

ILLINOIS INDEPENDENT
TAX TRIBUNAL

McCormick & Schmick Restaurant Corp,
Petitioner,

v.

ILLINOIS DEPARTMENT
OF REVENUE,

Respondent.

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PETITION

The Petitioner, McCormick & Schmick Restaurant, hereby petitions the Illinois Independent Tax Tribunal to review and reverse and/or modify the Notice of Tax Liability. "Notice of Tax Liability" issued by the Illinois Department of Revenue "Audit Department", for the reasons stated below:

INTRODUCTION

1. The "Notice of Tax Liability" was issued by the Department on May 4, 2015 (assessing) in the amount of \$43,150.00 in tax, \$8,629 in penalties and \$3,138.53 in interest for taxable periods July 1, 2010 through December 31, 2012. A copy of the "Notice of Tax Liability" is attached to this Petition.

2. Petitioner is a Corporation with its principal place of business in Houston, TX

3. It is located at 1510 West Loop South, and its telephone number is 713-386-8144.

The taxpayer account number is 3241-2924.

BACKGROUND AND RELEVANT FACTS

4. During the initial phase of the Illinois Sales Tax Audit, audit adjustments (\$327,705.34) were made for what were believed to be under reported Sales. The auditor reached this conclusion by reconciling Cash and Credit Card receipts with monthly Sales totals. What was not taken into consideration during the reconciliation process were the “Voluntary Tips” included in the credit card receipts. After providing the auditor with supporting documentation including the Tip Reporting Alternative Commitment reports (TRAC); “voluntary tips” were deducted from the audit adjustment.

Once the initial reconciliation issues were resolved, the auditor and his supervisor elected to utilize a more efficient audit approach by reconciling “Discounts” and “Sales Tax” account resulting in audit adjustments for Disallowed Discounts (re: Quality Control / Preferred Guest) and Tax Collected and not Remitted. The revised audit adjustment = \$35,082.00.

Because McCormick and Schmick was acquired by Landry’s in 2012, it was only after we secured additional pre-acquisition workpapers that we realized many of the audit adjustments were related and in effect scheduling the same transaction twice.

Additional research revealed the prior ownership tracked Quality Control Discounts via a Gift Card system leaving uncollected sales tax calculations on the Guest Receipts and within the POS system; thus appearing to have been collected. The auditor made adjustments for Disallowed Discounts and what he believed to be Tax Collected and not remitted.

In actuality, the Quality Control discounts were utilized to track meals served to Restaurant Managers etc., no currency (or sales tax) was ever collected. The meals were a Quality Control measure utilized by the restaurant; so Use Tax is due on Food and Beverage given away. Adjustments for Tax Collected and not remitted (re: Quality Control Discounts) should be removed.

APPLICABLE LAW

5. Title 86 Section 130.120(h) Sales to exempt entities
6. Title 86 Section 130.2125(b)(1) Discount Coupons

ERROR I

7. During the fieldwork phase of the audit, many of the IT reports and documentation utilized to track and record the Quality Control Discounts were unknown. After securing additional documentation and discussing the issue with the Accounting and IT Departments, we have now learned how the Quality Control discounts were processed and recorded. We have also obtained copies of Guest Receipt transactions demonstrating how the discounts were applied and sales tax incorrectly assessed for non-currency transactions.

8 As documented in the Background section of the Petition, "Quality Control Discount" meals were in actuality meals served to Restaurant Managers or given away for free; Use tax is due on the cost of the Food. Adjustments for Tax Collected and not remitted (re: Quality Control Discounts) should be removed. Projected Quality Control Discount sales for the Audit Period = \$28,593.04. Applying a 30% COGS %, the amount subject to Use Tax = \$6,000.54 and because the food was purchased uncooked, Use Tax (1%) = \$60.01.

ERROR II

9. The auditor disallowed Preferred Guest Discounts and also made related adjustments for Tax Collected and not Remitted. After securing additional documentation, we are in agreement; adjustments (\$6,555.50) for Tax Collected and not Remitted related to the Preferred Guest Discounts should remain in the audit. However, adjustments for Disallowed Preferred Guest Discounts should be removed based upon the following ~ Preferred Guest Discounts were

applied to the Customers Guest Receipts after sales tax was calculated, assessed and collected on the total amount due.

ERROR III

10. In reference to Sample month September 2010 (re: Location 87 / Wacker) of the auditor's Sales Tax Collected not Remitted worksheet, the auditor mis-entered the \$ amount of Sales Tax remitted by the taxpayer. The auditor entered \$588 when in fact \$857.88 was remitted. Because the September 2010 sample month accounts for 33% of the sample population, this mis-entry had significant impact on the projected tax due.

ERROR IV

11. In reference to Sample month June 2012 of the auditor's Sales Tax Collected Not Remitted worksheet, credit was not applied for sales taxes originally collected and later refunded to Exempt entities. Documentation can be provided to demonstrate the following Sales Taxes: (Location 45 / Chicago / \$655.76); (Location 101 / Skokie / \$215.15) and (Location 87 / Wacker / \$237.30) were collected in error and later refunded to the customer. Because the June 2012 Sample month accounts for 33% of the sample population, the refunded sales taxes had a significant impact on the projected tax due.

CONCLUSION AND RELIEF REQUESTED

12. Utilizing the same audit approach and methodology as the auditor, the original tax assessment of \$35,082 should be reduced to \$6,582 to reflect the adjustments for (1) Sales Tax incorrectly assessed on Quality Control Discounts; (2) Disallowed Preferred Guest Discounts; (3) the Sample Month September 2010 mis-entry and (4) Sales Taxes refunded to Exempt customers (Re: Sample month June 2012)

WHEREAS, Petitioner requests that the "Notice of Tax Liability" be modified or canceled for the reasons contained herein.

