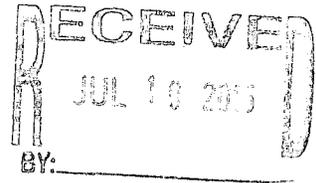


**ILLINOIS INDEPENDENT TAX TRIBUNAL**

TYSON FOODS, INC. & SUBSIDIARIES, )  
Arkansas companies )  
FEIN: 71-0225165 )  
 )  
Petitioners, )  
 )  
v. )  
 )  
ILLINOIS DEPARTMENT OF )  
REVENUE, )  
 )  
Respondent. )



15 11 137

**PETITION**

Petitioner Tyson Foods, Inc. & Subsidiaries (“Tyson”), by and through its attorneys, and for its petition to the Illinois Independent Tax Tribunal (the “Tribunal”), hereby states the following:

**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<sup>1</sup> September 30, 2005 and on or about September 30, 2007 through September 30, 2011 (hereinafter, FY 2005, and FY 2007 – FY 2011<sup>2</sup>) (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

<sup>1</sup> While all of the notices issued to Tyson that form the basis of the present dispute refer to Tyson’s fiscal years ending on “September 30,” Tyson operates on a 52-53 week tax year that ends on *or about* September 30.

<sup>2</sup> As used in this Petition, “FY” – or “fiscal year” – shall mean the taxable year ended on or about September 30 of the calendar year in question.

(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).

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.

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.

4. Second, 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.

### **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.

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

### **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.

### **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.”

**B. TSD’s 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.

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.

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].”

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.”

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.

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.

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.

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.

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.

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.

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 rentals for FY2010 & FY2011 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> party 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]

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.

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

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].”

**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.

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.

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.

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 modifications, changes or alterations were made to any of the product while at the Ottawa FWH, and all goods at the Ottawa FWH 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.

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.

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

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.<sup>3</sup>

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<sup>3</sup> 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

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.)

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."

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.)

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.

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refund claims for each of these three fiscal years.

## COUNT I

**Because TSD's Activities in Illinois Do Not Exceed Mere Solicitation,  
the Department is Prohibited by PL 86-272 From Including Its 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.

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.

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).

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.

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.

39. Similarly, as described in the Background section *supra*, TSD's "property" in Illinois for 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.

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.

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.

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.

WHEREFORE, Tyson prays this Tribunal to:

(a) find and declare that TSD's activities in Illinois during the Audit Period do not exceed the protections of PL 86-272;

(b) find and declare that TSD did not have nexus in Illinois during FY 2005, 2007, 2008, and 2011;

(c) direct the Department to adjust Tyson's Illinois sales factor by subtracting from the numerator \$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 such other relief as is reasonable and proper.

## COUNT II

### **TFM's Sales Shipped Through the Ottawa FWH Should Not Be Thrown Back to Illinois.**

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

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 sale, 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).

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.

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.

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 plants and to have remained in interstate commerce until delivered to the customer outside Illinois.

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.

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 *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.” (ICB Action Decision, Exh. G hereto.)

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.

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.*

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 also 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.

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 an 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 alterations 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).

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 alterations 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.

55. The Michigan Tax Tribunal case cited by the Department in the PLR also supports the same result. In *Visiocrp 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 and was ultimately shipped to the out-of-state purchaser.

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 C. v. State Tax Commission*, 337 U.S. 286, 290-91 (1949).

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]

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.

WHEREFORE, Tyson prays this Tribunal to:

(a) find and declare that TFM's use of the Ottawa FWH does not constitute the shipment of property "from an office, store, warehouse, factory or other place of storage" in Illinois;

(b) direct the Department to refund to Tyson 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;

(c) direct the Department to adjust Tyson's Illinois sales factor for FY 2011 by subtracting \$573,392,058 from the numerator;

(d) grant such other relief as is reasonable and proper.

### COUNT III

#### **Application of the Throwback Rule to TFM Violates the Commerce Clause of the United States Constitution.**

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

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).

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.

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.

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.

64. Thus, as 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 arbitrarily, in 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.").

WHEREFORE, Tyson prays this Tribunal to:

(a) find and declare that the Department's 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;

(b) find and declare that that the Department should have granted TFM's refund claims for FY 2005, 2007, 2008, 2009 and 2010;

(c) direct the Department to refund to Tyson 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) direct the Department to adjust Tyson's Illinois sales factor for FY 2011 by subtracting \$573,392,058 from the numerator;

(e) grant such other relief as is reasonable and proper.

#### COUNT IV

***In the Alternative, Tyson is Entitled to an  
Alternate Method of Allocation Pursuant to IITA Section 304(f).***

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

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.

67. Under the Department's regulations, "IITA Section 304(f) provides that if the allocation and apportionment provisions of subsections (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).

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.

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.

WHEREFORE, Tyson prays this Tribunal to:

(a) find and declare, pursuant to IITA Section 304(f), that the allocation and apportionment provisions of subsections (a) through (e) as applied by the Department to TFM's sales flowing through the Ottawa FWH do not fairly represent the extent of TFM's business activity in Illinois;

(b) find and declare that that the Department should apply an alternative allocation with respect to sales flowing through the Ottawa FWH applying throwback based on the plant from which the products were originally shipped;

(c) direct the Department to refund to Tyson 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) direct the Department to adjust Tyson's Illinois sales factor for FY 2011 by subtracting \$573,392,058 from the numerator;

(e) grant such other relief as is reasonable and proper.

## COUNT V

### ***In the Alternative, the Penalties and Amnesty Interest Assessed Against Tyson Should Be Abated.***

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

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.

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."

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 TSD'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.

**TYSON FOODS, INC. &  
SUBSIDIARIES**

FEIN: 71-0225165  
2200 Don Tyson Parkway  
Springdale, AR 72762-6999  
Mark B. Elser, Senior Vice President, Tax  
Telephone: 479-290-4000  
mark.elser@tyson.com

By: 

One of Their Attorneys

Scott J. Heyman  
Charles K. Schafer  
SIDLEY AUSTIN LLP  
One South Dearborn  
Chicago, IL 60603  
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Facsimile: 312-853-7036  
sheyman@sidley.com  
cschafer@sidley.com

## EXHIBIT LIST

<u>Ex. #</u>	<u>Description</u>
<b>A</b>	Notices of Deficiency for Fiscal Years 2005, 2007, 2008, 2011
<b>B</b>	Notices of Denial for Fiscal Years 2005 & 2007, 2008 & 2009, 2010
<b>C</b>	July 24, 2012 Notice of Proposed Deficiency ( <i>without exhibits</i> )
<b>D</b>	October 18, 2012 Notice of Proposed Deficiency ( <i>without exhibits</i> )
<b>E</b>	April 3, 2014 Notice of Proposed Tax Liability and Claim Denial
<b>F</b>	December 17, 2012 ICB Review Request ( <i>without exhibits</i> )
<b>G</b>	January 14, 2015 ICB Action Decision
<b>H</b>	February 24, 2014 Letter from B. Argo to H. Willis
<b>I</b>	February 27, 2014 Email from H. Willis to B. Argo, attaching "IDR-5C Apportionment IL Audit Adjustments Detail" ( <i>other attachments not included</i> )

# Notice of Deficiency

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



May 13, 2015



Letter ID: CNXXXX836X4X72X8

#BWNKMGV  
#CNXX XX83 6X4X 72X8#  
TYSON FOODS INC & SUB  
ATTN: MARK B ELSER/CP131  
PO BOX 2020  
SPRINGDALE AR 72765-2020

**Taxpayer ID:** 71-0225165  
**Reporting period:** September 2005  
**Total Deficiency:** \$1,212,342.02  
**Balance due:** \$1,212,342.02



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 "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 are 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 this notice. If you file a protest on time, we must reconsider the proposed deficiency, and if requested, grant you or your authorized representative an administrative hearing. An administrative hearing is a formal legal proceeding conducted pursuant to 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 deficiency 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 balance due 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) 785-6711

CC: TYSON FOODS INC & SUB  
4201 S ASHLAND AVE  
CHICAGO IL 60609-2305

# Statement

Date: May 13, 2015  
Name: TYSON FOODS INC & SUB  
Taxpayer ID: 71-0225165  
Letter ID: CNXXXX836X4X72X8

## Reasons for deficiency

See enclosed EDA-27 for explanation of adjustments.

If this liability qualified for amnesty, and you did not pay that liability during the amnesty period held October 1, 2010, through November 8, 2010, your penalty and interest amounts may be doubled. [86 Ill. Admin. Code 520/101(b)]

## Penalties

We are imposing an additional late-payment penalty because you did not pay the amount shown due on the Form IL-870, Waiver of Restrictions, within 30 days after the "Date of Issuance" shown on the form. Once an audit has been initiated, the additional late payment penalty is assessed at 15% of the late payment. Failure to pay the amount due or invoke protest rights within 30 days from the "Date of Issuance" on the Form IL-870, results in this penalty increasing to 20%. [35 ILCS 735-3-3(b-20)(2)] (for liabilities due on or after 1/1/2005)

## Interest

Interest on tax in the amount of \$446,915.82 has been computed through May 13, 2015.

