, the Department admits the existence, force and effect of the judicial decisions cited in paragraph 56 and states that such judicial decisions speak for themselves.

57. In *Jacksonville Paper Co.*, the question was whether certain forwarding warehouses of Jacksonville Paper Co. were engaged in interstate commerce, and thus subject to the Fair Labor Standards Act. 317 U.S. at 565. The shipments in question originated outside the state, were transshipped through the warehouses in question, and delivered within the State to the customer. *Id.* at 567. The activities of the warehouses were described as follows: “goods were

unloaded from the trucks, brought into the warehouse, checked, reloaded, and sent on to the customer during the same day or as early as was convenient.” *Id.* The Administrator of the Wage and Hour Division of the U.S. Department of Labor urged that “any pause at the warehouse is sufficient to deprive the remainder of the journey of its interstate status.” *Id.* at 567.

In rejecting that position, the Court held:

The entry of the goods into the warehouse interrupts but does not necessarily terminate their interstate journey. A temporary pause in their transit does not mean that they are no longer ‘in commerce’ within the meaning of the Act. As in the case of an agency (cf. *De Loach v. Crowley’s Inc.*, 128 F.2d 378) if the halt in the movement of the goods is a convenient intermediate step in the process of getting them to their final destinations, they remain ‘in commerce’ until they reach those points. Then there is a practical continuity of movement of the goods until they reach the customers for whom they are intended. That is sufficient. Any other test would allow formalities to conceal the continuous nature of the interstate transit which constitutes commerce....If there is a practical continuity of movement from the manufacturers or suppliers without the state, through respondent’s warehouse and on to customers whose prior orders or contracts are being filled, the interstate journey is not ended by reason of a temporary holding of the goods at the warehouse. [*Id.*, at 568-69].

**ANSWER:** Paragraph 57 contains legal conclusions, not material allegations of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). Further, the Department admits the existence, force and effect of the judicial decisions cited in paragraph 57 and states that such judicial decisions speak for themselves.

58. Each of these authorities supports the conclusion that the Department’s rejection of TFM’s refund claims for FY 2005, 2007, 2008, 2009 and 2010, and its NOD adjusting Tyson’s sales factor for FY 2011, were in error.

**ANSWER:** Whether certain legal authorities support a certain legal position is a legal conclusion, not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). The Department denies any factual allegations contained in paragraph 58.

WHEREFORE, the Department prays this Tribunal enter an order:

- (a) Finding that TFM's use of the Ottawa FWH constitutes the shipment of property "from an office, store, warehouse, factory or other place of storage" in Illinois;
- (b) Upholding the Department's denial of the refunds Petitioner claimed in the following amounts for the designated fiscal years: \$384,173 for FY 2005, \$813,644 for FY 2007, \$220,698 for FY 2008, \$423,720 for FY 2009 and \$1,609,645 for FY 2010;
- (c) Upholding the Department's inclusion of \$573,392,058 of additional sales in the numerator of Petitioner's Illinois sales factor for the fiscal year 2011;
- (d) Granting any other relief as reasonable and proper.

### COUNT III

**The Application of the Throwback Rule to TFM does not violate the Commerce Clause of the United States Constitution.**

59. Tyson incorporates in this Count III the allegations of paragraphs 1-58 of this Petition.

**ANSWER:** The Department incorporates and repeats its answers to Paragraphs 1 through 58 as if fully set forth herein.

60. A state tax affecting interstate commerce must meet a four-pronged test to survive a commerce clause challenge: (1) the tax must be applied to an activity that has a "substantial nexus" with the taxing state; (2) the tax must be "fairly apportioned" to activities carried on by the taxpayer in the taxing state; (3) the tax must not discriminate against interstate commerce; and (4) the tax must be "fairly related" to services provided by the taxing state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 277-279, 287 (1977).

**ANSWER:** Paragraph 60 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). The Department

admits the existence, force and effect of the judicial decision cited in paragraph 60 and states that such judicial decision speaks for itself.