McCormick & Schmick Restaurant Corp

By: Paul A. Tarrillo, one of the Attorneys
Representing Petitioner.

Representatives:



Illinois Department of Revenue
OFFICE OF ADMINISTRATIVE HEARINGS
Willard Ice Building
101 West Jefferson Street – Level 5SW
Springfield, IL 62702
(217)782-6995

June 25, 2015

Brad Chaffin
McCormick & Schmick Restaurant
1510 W. Loop South
Houston, TX 77027

Re: **PROTEST DISMISSAL DUE TO LACK OF JURISDICTION**
McCormick & Schmick Restaurant
Account ID: 3241-2924
Notice of Tax Liability (Reporting Period: July 2010 – December 2012)
Letter ID: CNXXXX8881282729, dated May 4, 2015

The Office of Administrative Hearings of the Illinois Department of Revenue recently received your protest and request for an administrative hearing for McCormick & Schmick Restaurant, regarding the above Notice. The mailing date of the protest and request for hearing indicate that the protest was sent within the 60-day protest period for requesting an administrative hearing stated on the above Notice. However, the amount at issue for the protest exceeds the statutory amount (\$15,000, exclusive of penalties and interest or \$15,000 for notices that involve only penalties and interest) for which the Department has jurisdiction for protests filed on or after January 1, 2014. For protests that exceed the statutory amount and are filed on or after January 1, 2014, jurisdiction is vested solely in the Illinois Independent Tax Tribunal (Tax Tribunal). See 35 ILCS 1010/1-1 *et seq.* **Because the Department does not have jurisdiction over this protest, the Department is respectfully dismissing your protest and request for administrative hearing.**

Because of these recent changes in Illinois law, the Department and the Tax Tribunal recognize that there may be instances, such as this, when a protest and request for an administrative hearing may be filed in the wrong jurisdiction. The Tax Tribunal's website (www.illinois.gov/taxtribunal) contains rules that include guidance on filing in the wrong jurisdiction and contact information for the Tax Tribunal. **The Tax Tribunal's rules provide that a timely protest that is dismissed by the Department for lack of jurisdiction may be filed with the Tax Tribunal within 60 days of the notice of such dismissal.** See Subsection (a)(3) of Section 5000.310 of the Tax Tribunal's rules. Please note that the Tax Tribunal has different requirements

than the Department for filing protests, including the payment of filing fees and the filing of a petition in the form required by the Tax Tribunal.

I recommend that you review the information provided on the Tax Tribunal's website and contact them if you have any questions.

Sincerely,



Terry D. Charlton
Chief Administrative Law Judge
Illinois Department of Revenue

TDC

Notice of Tax Liability
for Form EDA-105-R, ROT Audit Report



#BWNKMGV
#CNXX XX88 8128 2729#
MC CORMICK & SCHMICK RESTAURANT CORP
MC CORMICK & SCHMICKS SEAFOOD REST
5320 N RIVER RD
ROSEMONT IL 60018-5400

May 4, 2015



Letter ID: CNXXXX8881282729

Account ID: 3241-2924



We have audited your account for the reporting periods July 01, 2010, through December 31, 2012. As a result we have assessed the amounts shown below.

	<u>Liability</u>	<u>Payments/Credit</u>	<u>Unpaid Balance</u>
Tax	43,150.00	0.00	43,150.00
Late Payment Penalty Increase	8,629.00	0.00	8,629.00
Interest	3,138.53	0.00	3,138.53
Assessment Total	\$54,917.53	\$0.00	\$54,917.53

If you agree, pay the assessment total as soon as possible to minimize additional penalty and interest. Mail a copy of this notice and your payment with the voucher on the enclosed Taxpayer Statement. By including a copy of this notice, your payment will be properly applied to the audit liability.

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

- If the amount of this tax liability, exclusive of penalty and interest, is more than \$15,000, or if no tax liability is assessed but the total penalties and interest is more than \$15,000, file a petition with the Illinois Independent Tax Tribunal within 60 days of this notice. Your petition must be in accordance with the rules of practice and procedure provided by the Tribunal (35 ILCS 1010/1-1, *et seq.*).
- In all other cases that do not fall within the jurisdiction of the Illinois Independent Tax Tribunal, file a protest with us, the Illinois Department of Revenue, and request an administrative hearing within 60 days of the date of this notice, which is July 06, 2015. Submit your protest on Form AH-4, Protest and Request for Administrative Hearing with the Illinois Department of Revenue (available on our website at tax.illinois.gov). Mail form AH-4 along with a copy of this notice to the address on the form. If you do not file a protest within the time allowed, you will waive your right to a hearing, and this liability will become final. An administrative hearing is a formal legal proceeding conducted pursuant to the rules adopted by the Department and is presided over by an administrative law judge. A protest of this notice does not preserve your rights under any other notice.
- Instead of filing a petition with the Illinois Independent Tax Tribunal or a protest with us, the Illinois Department of Revenue, you may instead, under Sections 2a and 2a.1 of the State Officers and Employees Money Disposition Act (30 ILCS 230/2a, 230/2a.1), pay the total liability under protest using Form RR-374, Notice of Payment Under Protest (available on our website at tax.illinois.gov), and file a complaint with the circuit court for a review of our determination.

If you do not protest this notice or pay the assessment total in full, we may take collection action against you for the balance due, which may include levy of your wages and bank accounts, filing of a tax lien, or other action to satisfy your liability.

If you have questions, write or call us weekdays between 8:00 a.m. and 4:00 p.m. Our contact information is listed below.

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

217 785-6579