# Statement

Date: May 13, 2015  
Name: TYSON FOODS INC & SUB  
Taxpayer ID: 71-0225165  
Letter ID: CNXXXX836X4X72X8

## Computation of deficiency

Reporting Period: 30-Sep-2005

Income or loss	
Federal taxable income	\$725,595,902.00
Net operating loss deduction	\$0.00
Income tax and replacement tax deduction	\$435,941.00
Other additions	\$55,887,416.00
Income or loss	\$781,919,259.00
Base income or loss	
Treasury interest income & other exempt obl.	\$96,847.00
Other subtractions	\$470,174,643.00
Total subtractions	\$470,271,490.00
Base income or net loss	\$311,647,769.00
Income allocable to Illinois	
Non-business income or loss	\$0.00
Non-unitary partnership bus. income or loss	\$0.00
Business income or loss	\$311,647,769.00
Apportionment formula	
Sales Factor	
Total everywhere	\$24,301,815,871.00
Within Illinois	\$2,701,610,200.00
Apportionment factor	0.111169
Business income/loss apportionable to IL	\$34,645,571.00
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	\$34,645,571.00
Net income	
Base income or net loss	\$34,645,571.00
Approved Net Loss Carry Forward	\$0.00
Approved Net Loss Carry Back	\$0.00
IL net loss deduction (NLD) Varified	\$0.00
Standard exemption	\$0.00
Net income	\$34,645,571.00
Net replacement tax	
Replacement tax addback after apportionment	\$0.00
Net income at 2.5%	\$13,468,489.00

# Statement

Date: May 13, 2015  
Name: TYSON FOODS INC & SUB  
Taxpayer ID: 71-0225165  
Letter ID: CNXXXX836X4X72X8

Replacement tax at 2.5%	\$336,712.00
Net income at .35%	-\$13,468,489.00
Replacement tax at .35%	-\$336,712.00
Replacement tax	\$866,139.00
Recapture of investment credits	\$0.00
Replacement tax before credits	\$866,139.00
Replacement tax investment credits	\$0.00
Net replacement tax	\$866,139.00
Net income tax	
Net income at .8%	\$13,468,489.00
Income tax at .8%	\$646,487.00
Income tax	\$1,662,987.00
Recapture of investment credits	\$0.00
Income tax before credits	\$1,662,987.00
Income tax investment credits	\$73,428.00
Credit for replacement tax paid	\$0.00
Carryforward of credit for repl. tax paid	\$0.00
Net income tax	\$1,589,559.00
Total tax due	
Net replacement tax	\$866,139.00
Net income tax	\$1,589,559.00
Total net income and replacement tax due	\$2,455,698.00
Minus tax previously assessed	-\$1,908,965.00
Total tax deficiency	\$546,733.00
UPIA-5 late-payment penalty (Audit)	\$218,693.20
Plus interest on tax through May 13, 2015	\$446,915.82
Total deficiency	* \$1,212,342.02
If you intend to pay under protest, you must pay this total deficiency amount.	
Balance due	* \$1,212,342.02

## **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.

Taxpayer Name  
FEIN  
3/19/2015  
EDA27

Tyson Foods Inc. and Sub  
71-0225165  
A622795395

1  
9/05  
Year 1

**Audit Adjustment and Support**

(c) We adjusted your addition modifications to reflect the correct addback of the federal bonus depreciation, or the correct reversal of the Illinois depreciation for bonus depreciation assets in the last year you are allowed a federal depreciation deduction, as required to be shown on the Form IL-4562. [35 ILCS 5/203(b)(2)(E-10), (b)(2)(E-11), (c)(2)(G-10), (c)(2)(G-11), (d)(2)(D-5), (d)(2)(D-6)] -9,430,566

(f) We adjusted your subtraction modifications for foreign dividends on Schedule J, Foreign Dividends, to reflect the correct amount as allowed by Illinois law. [35 ILCS 5/203(b)(2)(G), (b)(2)(O), (h)] -265,346

(g) We adjusted your subtraction modifications to reflect the correct amount of Illinois depreciation related to bonus depreciation assets, and the reversal of the bonus depreciation addback for an asset in the last year you are allowed a federal depreciation deduction for that asset, as required to be shown on Form IL-4562. [35 ILCS 5/203(b)(2)(T), (c)(2)(R), (d)(2)(O)] -40,555,730

(a) We re-characterized as business income the interest income you earned from the investment of working capital [86 IL Adm. Code 106.3010(c)(4)] -206,462

(a) 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] 19,901

(d) We adjusted your sales factor to exclude from the numerator the Illinois destination sales of those companies in your unitary business group with no Illinois nexus. [Public Law 86-272]

(f) We have adjusted the Illinois sales factor to include in the numerator receipts (other than receipts from sales of tangible personal property) which are allocable to Illinois [5 ILCS 304(a)(3)(C-5)] 284,480,641

(o) 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)] -299,954

(r) We adjusted your sales factor to include your share of the gross receipts of partnerships that are unitary with your business operations. [86 IL Adm. Code 100.3380(d)] 1,764,168

(s) We adjusted the sales factor by excluding the portion of your foreign sales that are attributable to the amount of foreign income excluded from your federal taxable income. Gross receipts that are excluded from or deducted in the computation of federal taxable income and that are not added back in the computation of base income, are excluded from both the numerator and denominator of the taxpayer's sales factor. [86 IL Adm. Code 100.3370(a)(2)(B)] -597,587,642

(a) We adjusted your Illinois net loss deduction to the amount allowable under Illinois law [35 ILCS 5/207]

# Notice of Deficiency

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



May 13, 2015



Letter ID: CNXXX88162X24X9

#BWNKMGV  
#CNXX XX88 162X 24X9#  
TYSON FOODS INC & SUB  
ATTN: MARK B ELSER/CP131  
PO BOX 2020  
SPRINGDALE AR 72765-2020

**Taxpayer ID:** 71-0225165  
**Audit ID:** A622795392  
**Reporting period:** September 2007  
**Total Deficiency:** \$267,569.46  
**Balance due:** \$266,467.36



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 "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 are 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 this notice. If you file a protest on time, we must reconsider the proposed deficiency, and if requested, grant you or your authorized representative an administrative hearing. An administrative hearing is a formal legal proceeding conducted pursuant to 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 deficiency 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 balance due 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) 785-6711

CC: TYSON FOODS INC & SUB  
4201 S ASHLAND AVE  
CHICAGO IL 60609-2305

# Statement

Date: May 13, 2015  
Name: TYSON FOODS INC & SUB  
Taxpayer ID: 71-0225165  
Letter ID: CNXXXX88162X24X9

## Reasons for deficiency

See enclosed EDA-27 for explanation of adjustments.

If this liability qualified for amnesty, and you did not pay that liability during the amnesty period held October 1, 2010, through November 8, 2010, your penalty and interest amounts may be doubled. [86 Ill. Admin. Code 520/101(b)]

## Penalties

We are imposing an additional late-payment penalty because you did not pay the amount shown due on the Form IL-870, Waiver of Restrictions, within 30 days after the "Date of Issuance" shown on the form. Once an audit has been initiated, the additional late payment penalty is assessed at 15% of the late payment. Failure to pay the amount due or invoke protest rights within 30 days from the "Date of Issuance" on the Form IL-870, results in this penalty increasing to 20%. [35 ILCS 735-3-3(b-20)(2)] (for liabilities due on or after 1/1/2005)

## Interest

Interest on tax in the amount of \$70,968.70 has been computed through May 13, 2015.

# Statement

Date: May 13, 2015  
Name: TYSON FOODS INC & SUB  
Taxpayer ID: 71-0225165  
Letter ID: CNXXXX88162X24X9

## Computation of deficiency

Reporting Period: 30-Sep-2007

Income or loss	
Federal taxable income	\$354,437,427.00
Net operating loss deduction	\$0.00
Income tax and replacement tax deduction	\$474,455.00
Illinois bonus depreciation addition	\$17,894,596.00
Income or loss	\$372,806,478.00
Base income or loss	
Foreign dividends subtraction	\$1,011,195.00
Illinois bonus depreciation subtraction	\$59,985,328.00
Other subtractions	\$8,699,962.00
Total subtractions	\$69,696,485.00
Base income or net loss	\$303,109,993.00
Income allocable to Illinois	
Non-business income or loss	\$0.00
Non-unitary partnership bus. income or loss	\$1,963,058.00
Business income or loss	\$301,146,935.00
Apportionment formula	
Sales Factor	
Total everywhere	\$25,320,319,752.00
Within Illinois	\$2,683,429,679.00
Apportionment factor	0.105979
Business income/loss apportionable to IL	\$31,915,251.00
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	\$31,915,251.00
Net income	
Base income or net loss	\$31,915,251.00
Approved Net Loss Carry Forward	\$9,724,724.00
Approved Net Loss Carry Back	\$0.00
IL net loss deduction (NLD) Varified	\$9,724,724.00
Income after NLD	\$22,190,527.00
Standard exemption	\$0.00
Net income	\$22,190,527.00
Net replacement tax	

# Statement

Date: May 13, 2015  
Name: TYSON FOODS INC & SUB  
Taxpayer ID: 71-0225165  
Letter ID: CNXXXX88162X24X9

Replacement tax addback after apportionment	\$0.00
Replacement tax	\$554,763.00
Recapture of investment credits	\$0.00
Replacement tax before credits	\$554,763.00
Replacement tax investment credits	\$0.00
Net replacement tax	\$554,763.00
Net income tax	
Income tax	\$1,065,145.00
Recapture of investment credits	\$0.00
Income tax before credits	\$1,065,145.00
Income tax investment credits	\$162,856.00
Credit for replacement tax paid	\$0.00
Carryforward of credit for repl. tax paid	\$0.00
Net income tax	\$902,289.00
Total tax due	
Net replacement tax	\$554,763.00
Net income tax	\$902,289.00
Total net income and replacement tax due	\$1,457,052.00
Minus tax previously assessed	-\$1,316,308.00
Total tax deficiency	\$140,744.00
UPIA-5 late-payment penalty (Audit)	\$55,856.76
Plus interest on tax through May 13, 2015	\$70,968.70
Total deficiency	* \$267,569.46
If you intend to pay under protest, you must pay this total deficiency amount.	
<b>Computation of balance due</b>	
Minus payments	-\$1,102.10
Balance due	* \$266,467.36

Taxpayer Name  
FEIN  
3/19/2015  
EDA27

Tyson Foods Inc. and Sub  
71-0225165  
A822795395

9/07  
Year 3

**Audit Adjustment and Support**

(c) We adjusted your addition modifications to reflect the correct addback of the federal bonus depreciation, or the correct reversal of the Illinois depreciation for bonus depreciation assets in the last year you are allowed a federal depreciation deduction, as required to be shown on the Form IL-4562. [35 ILCS 5/203(b)(2)(E-10), (b)(2)(E-11), (c)(2)(G-10), (c)(2)(G-11), (d)(2)(D-5), (d)(2)(D-6)] 17,475,353

(f) We adjusted your subtraction modifications for foreign dividends on Schedule J, Foreign Dividends, to reflect the correct amount as allowed by Illinois law [35 ILCS 5/203(b)(2)(G), (b)(2)(O), (h)]

(g) We adjusted your subtraction modifications to reflect the correct amount of Illinois depreciation related to bonus depreciation, assets, and the reversal of the bonus depreciation addback for an asset in the last year you are allowed a federal depreciation deduction for that asset, as required to be shown on Form IL-4562. [35 ILCS 5/203(b)(2)(T), (c)(2)(R), (d)(2)(O)] 19,392,141

(a) We re-characterized as business income the interest income you earned from the investment of working capital. [86 IL Adm. Code 100.3010(c)(4)]