61. As applied to TFM's sales shipped through the Ottawa FWH, the Department's determination that income earned from the sale of products originating from plants outside Illinois and delivered to customers outside Illinois should be thrown back to Illinois merely because those products were consolidated, mid-shipment, at the Ottawa FWH, violates *Complete Auto's* fair apportionment requirement.

**ANSWER:** Paragraph 61 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). The Department admits the existence, force and effect of the judicial decision referenced in paragraph 60 and states that such judicial decision speaks for itself.

62. In order to meet the fair apportionment prong of *Complete Auto*, the tax must meet both an "internal consistency" and an "external consistency" test. *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983). Under the "internal consistency" test, the tax must not result in multiple taxation if every state were to impose the same tax. Under the "external consistency" test, a state is precluded from taxing value attributable to income earned outside of the state. Put differently, states are precluded from extraterritorial taxation. Here, requiring the entirety of all sales flowing through the Ottawa FWH to be thrown back to Illinois when the production occurred, and the customer was located, outside Illinois would permit Illinois to tax value that is attributable to activity occurring almost entirely outside its borders.

**ANSWER:** Paragraph 62 contains legal conclusions, not material allegations of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). The Department

admits the existence, force and effect of the judicial decisions cited or referenced in paragraph 62 and states that such judicial decisions speak for themselves.

63. FY 2008, for example, is illustrative. In that year, the taxpayer's Illinois sales thrown back from the Ottawa FWH were nearly double those that would be thrown back based on sales shipped from the Illinois manufacturing plant, and its sales factor increased by nearly 150% as a result.

**ANSWER** The Department lacks sufficient information to either admit or deny the allegations contained in Paragraph 63 and demands strict proof thereof.

64. Thus, applied here to sales neither originating nor delivered to customers in Illinois, the application of 86 Ill. Adm. Code § 100.3370(c)(1) to require TFM to throw back all sales flowing through the Ottawa FWH is invalid under the Commerce Clause. *See Hans Rees' Sons, Inc. v. North Carolina, ex rel. Maxwell*, 283 U.S. 123, 51 S. Ct. 385 (1931) (holding that "the statutory method, as applied to the appellant's business for the years in question operated unreasonably and attributing to North Carolina a percentage of income out of all appropriate proportion to the business transacted by the appellant in that State. In this view, the taxes as laid were beyond the State's authority.").

**ANSWER:** Paragraph 64 contains legal conclusions, not material allegations of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). The Department admits the existence, force and effect of the judicial decision and the regulation cited in paragraph 64 and states that the judicial decision and the regulation speak for themselves.

**WHEREFORE,** the Department prays this Tribunal to:

(a) Find that the Department's application of 86 Ill. Admin. Code § 100.3370(c)(1) requiring TFM to throw back all sales flowing through the Ottawa FWH is valid under the Commerce Clause;

(b) Hold that the Department properly denied TFM's refund claims for FY 2005, 2007, 2008, 2009 and 2010;

(c) Enter and order upholding the Department's denial of Tyson's income tax overpayments in the amounts of \$834,173 for FY 2005, \$813,644 for FY 2007, \$220,698 for FY 2008, \$423,720 for FY 2009 and \$1,609,645 for FY 2010;

(d) Enter and order upholding the Department's inclusion of \$573,392,058 of sales in the numerator of Petitioner's Illinois sales factor for FY 2011;

(e) Grant any other relief as is reasonable and just.

#### **COUNT IV**

#### **Petitioner is not entitled to alternative apportionment as provided for in IITA § 304(f).**

65. Tyson incorporates in this Count IV the allegations of paragraphs 1-64 of this Petition.

**ANSWER:** The Department incorporates and repeats its answers to paragraphs 1 through 64 as if fully set forth herein.

66. In the alternative to the relief sought in Counts II and III, Tyson is entitled, pursuant to IITA Section 304(f), to an alternate method of allocation of its business income in order to achieve an equitable apportionment thereof.