(a) 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] 71,286,983

(d) We adjusted your sales factor to exclude from the numerator the Illinois destination sales of those companies in your unitary business group with no Illinois nexus. [Public Law 86-272]

(f) We have adjusted the Illinois sales factor to include in the numerator receipts (other than receipts from sales of tangible personal property) which are allocable to Illinois. [5 ILCS 304(a)(3)(C-5)] 233,305,608

(c) 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)] -886,961

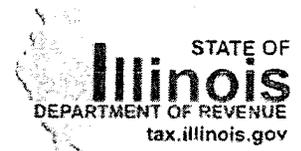
(r) We adjusted your sales factor to include your share of the gross receipts of partnerships that are unitary with your business operations. [86 IL Adm. Code 100.3380(d)]

(s) We adjusted the sales factor by excluding the portion of your foreign sales that are attributable to the amount of foreign income excluded from your federal taxable income. Gross receipts that are excluded from or deducted in the computation of federal taxable income and that are not added back in the computation of base income, are excluded from both the numerator and denominator of the taxpayer's sales factor. [86 IL Adm. Code 100.3370(a)(2)(B)] -215,763,713

(a) We adjusted your Illinois net loss deduction to the amount allowable under Illinois law. [35 ILCS 5/207]

# Notice of Deficiency

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



May 19, 2015



Letter ID: CNXXXX4438732969

#BWNKMGV  
#CNXX XX44 3873 2969#  
TYSON FOODS INC & SUB  
ATTN: MARK B ELSER/CP131  
PO BOX 2020  
SPRINGDALE AR 72765-2020

**Taxpayer ID:** 71-0225165  
**Audit ID:** A1212963456  
**Reporting period:** September 2008  
**Total Deficiency:** \$74,157.60  
**Balance due:** \$74,157.60



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 "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 are 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 this notice. If you file a protest on time, we must reconsider the proposed deficiency, and if requested, grant you or your authorized representative an administrative hearing. An administrative hearing is a formal legal proceeding conducted pursuant to 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 deficiency 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 balance due 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) 785-6711

CC: TYSON FOODS INC & SUB  
4201 S ASHLAND AVE  
CHICAGO IL 60609-2305

# Statement

Date: May 19, 2015  
Name: TYSON FOODS INC & SUB  
Taxpayer ID: 71-0225165  
Letter ID: CNXXXX4438732969

## Reasons for deficiency

See enclosed EDA-27 for explanation of adjustments.

If this liability qualified for amnesty, and you did not pay that liability during the amnesty period held October 1, 2010 through November 8, 2010, your penalty and interest amounts may be doubled. [86 Ill. Admin. Code 520/101(b)]

## Penalties

We are imposing an additional late-payment penalty because you did not pay the amount shown due on the Form IL-870, Waiver of Restrictions, within 30 days after the "Date of Issuance" shown on the form. Once an audit has been initiated, the additional late payment penalty is assessed at 15% of the late payment. Failure to pay the amount due or invoke protest rights within 30 days from the "Date of Issuance" on the Form IL-870, results in this penalty increasing to 20%. [35 ILCS 735-3-3(b-20)(2)] (for liabilities due on or after 1/1/2005)

## Interest

Interest on tax in the amount of \$16,067.40 has been computed through May 19, 2015.

# Statement

Date: May 19, 2015  
Name: TYSON FOODS INC & SUB  
Taxpayer ID: 71-0225165  
Letter ID: CNXXXX4438732969

## Computation of deficiency

Reporting Period: 30-Sep-2008

Income or loss	
Federal taxable income	\$146,375,174.00
Net operating loss deduction	\$0.00
Income tax and replacement tax deduction	\$1,867,755.00
Illinois bonus depreciation addition	\$14,106,625.00
Other additions	\$0.00
Income or loss	\$162,349,554.00
Base income or loss	
Foreign dividends subtraction	\$1,197,751.00
Illinois bonus depreciation subtraction	\$34,794,485.00
Other subtractions	\$10,562,313.00
Total subtractions	\$46,554,549.00
Base income or net loss	\$115,795,005.00
Income allocable to Illinois	
Non-business income or loss	\$0.00
Non-unitary partnership bus. income or loss	\$892,505.00
Business income or loss	\$114,902,500.00
Apportionment formula	
Total sales everywhere	\$26,585,317,011.00
Total Illinois sales	\$2,662,702,217.00
Apportionment factor	0.100157
Business income/loss apportionable to IL	\$11,508,290.00
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	\$11,508,290.00
Net income	
Base income or net loss	\$11,508,290.00
IL net loss deduction (NLD)	\$0.00
Net income	\$11,508,290.00
Net replacement tax	
Replacement tax	\$287,707.00
Recapture of investment credits	\$0.00
Replacement tax before credits	\$287,707.00
Replacement tax investment credits	\$0.00
Net replacement tax	\$287,707.00
Net income tax	

# Statement

Date: May 19, 2015  
Name: TYSON FOODS INC & SUB  
Taxpayer ID: 71-0225165  
Letter ID: CNXXXX4438732969

Income tax	\$552,398.00
Recapture of investment credits	\$0.00
Income tax before credits	\$552,398.00
Income tax investment credits	\$99,306.00
Net income tax	\$453,092.00
Refund or balance due	
Net replacement tax	\$287,707.00
Net income tax	\$453,092.00
Total net income and replacement tax due	\$740,799.00
Minus tax previously assessed	-\$699,306.00
Total tax deficiency	\$41,493.00
UPIA-5 late-payment penalty (Audit)	\$16,597.20
Plus interest on tax through May 19, 2015	\$16,067.40
Total deficiency	* \$74,157.60
If you intend to pay under protest, you must pay this total deficiency amount.	
Balance due	* \$74,157.60

## **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.

Taxpayer Name  
FEIN  
EDA27

Tyson Foods Inc. and Sub  
71-0225165

1

**Audit Adjustment and Support**

9/30/2008

(c) We adjusted your addition modifications to reflect the correct addback of the federal bonus depreciation, or the correct reversal of the Illinois depreciation for bonus depreciation assets in the last year you are allowed a federal depreciation deduction, as required to be shown on the Form IL-4562. [35 ILCS 5/203(b)(2)(E-10), (b)(2)(E-11), (c)(2)(G-10), (c)(2)(G-11), (d)(2)(D-5), (d)(2)(D-6)]	14,106,625
(g) We adjusted your subtraction modifications to reflect the correct amount of Illinois depreciation related to bonus depreciation assets, and the reversal of the bonus depreciation addback for an asset in the last year you are allowed a federal depreciation deduction for that asset, as required to be shown on Form IL-4562. [35 ILCS 5/203(b)(2)(T), (c)(2)(R), (d)(2)(O)]	25,091,780
(a) 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]	3,750,900
(f) We have adjusted the Illinois sales factor to include in the numerator receipts (other than receipts from sales of tangible personal property) which are allocable to Illinois. [5 ILCS 304(a)(3)(C-5)]	348,593,222
(o) 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)]	-577,957

# Notice of Deficiency

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



May 15, 2015



Letter ID: CNXXX13391X832X7

#BWNKMGV  
#CNXX X133 91X8 32X7#  
TYSON FOODS INC & SUB  
ATTN: MARK B ELSER/CP131  
PO BOX 2020  
SPRINGDALE AR 72765-2020



Taxpayer ID: 71-0225165  
Audit ID: A913310720  
Reporting period: September 2011  
Total Deficiency: \$2,058,406.10  
Balance due: \$2,058,406.10

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 "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 are 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 this notice. If you file a protest on time, we must reconsider the proposed deficiency, and if requested, grant you or your authorized representative an administrative hearing. An administrative hearing is a formal legal proceeding conducted pursuant to 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). 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 deficiency 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 balance due 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) 785-6711

CC: TYSON FOODS INC & SUB  
4201 S ASHLAND AVE  
CHICAGO IL 60609-2305

# Statement

Date: May 15, 2015  
Name: TYSON FOODS INC & SUB  
Taxpayer ID: 71-0225165  
Letter ID: CNXXX13391X832X7

## Reasons for deficiency

See enclosed EDA-27 for explanation of adjustments.

## Penalties

We are imposing a late-filing or nonfiling penalty because you did not file a processable return by the due date (including any extended due date). This penalty is figured at the rate of 2 percent of the amount of tax required to be shown due on your return, after subtracting any payments made or credits allowed by the due date of the return. This penalty is imposed the day after the original due date of your return, including any extended due date. This penalty cannot exceed \$250. [35 ILCS 735/3-3(a-10)] (for liabilities due on or after 1/1/2001)

We are imposing a late-payment penalty because you did not pay the total tax you owe by the original due date of the return, even if you had an extension of time to file. This penalty is based on the amount required to be shown due on your return, minus any timely payments and timely credits. This penalty is figured at increasing rates based on the number of days your payment is late. The penalty rates are

- 2 percent of any amount that is paid no later than 30 days after the due date;
- 10 percent of any amount that is paid later than 30 days after the due date.

[35 ILCS 735-/3-3(b-20)(2)] (for liabilities due on or after 1/1/2005)

## Interest

Interest on tax in the amount of \$117,787.30 has been computed through May 15, 2015.

# Statement

Date: May 15, 2015  
Name: TYSON FOODS INC & SUB  
Taxpayer ID: 71-0225165  
Letter ID: CNXXX13391X832X7

## Computation of deficiency

Reporting Period: 30-Sep-2011

Income or loss	
Federal taxable income	\$598,254,925.00 ✓
Net operating loss deduction	\$0.00
Income tax and replacement tax deduction	\$5,637,049.00 ✓
Illinois bonus depreciation addition	\$156,988,158.00 ✓
Related party expenses additions	\$103,935,100.00 ✓
Other additions	\$0.00
Base income or loss	
Foreign dividends subtraction	\$4,195,672.00 ✓
Illinois bonus depreciation subtraction	\$208,271,369.00 ✓
Other subtractions	\$11,607,087.00 ✓
Total subtractions	\$224,074,128.00
Base income or net loss	\$640,741,104.00 ✓
Income allocable to Illinois	
Non-business income or loss	\$0.00
Non-unitary partnership bus. income or loss	\$0.00
Business income or loss	\$640,741,104.00
Apportionment formula	
Total sales everywhere	\$31,410,892,371.00
Total Illinois sales	\$2,712,927,498.00
Apportionment factor	0.086369
Business income/loss apportionable to IL	\$55,340,168.00
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	\$55,340,168.00
Net income	
Base income or net loss	\$55,340,168.00
IL net loss deduction (NLD)	\$0.00
Net income	\$55,340,168.00
Net replacement tax	
Replacement tax	\$1,383,504.00
Recapture of investment credits	\$0.00
Replacement tax before credits	\$1,383,504.00
Replacement tax investment credits	\$0.00
Net replacement tax	\$1,383,504.00
Net income tax	

# Statement

Date: May 15, 2015  
Name: TYSON FOODS INC & SUB  
Taxpayer ID: 71-0225165  
Letter ID: CNXXX13391X832X7

Income tax	\$3,572,761.00
Recapture of investment credits	\$0.00
Income tax before credits	\$3,572,761.00
Income tax investment credits	\$131,992.00
Net income tax	\$3,440,769.00
Refund or balance due	
Net replacement tax	\$1,383,504.00
Net income tax	\$3,440,769.00
Total net income and replacement tax due	\$4,824,273.00
Minus tax previously assessed	-\$3,207,299.00
Total tax deficiency	\$1,616,974.00 ✓
Plus late-filing penalty	\$250.00
Plus late-payment penalty	\$323,394.80
Plus interest on tax through May 15, 2015	\$117,787.30
Total deficiency	* \$2,058,406.10
If you intend to pay under protest, you must pay this total deficiency amount.	
Balance due	* \$2,058,406.10

## **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.

5/13/14  
hiw

Tyson Foods Inc. Subs  
Explanation of Adjustments  
EDA-27

FEIN: 71-0225165  
TRACK: A913310720

9/30/2011

Addition Modification:

Illinois Income & Replacement Addback

We adjusted your addition modifications to include Illinois Income & Replacement Tax, or both to the extent deducted in the computation of federal taxable income [35 ILCS 5/203(b)(2)(B), (c)(2)(B)] (122,268.00)

Bonus Depreciation Addition

We adjusted your addition modifications to reflect or the correct reversal of the Illinois depreciation for bonus depreciation assets in the last year you are allowed a federal depreciation deduction, as required to be shown on the Form IL-4562. [35 ILCS 5/203(b)(2)(E-10), (b)(2)(E-11), (c)(2)(G-10), (c)(2)(G-11), (d)(2)(D-5), (d)(2)(D-6)] 107,678,853

Subtraction Modification:

Bonus Depreciation Subtraction

We adjusted your subtraction modifications to reflect the correct amount of Illinois depreciation related to bonus depreciation, assets, and the reversal of the bonus depreciation addback for an asset in the last year you are allowed a federal depreciation deduction for that asset, as required to be shown on Form IL-4562. [35 ILCS 5/203(b)(2)(T),(c)(2)(R), (d)(2)(O)] 136,899,501

Foreign Dividends

We adjusted your subtraction modifications for foreign dividends on Schedule J, Foreign Dividends, to reflect the correct amount as allowed by Illinois law. [35 ILCS 5/203(b)(2)(G), (b)(2)(O), (h)] (504,042)

Partnership Verification

Non-unitary partnership  
We adjusted your business income and apportionment factors to include the income and apportionment factors of partnerships that are unitary with your business operations. [86 IL Adm. Code 100.3380(d)] (205,004)

Apportionment

Everywhere Sales

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)] (5,554,388)

Illinois Sales

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] 573,392,058

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] 389,588,768

**STATEMENT**

DATE: 5/13/2015  
FORM: IL-1120  
FEIN: 71-0225165  
NAME: TYSON FOODS INC & SUB

TAXABLE YEAR ENDING: 9/30/2005, 9/30/2007

Track no.: A622795392

Your claim for refund has been denied in full as 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]

cc TYSON FOODS INC & SUB  
4201 S ASHLAND AVE  
CHICAGO IL 60609-2305

TYSON FOODS INC & SUB  
ATTN: MARK B ELSER/CP131  
PO BOX 2020  
SPRINGDALE AR 72765-2020



**Illinois Department of Revenue**

101 W. Jefferson St.  
Springfield, IL 62702

**NOTICE OF DENIAL**

5/19/2015

TYSON FOODS INC & SUB  
ATTN: MARK B ELSER/CP131  
PO BOX 2020  
SPRINGDALE AR 72765-2020

FORM: IL-1120

FEIN: 71-0225165

TAXABLE YEAR ENDING  
9/30/2008, 9/30/2009

AMOUNT DENIED  
\$924,594

Pursuant to Section 909(e) of the Illinois Income Tax Act, notice is hereby given that your claims for refund of income tax overpayment in the amount of \$289,746 for taxable year ending 9/30/2008 and \$634,848 for taxable year ending 9/30/2009, filed on May 29, 2013, are denied in full.

IF YOU DO NOT AGREE, Section 910(a) of the Act provides that the Department shall reconsider the denial if within 60 days of the date of this notice, the claimant or his authorized representative files a written protest setting forth the grounds upon which the protest is based and, if requested, shall grant the taxpayer or his authorized representative a hearing (under Section 914). Thus, if you disagree with the proposed denial of your claim, you may file a protest and, if desired, request a hearing. If an adequate and timely protest is not received, the denial of your claim in the amount shown above will become final as of the expiration of the aforementioned 60-day period pursuant to Section 909(f). A protest, if filed, should be forwarded to the address shown below.

Sincerely,

Constance Beard  
Director

*BE*

Enclosures: EAR-14  
IDR-867  
Return Envelope

NOTICE SECTION  
ILLINOIS DEPARTMENT OF REVENUE  
PO BOX 19012  
SPRINGFIELD, IL 62794-9012  
PHONE: 217 785-6711  
ATTENTION: JN A1212963456

STATEMENT

DATE: 5/19/2015  
FORM: IL-1120  
FEIN: 71-0225165  
NAME: TYSON FOODS INC & SUB

TAXABLE YEAR ENDING: 9/30/2008, 9/30/2009

Track no.: A1212963456

Your claim for refund has been denied in full as 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]

cc TYSON FOODS INC & SUBSIDIARIES  
4201 S ASHLAND AVE  
CHICAGO IL 60609-2305



## Illinois Department of Revenue

101 W. Jefferson St.  
Springfield, IL 62702

### NOTICE OF DENIAL

5/15/2015

TYSON FOODS INC & SUB  
ATTN: MARK B ELSER/CP131  
PO BOX 2020  
SPRINGDALE AR 72765-2020

FORM: IL-1120

FEIN: 71-0225165

TAXABLE YEAR ENDING  
9/30/2010

AMOUNT DENIED  
\$2,410,308

Pursuant to Section 909(e) of the Illinois Income Tax Act, notice is hereby given that your claim for refund of income tax overpayment in the amount of \$2,410,308 for taxable year ending 9/30/2010, filed on March 31, 2013, is denied in full.

IF YOU DO NOT AGREE, Section 910(a) of the Act provides that the Department shall reconsider the denial if within 60 days of the date of this notice, the claimant or his authorized representative files a written protest setting forth the grounds upon which the protest is based and, if requested, shall grant the taxpayer or his authorized representative a hearing (under Section 914). Thus, if you disagree with the proposed denial of your claim, you may file a protest and, if desired, request a hearing. If an adequate and timely protest is not received, the denial of your claim in the amount shown above will become final as of the expiration of the aforementioned 60-day period pursuant to Section 909(f). A protest, if filed, should be forwarded to the address shown below.

Sincerely,

Constance Beard  
Director

BY

Enclosures: EAR-14  
IDR-867  
Return Envelope

NOTICE SECTION  
ILLINOIS DEPARTMENT OF REVENUE  
PO BOX 19012  
SPRINGFIELD, IL 62794-9012  
PHONE: 217 785-6711  
ATTENTION: JN A913310720

STATEMENT

DATE: 5/15/2015  
FORM: IL-1120  
FEIN: 71-0225165  
NAME: TYSON FOODS INC & SUB

TAXABLE YEAR ENDING: 9/30/2010  
Track no.: A913310720

Your claim for refund has been denied in full as 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]

cc TYSON FOODS INC & SUB  
4201 S ASHLAND AVE  
CHICAGO IL 60609-2305

# Notice of Proposed Deficiency



July 24, 2012



Letter ID: L1482147456

TYSON FOODS INC & SUB  
ATTN: MARK B ELSER/CP131  
PO BOX 2020  
SPRINGDALE AR 72765-2020

Taxpayer ID: 71-0225165  
Account ID: 04705-77920  
Audit ID: A622795392  
Return type: IL-1120  
Audit periods: 10/2004 - 09/2007



We have audited your account and have determined that there is additional liability due.

Tax	\$218,633.00
Penalty	\$109,692.00
Interest	\$407,955.00
Total	<u>\$736,280.00</u>

Our calculations, periods covered, and other explanations resulting in the determination are attached for your review.

If you agree with the figures as shown, please contact the auditor at the telephone number shown below. We will send you Form IL-870, Waiver of Restrictions, showing the same tax and penalty amounts as above. When you receive Form IL-870, you must sign the form and return it to us along with any payment due within 30 days of the "Date of Issuance" shown on Form IL-870. Unless the auditor provides different instructions, mail Form IL-870 and your payment to:

AUDIT PERFECTION SECTION  
ILLINOIS DEPARTMENT OF REVENUE  
PO BOX 19012  
SPRINGFIELD IL 62794-9012

Please note, if you sign the IL-870 or pay the amount shown due, you waive the right to seek review by the Informal Conference Board.

If you do not agree with the figures shown above, you may request a review of this proposed liability by the Informal Conference Board (Section 2505-510). To do this, you must complete Form ICB-1, Request for Informal Conference Board Review, within 60 days from the date of this notice and mail it along with the auditor's work papers and a copy of this notice to:

INFORMAL CONFERENCE BOARD  
100 W RANDOLPH SUITE 7-341  
CHICAGO IL 60601

If you do not request an ICB review within 60 days from the date of this notice, we will send you a Form IL-870 showing the amount of tax due, plus applicable penalties.