**ANSWER:** Denied.

67. Under the Department's regulations, "IITA Section 304(f) provides that if the allocation and apportionment provisions of subsection (a) through (e) do not fairly represent the

extent of a person's business activity in this State, the person's may petition for or the Director of Revenue may require, in respect of all or any part of the person's business activity, if reasonable: (1) separate accounting; (2) the exclusion of any one or more factors; (3) the inclusion of one or more additional factors which will fairly represent the person's business activities in this State; or (4) the employment of any other method to effectuate an equitable allocation and apportionment of the person's business income." 86 Ill. Adm. Code, § 100.3390(a).

**ANSWER:** Paragraph 67 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). The Department admits the existence, force and effect of the statute and regulation cited in paragraph 67 and states that such statute and regulation speaks for themselves.

68. As above, Tyson's apportionment calculations as filed with the Department for FY 2008, for example, demonstrate that the taxpayer's Illinois sales thrown back from the Ottawa FWH were nearly double those that would be thrown back based on sales shipped from the Illinois manufacturing plant, and its sales factor increased by nearly 150% as a result.

**ANSWER:** The Department lacks sufficient information to either admit or deny the allegation contained in Paragraph 68 and demands strict proof thereof.

69. Such a result is distortive. An alternative methodology, specific to allocating Illinois throwback sales related to the transactions traveling through the Ottawa FWH should be applied. An allocation providing for throwback based on the plant from which the products were originally shipped would more fairly and equitably reflect the business conducted in Illinois.

**ANSWER:** Paragraph 69 contains legal conclusions, not material allegations of fact, and therefore does not require an answer pursuant to Rule 310(b)(2).

**WHEREFORE,** the Department prays this Tribunal to:

- (a) Find that the Tribunal does not have jurisdiction to hear Petitioner's request for alternative apportionment pursuant to Section 304(f) of the Illinois Income Tax Act because an alternative apportionment "determination[]" of the Department" is not "reflected on" the Notices of Deficiency protested in Petitioner's Petition (35 ILCS 1010/1-45;
- (b) Find that the Tribunal does not have jurisdiction to hear Petitioner's request for alternative apportionment pursuant to Section 304(f) of the Illinois Income Tax Act because Petitioner did not follow the procedure set forth in 86 Ill. Admin. Code Section 100.3390, which are the "exclusive means by which a taxpayer may petition for an alternative apportionment formula" under IITA Section 304(f);
- (c) Find that the allocation and apportionment provisions of subsections (a) through (e) of the IITA Section 304, as applied by the Department to TFM's sales shipped from the Ottawa FWH, fairly represent the extent of TFM's business activity in Illinois;
- (d) Find that the Department should not apply an alternative allocation or apportionment methodology with respect to sales shipped from the Ottawa FWH;
- (e) Find that Petitioner is not entitled to receive refunds in the amounts of \$834,173 for FY 2008, \$813,644 for FY 2007, \$220,698 for FY 2008, \$423,720 for FY 2009 and \$1,609,645 for FY 2010;
- (f) Find that the Department is not required to adjust Petitioner's Illinois sales factor for FY 2011 by subtracting \$573,392,058 from the numerator; and

(g) Grant any other relief as is reasonable and just.

## COUNT V

**The Penalties and Amnesty Interest Assessed Against Petitioner should not be abated.**

70. Tyson incorporates in this Count V the allegations of paragraphs 1-69 of this Petition.

**ANSWER:** The Department incorporates and repeats its answers to paragraphs 1 through 69 as if fully set forth herein.

71. For the reasons articulated in Counts I-IV, the Department should withdraw those portions of its NOD's to Tyson based upon its erroneous finding that TSD had nexus in Illinois and adjust Tyson's Illinois sales factor accordingly. If, however, TSD is determined by this Tribunal to have nexus in Illinois, Tyson pleads in the alternative that – for all of the reasons set forth in Counts I-IV above – it had more than a reasonable basis for excluding TSD's sales to Illinois customers from the numerator of its Illinois sales factor and for determining that sales flowing through TFM's Ottawa FWH should not be thrown back to Illinois. Accordingly, Tyson is entitled to abatement of the late-payment penalties and amnesty interest assessed by the Department.