Sincerely,

Haven Willis

ILLINOIS DEPARTMENT OF REVENUE  
101 W JEFFERSON ST  
SPRINGFIELD, IL 62794

217 836-7301  
972 423-4301 fax

7/24/2012

Tyson Foods Inc. and Subsidiaries  
Explanation of Adjustments

FEIN: 71-0225165  
TRACK: A622795392

	9/30/2005	9/30/2006	9/30/2007	Support Reference
<b>Income Verification (Sch I-A):</b>				
No Change				
<b>Modifications:</b>				
Bonus Depreciation Addition Modification (Sch II-A)	(9,430,566)	3,234,287	17,475,353	IITA Sec 203 (b)(2)(E-10) Bonus Depreciation Analysis Bonus Depreciation Audit Schedule
Bonus Depreciation Subtraction Modification (Sch II-A)	(40,655,730)	(2,640,543)	18,955,442	IITA Sec 203 (b)(2)(E-10) Bonus Depreciation Analysis Bonus Depreciation Audit Schedule
Foreign Dividends (Sch II-A) incorrect percentage was used on 40% & 20% ownership Subtraction should be 80% for those ownership percentages	(265,346)			IITA Sec 203(b)(2)(G) & (b)(2)(o).
<b>Partnership Income:</b> partnership found to be unitary based on partnership agreement.			1,963,058	IAC 100.3380 (d)(1)
<b>Apportionment Factor:</b>				
<b>Sales Factor Everywhere</b>				
Royalty income removed from factor	(299,954)	(224,759)	(886,561)	IITA Sec 304(a)(3)(B-2) -
Extraterritorial Sales adjustment- (Sch IX-B)	(597,587,642)	(606,428,540)	(215,763,713)	IAC 100.3370(a)(2)(B) -
<b>Sales Factor Illinois</b>				
Tyson Fresh Meats- Throwback Sales Adjustment	-	970,249,000	69,650,000	IITA Sec. 304(a)(3)(B)(i) and (ii)
Tyson Hog Markets- Throwback Sales Adjustment KY & WI originating from IL per apportionment wp	1,871,080	1,696,329	2,163,831	IITA Sec. 304(a)(3)(B)(i) and (ii)
Tyson Prepared Foods, Inc.- Throwback Sales Adj.		3,251,566	949,331	IITA Sec. 304(a)(3)(B)(i) and (ii)
DFG, Inc. added per audit- DFG LLC partnership receipts per apportionment schedules			1,764,158	nexus from partnership rental prop and payroll per apportionment wp
Tyson Sales and Distribution- company has nexus per audit.	284,480,641	-	219,409,834	IAC 100.9720 (c)(2)(A)

# Notice of Proposed Deficiency



October 18, 2012



Letter ID: L0302927520

TYSON FOODS INC & SUB  
ATTN: MARK B ELSER/CP131  
PO BOX 2020  
SPRINGDALE AR 72765-2020

Taxpayer ID: 71-0225165  
Account ID: 04705-77920  
Audit ID: A1212963456  
Return type: IL-1120  
Audit periods: 10/2007 - 09/2009



We have audited your account and have determined that there is additional liability due.

Tax	\$391,845.00
Penalty	\$41,993.00
Interest	<u>\$26,441.00</u>
Total	\$460,279.00

Our calculations, periods covered, and other explanations resulting in the determination are attached for your review.

If you agree with the figures as shown, please contact the auditor at the telephone number shown below. We will send you Form IL-870, Waiver of Restrictions, showing the same tax and penalty amounts as above. When you receive Form IL-870, you must sign the form and return it to us along with any payment due within 30 days of the "Date of Issuance" shown on Form IL-870. Unless the auditor provides different instructions, mail Form IL-870 and your payment to:

AUDIT PERFECTION SECTION  
ILLINOIS DEPARTMENT OF REVENUE  
PO BOX 19012  
SPRINGFIELD IL 62794-9012

Please note, if you sign the IL-870 or pay the amount shown due, you waive the right to seek review by the Informal Conference Board.

If you do not agree with the figures shown above, you may request a review of this proposed liability by the Informal Conference Board (Section 2505-510). To do this, you must complete Form ICB-1, Request for Informal Conference Board Review, within 60 days from the date of this notice and mail it along with the auditor's work papers and a copy of this notice to:

INFORMAL CONFERENCE BOARD  
100 W RANDOLPH SUITE 7-341  
CHICAGO IL 60601

If you do not request an ICB review within 60 days from the date of this notice, we will send you a Form IL-870 showing the amount of tax due, plus applicable penalties.

Sincerely,

Haven Willis

ILLINOIS DEPARTMENT OF REVENUE  
AUDIT- SPI-A, IL DEPT OF REVENUE, PO BOX 19475,  
SPRINGFIELD, IL 62794-9475

217 836-7301  
217 785-3251 fax

10/18/12

Tyson Foods Inc. and Subsidiaries  
Explanation of Adjustments

FEIN: 71-0225165  
TRACK: A1212963456

	9/30/2008	9/30/2009	Support Reference
<b>Income Verification (Sch I-A):</b>			
No Change			
<b>Modifications:</b>			
Bonus Depreciation Addition Modification (Sch II-A)	13,771,175	91,762,640	IIITA Sec 203 (b)(2)(E-10) Bonus Depreciation Analysis Bonus Depreciation Audit Schedule
Bonus Depreciation Subtraction Modification (Sch II-A)	33,952,148	82,982,517	IIITA Sec 203 (b)(2)(E-10) Bonus Depreciation Analysis Bonus Depreciation Audit Schedule
<b>Partnership Income:</b>			
partnership found to be unitary based on partnership agreement.	892,505	3,842,534	IAC 100 3380 (d)(1)
<b>Apportionment Factor:</b>			
<b>Sales Factor Everywhere</b>			
Royalty income removed from factor	(577,957)	(364,332)	IIITA Sec 304(a)(3)(B-2)
<b>Sales Factor Illinois</b>			
Tyson Hog Markets- Throwback Sales Adjustment KY & WI originating from IL, per apportionment w/p from prior audit	4,781,720	9,750,636	IIITA Sec 304(a)(3)(B)(i) and (ii)
Tyson Sales and Distribution- company has nexus per audit	348,593,222	371,962,778	IAC 100 9720 (c)(2)(A)

# Notice of Proposed Tax Liability and Claim Denial



April 3, 2014



Letter ID: L2054846176

TYSON FOODS INC & SUB  
ATTN: MARK B ELSER/CP131  
PO BOX 2020  
SPRINGDALE AR 72765-2020

**Taxpayer ID:** 71-0225165  
**Account ID:** 04705-77920  
**Audit ID:** A913310720  
**Return type:** IL-1120  
**Audit periods:** 10/2009 - 09/2011



We have audited your account and also received your claim for refund. The following information shows our findings.

### **Audit Results**

As a result of our audit, we have determined that there is additional liability due for the audit period. Our calculations, periods covered, and other explanations resulting in the determination are attached for your review.

Tax Year Ending	09/2010	09/2011
Tax	\$1,295,068.00	\$1,616,967.00
Penalty	<u>\$129,507.00</u>	<u>\$161,697.00</u>
Total	\$1,424,575.00	\$1,778,664.00

If you agree with the figures as shown, contact us using the information listed on the next page. We will send you Form IL-870, Waiver of Restrictions, showing the same tax and penalty amounts as above. When you receive Form IL-870, you must sign the form and return it to us along with any payment due within 30 days of the "Date of Issuance" shown on Form IL-870. Unless different instructions are provided, mail Form IL-870 and your payment to:

AUDIT PERFECTION SECTION  
ILLINOIS DEPARTMENT OF REVENUE  
PO BOX 19012  
SPRINGFIELD IL 62794-9012

Please note, if you sign the Form IL-870 and pay the amount shown due, you waive the right to any review by the Informal Conference Board.

### **Claim for Refund Results**

We are proposing to deny the claim for refund you filed on 05/29/2013, for the tax period 09/2010 in the total amount of \$2,410,308.00, as shown below.

Tax Year Ending	09/2010
Amount of original claim	\$2,410,308.00
Amount of proposed adjustment	<u>-\$2,410,308.00</u>
Net claim allowed	\$0.00

If you agree to the figures shown regarding your claim for refund, please contact us using the information listed on the next page.

If you do not agree with the figures regarding either the deficiency or your claim for refund, you may request a review of this proposed liability by the Informal Conference Board (Section 2505-510). To do this, you must complete Form ICB-1, Request for Informal Conference Board Review, within 60 days from the date of this notice and mail it along with the auditor's work papers and copy of this notice to:

INFORMAL CONFERENCE BOARD  
100 W RANDOLPH SUITE 7-341  
CHICAGO IL 60601

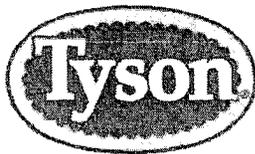
If you do not request an ICB Review within 60 days from the date of this notice, we will issue a Form IL-870 and Notice of Claim Denial, showing the amount tax due, plus applicable penalties.

Sincerely,

Haven Willis  
Revenue Auditor

ILLINOIS DEPARTMENT OF REVENUE  
AUDIT- SPI-A, IL DEPT OF REVENUE, PO BOX 19475  
SPRINGFIELD, IL 62794-9475

217 836-7301  
217 785-3251 fax



Tyson Foods, Inc.

December 17, 2012

Informal Conference Board  
Illinois Dept. of Revenue  
100 W. Randolph #7-341  
Chicago, IL 60601

RE: Tyson Foods, Inc. & Subsidiaries  
FEIN 71-0225165  
Audit Periods: 10/2007 – 9/2009 and 10/2004-9/2007  
Request to Combine Informal Conference Board Reviews

Dear Sir or Madam:

Attached is our formal Request for Informal Conference Board Review for the audit period 10/2007-9/2009. Additionally, attached is the same request for audit period 10/2004-9/2007 filed September 21, 2012. The issues in both cases are the same; thus, we believe it is in both the State's and our best interests to review both audit periods together. Accordingly, we respectfully request the audit periods under both audits be reviewed together rather than separately.

Additionally, please note, for Issue #2 discussed in the attachment to Form ICB-1, regarding the ship from throwback sales related to the forward warehouse for both audit periods referenced above, we are filing amended returns to correct for this issue, which the auditor denied reflecting in the audit report.

Sincerely,

A handwritten signature in black ink that reads "Mark B. Elser". The signature is written in a cursive, flowing style.

Mark B. Elser, CPA  
Vice President, Tax



# ICB-1 Request for Informal Conference Board Review

## Read this information first

By completing and filing this form, you are requesting that the Informal Conference Board (ICB) conduct an informal review to examine the basis for a Notice of Proposed Deficiency, Notice of Proposed Liability, Notice of Proposed Claim Denial, or Notice of Proposed Liability and Claim Denial issued by the Illinois Department of Revenue. If you did not receive one of these notices, **do not file this form.**

**Note: Do not** complete this form if you are requesting a review of an offer in compromise based on an inability to pay an undisputed tax liability. These offers must be made by filing a petition with the Board of Appeals after a final assessment of the tax has been issued.

- ✓ You must complete Steps 1, 3, 4, 5, and 6. Complete Step 2 if someone will represent you during the informal conference process.
- ✓ If you are requesting an in-person conference with the ICB, you must make the request in Step 4.
- ✓ Complete and attach Form ICB-2, Offer of Disposition of a Proposed Assessment or Claim Denial, if you are making an offer of disposition as part of this review request.
- ✓ You must file this request within **60 days** of the date of the Notice of Proposed Deficiency, Notice of Proposed Liability, Notice of Proposed Claim Denial, or Notice of Proposed Liability and Claim Denial. This date is the later of the date appearing on the face of the notice or the postmark date.

## Step 1: Identify yourself, your business, or your organization

<p>1 Taxpayer's name <u>Tyson Foods, Inc. &amp; Subs.</u></p> <p>2 Current address <u>2200 Don Tyson Parkway, CP 131</u>  <small>Street address</small>  <u>Springdale, AR 72762</u>  <small>City State ZIP</small></p> <p>Daytime phone no. (<u>479</u>) <u>290-4000</u></p> <p>Fax no. (<u>479</u>) <u>290-7956</u></p> <p>3 Contact person <u>Shannon Lee</u>  <small>(For business or organization)</small></p> <p>Daytime phone no. (<u>479</u>) <u>290-2800</u></p>	<p>4 SSN _____  <small>Social Security number</small></p> <p>5 FEIN <u>71 - 0225165</u>  <small>Federal employer identification number</small></p> <p>6 Account ID <u>04705-77920</u></p> <p>7 License no. _____</p> <p>8 <b>Corporate income tax audits only:</b> complete the following information if you filed as a member of a unitary group or the auditor proposed that you should be a member of a unitary group.</p> <p>a Sch. UB filer name <u>Tyson Foods, Inc.</u></p> <p>b Sch. UB filer FEIN <u>71 - 0225165</u></p>
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## Step 2: Identify your representative *Tyson has not yet decided whether to be represented*

Complete all the information requested in this step if someone will represent you during the informal conference process.

**Note:** Your representative **must** attach a properly executed Form IL-2848, Power of Attorney.

<p>1 Representative's name <u>To be determined later</u></p> <p>2 Representative's address _____  <small>Street address</small>  _____  <small>City State ZIP</small></p> <p>3 Daytime phone no. (____) _____</p> <p>Fax no. (____) _____</p>	<p>4 Check this box if all correspondence should be sent to your representative's address. → <input type="checkbox"/></p> <p>If you checked the box, all correspondence from the ICB will be mailed to this address.</p> <p>If you did not check the box, all correspondence from the ICB will be mailed to the address provided in Step 1.</p>
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## Step 3: Provide the following audit or examination information

**Note:** You must attach a copy of the Notice of Proposed Deficiency, Notice of Proposed Liability, Notice of Proposed Claim Denial, or Notice of Proposed Liability and Claim Denial and any attachments you received from us.

<p>1 Write the audit ID or track number from the notice you received. <u>A1212963456</u></p> <p>2 Write the tax type. <u>Income Tax</u></p>	<p>3 Write the audit period and the amount of the proposed assessment or claim denial.</p> <p>Audit period: <u>10/2007 - 9/2009</u></p> <p>Amount: <u>\$460,279.00</u></p>
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Disclosure of this information is VOLUNTARY. This form has been approved by the Forms Management Center, IL-492-3462



### **Legal Authority Supporting Tyson's Position**

As stated previously, Tyson 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. We respectfully reserve the right to provide such information at a later time once the Auditor's--or, more generally, the Department's-- position is known.

### **Issue 2**

TFM operates thirteen beef and pork processing plants in the Midwest, with multiple plants in Iowa, Kansas and Nebraska, and one plant in a number of other states, including Illinois. TFM products are generally delivered to customers in one of three ways. First, a customer may send a truck to the plant to pick up the order; second, if there is a full or near-full truckload, the plant could ship an order directly to the customer either via common carrier or on TSD trucks; or third, if a full load is not being shipped, through the forward warehouse ("FWH") in Ottawa, Illinois.

During the Illinois audit, Tyson discovered that "ship to/ship from" reports received from TFM personnel and used for determining TFM's sales for apportionment purposes (Illinois as well as all other states), showed all shipments, even those originating at plants outside Illinois that flowed through the FWH as "shipped from" Illinois. As a result, where TFM was not taxable in the destination state, they were shown as Illinois sales because of throwback. Tyson believes these sales are not Illinois sales, and requested that the Auditor remove them from the apportionment calculation. The Auditor declined Tyson's request and determined that the sales were correctly included in the apportionment calculation. We are filing amended returns for the audit periods 10/2004-9/2009 to reflect the correction needed related to this issue.

### **Legal Authority Supporting Tyson's Position**

Illinois Regulation 100.3370(c)(1) states that for or Illinois apportionment purposes,

"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 sale, 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"

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.

First, products shipped through the FWH are neither delivered nor shipped to customers in Illinois. Second, and related to the first reason, with regard to all products shipped through the FWH, customers do not take possession of the products in Illinois because the FWH is a TFM location rather than a customer's. For each of these reasons, the first test under the regulation is inapplicable to TFM. As a result, products shipped to customers located outside Illinois that pass through the FWH on their way to the customer are not Illinois sales under the first test because the customer does not receive the property in Illinois.

The second test under Illinois Regulation 100.3370(c)(1) analyzes whether sales of tangible personal property are subject to "throwback." With respect to TFM's sales flowing through the FWH, this test requires a determination as to whether products that move through the FWH should be deemed "shipped from an office, store, warehouse, factory or other place of storage" as required by the regulation. Other than as used in this specific regulation, Illinois law does not appear to define "a place of storage." Based on the express language of Illinois Regulation 100.3370(c)(1), "offices, stores and factories" may be considered "a place of storage." In other words, a store, a factory, or a warehouse can be used for storage, and in those cases, they are "places of storage" under the regulation. As a result, the key question to be answered is whether the FWH constitutes "a place of storage," or is the product shipped through the FWH properly considered in transit to the customer?

One definition of "storage", found at [Businessdictionary.com](http://Businessdictionary.com), is:

"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."

All shipments of product arriving at the FWH have already been sold to a customer and is in transit to the customer. The primary purpose of shipping orders through the FWH is to allow products ordered by a single customer on their way to the same geographic area and/or produced by multiple plants to be loaded together and shipped more economically than if they were shipped separately. Often, the work performed at the FWH relates to little more than coordinating the shipments and moving the loads from one truck to another. In most instances, product may be held during a single day to allow other shipments to arrive. Irrespective of the specific reason why product is shipped through the FWH, it is clear that it is not being directed through the FWH to be "stored."

The United States Supreme Court has issued several decisions making clear that when a sale is made by a plant and shipped to a customer via a common carrier, that shipment is generally considered to be in transit (interstate commerce), and commerce doesn't end until the property is delivered to the customer.<sup>1</sup> Under this clear guidance from the Court, therefore, when a TFM plant ships product to a customer, albeit through a FWH, that shipment is considered in the uninterrupted stream of commerce

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<sup>1</sup> See *Dahnke-Walker Co. v. Bondurant*, 257 U.S. 282; *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 567; *Joy Oil C. v. State Tax Commission*, 337 U.S. 286;

until it is delivered to the customer. As a result, products shipped from the plants should be considered to have remained in interstate commerce, rather than having been shipped from a “storage” facility. The second test under Illinois Regulation 100.3370(c)(1) also indicates products shipped to customers that flow through the FWH on their way to a customer outside the state are not Illinois sales.

The courts of Illinois have stated that the purpose of the Illinois “throwback” provisions is to eliminate the possibility of “nowhere sales” and as a result, tax 100% of a corporation’s income, no more and no less.<sup>2</sup> It would be hard to argue that when a shipment leaves a TFM plant in Kansas, destined for a customer in a state in which TFM is not taxable, and the shipment remains in interstate commerce until reaching the ultimate destination, that Kansas would not view that as a sale subject to Kansas throwback provisions. By asserting the same transactions are subject to Illinois throwback rules under Illinois Regulation 100.3370(c)(1), the end result is the taxation of the same transaction twice. In such circumstances, the stated purpose of the throwback provisions as articulated by the courts in this State would not be met.

IIITA Section 304(f) provides that if the allocation and apportionment provisions of subsections (a) through (e) and of subsection (h) do not fairly represent the extent of a taxpayer's business activity in Illinois, the taxpayer 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”

Tyson’s FY 9/2009 apportionment calculations as filed with the Department indicated TFM’s Illinois sales to Illinois customers totaled \$837,696,535, or 5.73% of its total sales of \$14,610,226,947. Additionally, sales that flowed through the FWH totaling \$910,683,000 were attributed to Illinois (another 6.23% of total sales). As a result, over 12% of TFM’s sales were attributed to Illinois, ***more than double the sales actually shipped to Illinois customers.***

If Illinois’s throwback provisions are held to provide that shipments from plants outside Illinois that travel through the FWH are taxable in Illinois, Tyson believes that such a result is distortive. An alternative methodology, specific to allocating Illinois throwback sales related to the transactions traveling through the FWH should be applied. Tyson believes an allocation based on the plant from which the products were originally shipped would be equitable in that it would result in no more and no less than 100% of the sales being subject to throwback, regardless of the state in which the shipment originates.

<sup>2</sup> See GTE Automatic Electric, Inc., Appellant, v. Robert H. Allphin, Director of Revenue, Appellee, 68 Ill 2d 326 12 Ill Dec 134 369 NE2d 841, 09/20/1977

### **Issue 3**

A change was made to the bonus depreciation adjustment included by Tyson in their tax returns. Tyson does not believe the adjustments made were correct.

#### **Legal Authority Supporting Tyson's Position**

Tyson does not dispute the need to adjust federal depreciation for bonus depreciation adjustments required by Illinois law. Tyson believes the adjustment calculated is incorrect and submits the attached Bonus Depreciation Adjustment Schedule of the corrected calculation. Please refer to explanations on the schedule identifying specific changes to be made by the state. Additionally, we reserve the right to provide additional documentation if needed.

### **Issue 4**

An adjustment was made to include the income of Carneco Foods, LLC ("Carneco") in Tyson's return on the basis that Carneco's activities are unitary with the Tyson group. Tyson does not believe Carneco is unitary.