**ANSWER:** The Department denies the factual allegations in paragraph 71. The Department also denies that reasonable cause abatement applies to interest accrued pursuant to Uniform Penalty and Interest Act Section 3-2 or to amnesty interest pursuant to Uniform Penalty and Interest Act Section 3-2(g) and Regulation 520.101(b)(1). 35 ILCS 735/3-2; 86 Ill. Admin. Code § 520.101(b)(1).

72. Section 3-8 of the Uniform Penalty and Interest Act (35 ILCS 735/3-8), entitled “No penalties if reasonable cause exists,” provides in relevant part that: “the penalties imposed

under the provisions of Sections 3-3, 3-4, 3-5 and 3-7.5 of this Act shall not apply if the taxpayer shows that his failure to file a return or pay tax at the required time was due to reasonable cause. Reasonable cause shall be determined in each situation in accordance with the rules and regulations promulgated by the Department.” While not specifically included in 35 ILCS 735/3-8, amnesty interest (i.e., the doubling of the otherwise appropriate interest rate) is effectively an additional penalty upon Tyson, which is in excess of the cost of the use of funds and thus not properly characterized as “interest.”

**ANSWER:** Paragraph 72 contains legal conclusions, not material allegations of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). The Department admits the existence, force and effect of the statute cited in paragraph 72 and states that such statute speaks for itself. Further, pursuant to Section 1502 of the IITA, “No inference, implication, or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular Section or provision of this Act, *nor shall any caption be given any legal effect.*” 35 ILCS 5/1502 (emphasis added). The Department denies that amnesty interest is “effectively an additional penalty” “not properly characterized as ‘interest,’” and denies that amnesty interest can be abated for reasonable cause.

73. For the reasons set forth in Counts I-IV, Tyson had *at a minimum* reasonable cause to believe that it was properly excluding TSD’s sales to Illinois customers from its Illinois sales factor, and that sales flowing through TFM’s Ottawa FWH should not be thrown back to Illinois. If it is ultimately determined that TDS’s and TFM’s income tax reporting was erroneous, however, Tyson should not be made to pay late-payment penalties or amnesty interest with respect thereto.

**ANSWER:** Paragraph 73 contains legal conclusions, not material allegations of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). The Department denies any factual allegations in paragraph 73.

**WHEREFORE,** the Department respectfully requests this Tribunal to:

- a. Find that Petitioner did not have reasonable cause to justify abatement of the late payment penalties;
- b. Hold that amnesty interest cannot be abated for reasonable cause;
- c. Find that in light of the \$573,392,058 audit adjustment to the numerator of Petitioner's sales factor, it was unreasonable for Petitioner to believe that it was excluding only the sales made to Illinois customers from its Illinois sales factors;
- d. Find that it was not reasonable for Petitioner to believe that the sales flowing through the TFM Ottawa FWH should not be thrown back to Illinois, and thereafter included in the numerator of its sales factor;
- e. Uphold the Department's Notices including imposition of penalties and interest;  
and
- f. Grant any other relief as is reasonable and just.

Respectfully Submitted,

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**ILLINOIS INDEPENDENT TAX TRIBUNAL  
CHICAGO, ILLINOIS**

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<b>TYSON FOODS, INC. &amp; SUBSIDIARIES,</b>	)	
<b>Arkansas companies</b>	)	
	)	
<b>Petitioners,</b>	)	
<b>v.</b>	)	<b>15-TT-139</b>
	)	
<b>ILLINOIS DEPARTMENT OF</b>	)	
<b>REVENUE,</b>	)	
	)	
<b>Respondent.</b>	)	

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**CERTIFICATE OF SERVICE BY ELECTRONIC MAIL**

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Please take notice that the undersigned Representative for the Illinois Department of Revenue (the "Department") certifies that, on December 24, 2015, he served the Department's Answer to Tyson Foods, Inc. & Subsidiaries' Petition by electronic mail at the electronic mail addresses shown above at the time shown on the electronic transmission confirmation.

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