#### **Legal Authority Supporting Tyson's Position**

Tyson reserves the right to provide legal authority supporting its position at a later date.

### **Issue 5**

An adjustment was made to throwback sales to Illinois for Tyson Hog Markets, Inc. (THM) delivered to Kentucky. Tyson does not believe the adjustments are correct as THM is taxable in and filed returns to the State of Kentucky.

#### **Legal Authority Supporting Tyson's Position**

Illinois Regulation 100.3380(c)(1) "in the case of sales where neither the origin nor the destination of the sale is within this State, and the person is taxable in neither the state of origin nor the state of destination, the sale will be attributed to this State (and included in the numerator of the sales factor) if the person's activities in this State in connection with the sales are not protected by the provisions of P.L. 86-272, 15 USC 381-385. Although P.L. 86-272, by its terms covers only sales of tangible personal property, its rules regarding a state's power to impose a net income tax, for purposes, of this special rule, will be applied whether the sale is of tangible or intangible property." Tyson is taxable in the state of destination, Kentucky, and therefore not subject to throwback.



**Illinois Department of Revenue**

Informal Conference Board  
Louise Calvert, Administrator  
100 West Randolph Street, 7-286  
Chicago, Illinois 60601  
Phone: 312 814-1722  
Fax: 312-814-3109

**RE: TAXPAYER: Tyson Foods Inc. and Subs**  
**DOCKET NO.: 12-0328**  
**TAXPAYER ID: 71-0225165**  
**AUDIT ID: A622795392**  
**TAX YEARS: 9/05-9/07**

**TAXPAYER: Tyson Foods Inc. and Subs**  
**DOCKET NO.: 12-0423**  
**TAXPAYER ID: 71-0225165**  
**AUDIT ID: A1212963456**  
**TAX YEARS: 9/08-9/09**

**ACTION DECISION**

The Informal Conference Board has reviewed the Illinois Department of Revenue Audit Bureau's proposed adjustments in this matter and, based upon information supplied during the review process, finds that some of the proposed adjustments should be revised. No change is to be made to the remaining proposed adjustments.

The Audit Bureau is instructed to make the following adjustments:

- A. Exclude Kentucky sales from the proposed throwback sales adjustment for Tyson Hog Markets, Inc.
- B. Revise the proposed bonus depreciation adjustment to reflect the corrected adjustment shown on the revised workpapers provided to the taxpayer on 11/5/13, and to which the Taxpayer has agreed.
- C. Exclude Carneco Foods LLC from the taxpayer's unitary business group since there is insufficient information to establish the exercise of centralized management of the partnership.

Tyson Sales & Distribution, Inc. (TSD) has Illinois nexus since there are sufficient activities in Illinois which are not protected by P.L. 86-272.

No change is warranted to the Tyson Hog Markets, Inc. (THM) throwback sales adjustment with respect to sales to Wisconsin since the Taxpayer did not provide any documentation on this issue.

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 *Fillterek, Inc. v. Department of Revenue*, 186 Ill. App. 3d 208,

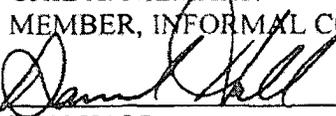
541 N.E. 2d 1385, any storage, regardless of immediate shipment, was sufficient to meet the statutory requirement of shipment from an Illinois place of storage.

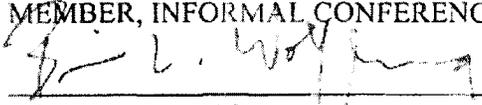
The Audit Bureau is instructed to conclude and process the audit in a manner consistent with this decision.

Taxpayer Request for Audit Adjustments is Granted in Part.

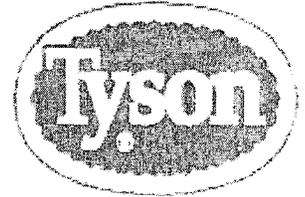
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GAIL A. NIEMANN  
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MEMBER, INFORMAL CONFERENCE BOARD

1-14-15  
DATE ENTERED



# Memorandum

To: Haven Willis, Revenue Auditor III  
From: Bryan Argo   
Date: February 24, 2014  
Re: IL State Audit 10/01/2009-9/30/2011 IDR # 5I

- 1) Regarding Tyson Sales & Distribution, there are changes from prior audits to the current audit with the property factor. Please answer questions about inventories and rentals.

There are no changes from prior audits to the current audit with the property factor. The inventories and rentals for FY2010 & FY2011 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> party 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.



Illinois Department of Revenue

Request Number  
51

Information Document Request

TO: (Taxpayer name and company division or branch)

Audit period: 10/01/2009 – 9/30/2011

Tyson Foods Inc. and Subs  
P.O. Box 2020  
Springdale, AR 72765

FEIN: 71-0225165  
Track: A913310720

Submitted to: Mr. Bryan Argo

Description of items requested

Taxpayer response

Tyson Sales and Distribution

FY2010

Payroll- 889,651  
Inventories- 174,308  
Sales- 385,603,345

FY2011

Payroll- 973,048  
Inventories- 316,385  
Rentals- TPP- 9,656  
Sales- 389,588,768

There are changes from the prior audits to the current audit with the property factor. Please answer the following questions about inventories and rentals:

1. Where is the inventory located in Illinois?
2. Is it located at a Tyson affiliated own or rented facility? Is so, please provide the name of the Tyson affiliate and location.
3. Who manages the inventory in Illinois?
4. What is the type of inventory located in IL?
5. What is the cost for storing the inventory in IL?
6. How is rental income derived in IL?
7. What is the tpp that was rented?
8. What is the location of the rented tpp?
9. Who is the payee of the rental income?

Requestor (name and title)

Date

FROM: Haven Willis, RA III

1/23/14

- Part I - Taxpayer File Copy
- Part II - To be returned by taxpayer with reply
- Part III - Requestor's copy

## Schafer, Chad

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**From:** Willis, Haven [Haven.Willis@Illinois.gov]  
**Sent:** Thursday, February 27, 2014 2:35 PM  
**To:** Argo, Bryan  
**Subject:** IDR-5C Apportionment IL Audit Adjustments  
**Attachments:** IDR-5C Apportionment IL Audit Adjustments Detail.docx; IDR-5C Apportionment IL Audit Adjustments.doc; IDR-5C Apportionment IL Audit Adjustments.xls

Bryan,

I made a small change to the worksheet for processing purposes. I will be denying the IL-1120-X with the throwback sales removed so I need to show the IL sales factor schedule with the original return sales factor amount which included all throwbacks. It won't change your ability to protest the adjustment to ICB and legal but I have to process the X's first and then make audit adjustments. I will have more information to give you about the IL-1120-X returns by tomorrow.

Thanks,  
Haven

*Ms. Haven Willis*  
*Revenue Auditor III*  
217-836-7301

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**From:** Willis, Haven  
**Sent:** Thursday, February 27, 2014 11:22 AM  
**To:** Argo, Bryan (Bryan.Argo@tyson.com)  
**Subject:** IDR-5C Apportionment IL Audit Adjustments

Bryan,

I have completed the review of IL apportionment. This is where most of the audit changes will be found. Most of the changes are the same issues that are currently in ICB.

Thanks,  
Haven

*Ms. Haven Willis*  
*Revenue Auditor III*  
217-836-7301

**Tyson Foods Inc. and Subs**  
**Explanation of Illinois Apportionment Audit Adjustments**

**FEIN: 71-0225165**

**Tax Years: 9/10-9/11**

**I. Tyson Sales and Distribution Nexus:**

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.

**II. Throwback sales adjustment for Tyson Hog Markets**

In the prior audit cycle, IDR #13 was issued for the 9/05, 9/06, 9/07 audit requesting throwback sales for Tyson Hog Markets, Inc. The taxpayer response stated "THM buys hogs from growers in various states and ships them to processors. We do not have the sales data to show the ship from information. It would have to be pulled from the sales orders. But please note that almost 90% of the destination sales for THM are in Illinois, Iowa, Indiana, Michigan, Ohio, and Tennessee, all of which are states that THM files returns in. Therefore, if any sales originated in Illinois for other states in which THM did not file, the amount would be very minimal. Attached are the destinations sales for THM for your reference as Exhibit C."

In the prior audit, Exhibit C provided with IDR #13 was reviewed. Exhibit C listed destination sales by state. Kentucky and Wisconsin sales were included as a throwback to IL because of the taxpayer's explanation above. The assumption was made that the t/p did not file in these two taxable states because the t/p lists all states where THM files returns. Therefore, KY and WI sales were included as a throwback to IL.

The taxpayer provided Kentucky income tax returns for Tyson Hog Markets for 9/05-9/09 to prove that the sales were accounted for on that state return. Per audit, the throwback sales for KY were removed from the Illinois apportionment factor on the Audit Support Schedule. The Wisconsin sales were not addressed by the taxpayer so those throwback sales are still included in the Illinois sales factor in the Audit Support Schedule for the prior audits in ICB.

For the current audit 9/10 and 9/11, the Apportionment Data worksheet provided with IDR-5C was used to record WI sales as a throwback to IL for Tyson Hog Markets. This is consistent with the prior audits.

### **III. Tyson Service Center**

IDR-5G was issued to inquire about Tyson Service Center. This company is excluded from the IL apportionment factor as filed for the current audit cycle. This company was included in the IL apportionment factor in the prior audit cycles because of an office and employees in Elgin, IL. The taxpayer responded and claims that TSC sales are intercompany sales between TSC and TFM, Inc. and they should be eliminated on a combined basis. IDR-5A was issued to request intercompany items for the consolidated group including intercompany sales. Tyson Service Center sales were included in the IL sales factor per audit pending the response to IDR-5A and the verification of intercompany sales.

### **IV. Throwback sales adjustment for Tyson Fresh Meats**

The original IL-1120 for 9/10 was filed with throwback sales including sales that originate from outside Illinois and are shipped to Ottawa, IL and then to the final customer. The taxpayer filed an IL-1120-X on 5/29/13 to remove sales originating from outside the State of Illinois that are shipped to the Ottawa, IL freight forward warehouse. The reduction in the Illinois sales factor for these throwback sales on the IL-1120-X was 717,057,532. IDR-5B requested throwback sales for Tyson Fresh Meats. The IDR asked the taxpayer to segregate the sales that are at issue which are the ones that originate from another state destined for the Ottawa FFW. The taxpayer provided a breakdown of TFM throwback sales per return of 145,198,026 and the Ottawa FFW sales at issue of 478,871,412. IDR-5H was issued to explain the difference in the IL-1120-X Ottawa FFW sales of 717,057,532 which were eliminated from the IL sales factor and the Ottawa FFW sales of 478,871,412 listed on IDR-5B. These amounts should be the same since they are reportedly sales that originated from another state destined for the Ottawa FFW. The taxpayer responded to IDR-5H by stating that the throwback sales number on the amended return of 145,198,026 did not include all of the IL origination sales. The number should have been 383,384,147. A correction was made on the Illinois sales tab of the Audit Support worksheet. The Ottawa FFW sales of 478,871,412 were included per audit and the throwback sales where no issue exists were corrected to the revised amount of 383,384,147. The taxpayer filed the original 9/11 return by excluding the Ottawa FFW sales at issue. The taxpayer provided the Ottawa FFW throwback sales amount on IDR-5B. Sales of 573,392,058 were added back to the IL sales factor per audit for 9/11.

The throwback sales originate from the Tyson Fresh Meats warehouse in Ottawa, Illinois. The taxpayer's position is that no sales should be thrown back to Illinois that are shipped from the Ottawa warehouse. In the prior audit, the taxpayer prepared a letter stating the Tyson position. The following is the position established in audit:

## **Issue**

Are the sales that pass through the Ottawa Forwarding Warehouse includable in the Illinois sales factor numerator as throwback sales?

## **Discussion and Analysis**

The rules for attributing sales of tangible personal property ("TPP") to Illinois for apportionment is found in IITA Sec. 304(a)(3)(B)(i) and (ii), as shown below in part:

(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 the sale; or

(ii) The property is shipped from an office, store, warehouse, factory or other place of storage in this State and either the purchaser is the United States government or the person is not taxable in the state of the purchaser; [...]

Clauses (i) and (ii) can be referred to as the "destination rule" and the "throwback rule", respectively. According to the destination rule, where the taxpayer has nexus in Illinois (overcoming the protection of PA 86-272 for sales of TPP), sales of TPP delivered or shipped to the purchaser in Illinois are attributed to Illinois. Even if the TPP is later transferred by purchaser to another state, it is considered delivered or shipped to Illinois. The question concerning Tyson involves sales for purchasers outside of Illinois, so the destination rule is not relevant in this situation. Tyson acknowledges this to be the case as well, and alleges that it is already attributing its destination sales to Illinois.

The "throwback rule" under clause (ii) is what is at issue concerning Tyson. If sales of TPP are shipped from Illinois and delivered in a state where the seller is not taxable, those sales are "thrown back" to Illinois to be included in the Illinois sales factor numerator. This prevents the taxpayer from having "nowhere sales", that is, sales that do not generate taxable income in some state. IT 04-0030-GIL plainly explains the throwback rule involving warehouses:

Based on IITA Section 304(a)(3)(B), shipments from an Illinois warehouse into states that do not impose an income tax will be included in the Illinois numerator. 86 Ill.Admin.Code 100.3200(a)(1) sets forth the requirements of taxability in another state: [...]

Tyson is trying to qualify that their warehouse is a "forwarding warehouse" ("FWH") where the goods may only spend a minimal amount of time before being reshipped; in fact they argue that the goods are still technically in transit. They contend that "place of storage" is not defined in the Act or Regulations, the sales orders are already approved (out-of-state), that product is often not held more than a day, and that it does not arrive at the warehouse to be "stored".

It is the audit position that Tyson's sales of TPP through the FWH still falls under the express language of IITA 304(a)(3)(B)(ii). Their interpretation of definitions seems to fall

outside the plain language of the Illinois statute in attempt to avoid increased Illinois apportionment. The rule is if goods are shipped from an Illinois warehouse to a state where Tyson is not taxable, then the sales must be thrown back to Illinois. Yes, orders are placed out-of-state for purchasers in other states. For example, an order may be placed at a Kentucky plant for a purchaser in Colorado. That order is then shipped to the Ottawa FWH, which by the sake of its own name admits of being a warehouse. Then the order may sit anywhere for a few hours up to a day, awaiting other goods perhaps for that specific purchaser or the region. The order is not in transit at this point, but temporary storage awaiting rearrangement. Once the orders for that purchaser or region are ready, they are then shipped from the FWH to Colorado for delivery to the purchaser, where Tyson is not taxable. All the elements here of this type of order by Tyson meet the criteria of the throwback rule.

A crucial argument of Tyson is short amount of time spent at the FWH. No required minimum time of storage is mentioned in the statute. In *Filtertek Inc. v. Department of Revenue*, 186 Ill.App.3d 208, 541 N.E.2d 1385, 133 Ill.Dec. 947 (2d Dist. 1989), the Illinois appellate court held that receipts from sales of goods stored temporarily in Illinois and shipped from an Illinois storage facility to purchasers in states where the company was not taxable were properly includable in the Illinois sales factor. The court held that any storage, regardless of immediate shipment, was sufficient to meet the statutory requirement of shipment from an Illinois place of storage. Below is an excerpt from that court decision:

With the sales being attributable to Filtertek, the next step is to determine whether or not the sales can be taxed by Illinois. Under section 304(a)(3)(B)(ii) of the Act, two elements must be proved: (1) the property was shipped from some place of storage in Illinois; and (2) the person (i.e., Filtertek) was not taxable in the State of the purchaser. Ill.Rev.Stat.1979, ch. 120 par. 3-304(a)(3)(B)(ii).

Although Filtertek stresses the almost immediate reshipment of the products, the length of time spent in storage is unimportant to our analysis. Nowhere does the statute require a minimum storage time. All that is required is some time spent in storage at an Illinois facility. The hearing officer's finding that the goods were held in storage, at least for short periods of time, at the Filtertek facility is not against the manifest weight of the evidence and will not be disturbed.

To argue that the goods are not at least in temporary storage at FWH until further shipment is misconstruing the facts, and the short amount of time goods spend at FWH is not relevant to the statutory meaning of storage and the sales throwback rule.

To further support our claim that the goods at FWH are no longer in transit, we look to the courts again. The "continuity of transit" is a court doctrine that prevents a state from exacting property taxes on goods that are considered in transit and part of interstate commerce. "Continuity of transit" was explained in the case *State v. Continental Oil Co.*, 218 Minn. 123, 15 N.W.2d 542 (Minn. 1944), as shown below:

Continuity of transit plainly means that the transportation is proceeding and that the goods are being moved. But, in order to afford protection from state restriction upon interstate commerce and hence immunity from state taxation, the interstate movement is regarded as continuing despite temporary interruptions: (1) because of the necessities of the journey, or (2) for the purpose of safety and convenience in the course of the movement. Other court cases that support the audit position are Champlain Realty Co. v. Town of Brattleboro, 260 U.S. 366, 43 S.Ct. 146, 67 L.Ed. 309, 25 A.L.R. 1195 (logs held during high water to insure safety of the journey); Carson Petroleum Co. v. Vial, 279 U.S. 95, 49 S.Ct. 292, 73 L.Ed. 626 (oil held to accumulate a cargo and await a ship to transport it). The goods have come to rest for causes serving the purposes of the owner of the goods and they have ceased to be the subject of interstate commerce and are subject to nondiscriminatory state taxation. Property transported in interstate commerce and ultimately destined for points beyond that at which the journey is interrupted, which has 'come to rest within a state, being held there at the pleasure of the owner, for disposal or use, so that he may dispose of it either within the state, or for shipment elsewhere, as his interest dictates,' is not in interstate commerce and is to be 'deemed to be a part of the general mass of property within the state,' and as such is subject to state taxation. State of Minnesota v. Blasius, 290 U.S. 1, 10, 54 S.Ct. 34, 37, 78 L.Ed. 131, 136, supra. [...]

In numerous cases the rule has been settled that property transported in interstate commerce, which has come to rest and is held in storage either for sale or for use or for distribution, is not in transit, but is part of the mass of the property within the state and as such is subject to state taxation, although it was intended at the inception of the interstate movement to reship the property from the point where the interstate movement was interrupted to a point beyond as its ultimate destination.

Southern Pac. Co. v. Gallagher, 306 U.S. 167, 59 S.Ct. 389, 83 L.Ed. 586; Federal C. & W. Co. v. McLean, 291 U.S. 17, 54 S.Ct. 267, 78 L.Ed. 622; State of Minnesota v. Blasius, 290 U.S. 1, 54 S.Ct. 34, 78 L.Ed. 131; Nashville, C. & St. L. Ry. Co. v. Wallace, 288 U.S. 249, 53 S.Ct. 345, 77 L.Ed. 730, 87 A.L.R. 1191; Atlantic Coast Line R. Co. v. Standard Oil Co., 275 U.S. 257, 48 S.Ct. 107, 72 L.Ed. 270; Arkadelphia Milling Co. v. St. Louis S. W. Ry. Co., 249 U.S. 134, 39 S.Ct. 237, 63 L.Ed. 517; Susquehanna Coal Co. v. City of South Amboy, 228 U.S. 665, 33 S.Ct. 712, 57 L.Ed. 1015; Bacon v. Illinois, 227 U.S. 504, 33 S.Ct. 299, 57 L.Ed. 615; General Oil Co. v. Crain, 209 U.S. 211, 28 S.Ct. 475, 52 L.Ed. 754; American Steel & Wire Co. v. Speed, 192 U.S. 500, 24 S.Ct. 365, 48 L.Ed. 538, 100 Am.St.Rep. 827; Pittsburgh & So. Coal Co. v. Bates, 156 U.S. 577, 15 S.Ct. 415, 39 L.Ed. 538; Brown v. Houston, 114 U.S. 622, 5 S.Ct. 1091, 29 L.Ed. 257; Missouri Pac. R. Co. v. Schnipper, D.C., 51 F.2d 749, affirmed 7 Cir., 56 F.2d 30; State v. Bartles Oil Co., 132 Minn. 138, 155 N.W. 1035, L.R.A.1916D, 193; State v. Maxwell Motor Sales Corp., 142 Minn. 226, 171 N.W. 566; State ex rel. Burr v. Seaboard A. L. R. Co., 92 Fla. 61, 109 So. 656

Tyson's goods at the Ottawa FWH have come to rest, to serve the purpose of the owner (convenience of Tyson) for further shipment, have left interstate commerce, and are not

in transit. Sales shipped from the Ottawa FWH to states where Tyson is not taxable should be thrown back to Illinois for apportionment purposes.