ILLINOIS INDEPENDENT
TAX TRIBUNAL

McCORMICK & SCHMICK RESTAURANT CORP.,	)	
Petitioner,	)	
v.	)	**No. 15 TT 179**
	)	**Judge Brian F. Barov**
ILLINOIS DEPARTMENT OF REVENUE,	)	
Respondent.	)	

DEPARTMENT'S ANSWER TO PETITION

Respondent, the Illinois Department of Revenue (the "Department"), by and through its attorney, Lisa Madigan, Illinois Attorney General, for its Answer to the Petition (the "Petition"), hereby states as follows:

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.

ANSWER: The Department admits the existence, force and effect, at all relevant times of the document attached to the Petition as an Exhibit and referred to in Paragraph 1 and state that such document speaks for itself.

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

ANSWER: The Department admits the allegations contained in paragraph 2.

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

The taxpayer account number is 3241-2924.

ANSWER: The Department admits the allegations contained in paragraph 3.

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.

ANSWER: The Department admits the allegations contained in paragraph 4.

4(a)[1]. 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 *I* Preferred Guest) and Tax Collected and not Remitted. The revised audit adjustment= $35,082.00.

ANSWER: The Department admits the allegations contained in paragraph 4(a).

4(b). 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.

ANSWER: The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 4(b) and therefore neither admits or denies the allegations

[1] In order to avoid answering one long, multiple paragraph allegation, the Department is renumbering the paragraphs to facilitate more precise and specific answers. Accordingly, the Department added the numbers 4(a) – 4(d) to the unnumbered paragraphs in Petitioner's multiple paragraph 4.

4(c). 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.

> **ANSWER**: The Department is without knowledge or information sufficient to form a belief as to the allegations contained in the first sentence of paragraph 4(c) and therefore neither admits or denies the allegations. The Department admits the allegations contained in second sentence of paragraph 4(c).

4(d). 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 remiitted (re: Quality Control Discounts) should be removed.

> **ANSWER**: The Department is without knowledge or information sufficient to form a belief as to the allegations contained in the first sentence of paragraph 4(d) and therefore neither admits or denies the allegations. The remaining two sentences of paragraph 4(d) are not allegations of material facts but legal conclusions, consequently, the Department denies the allegations/legal conclusions contained in those two sentences.

APPLICABLE LAW

5. Title 86 Section 130.120(h) Sales to exempt entities.

> **ANSWER**: Paragraph 5 is not a material allegation of fact but a citation to a regulation and as such does not require an answer pursuant to Tribunal Rule 86 Ill.Adm.Code §5000.310(b).

6. Title 86 Section 130.2125(b)(l) Discount Coupons.

> **ANSWER**: Paragraph 6 is not a material allegation of fact but a citation to a regulation and as such does not require an answer pursuant to Tribunal Rule 86 Ill.Adm.Code §5000.310(b).

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.

> **ANSWER**: Although paragraph 7 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 7.

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.

> **ANSWER**: Although paragraph 8 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 8.

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.

ANSWER: The Department admits the first two sentences of paragraph 9 but denies the remaining sentence in paragraph 9 as a legal conclusion not material allegation of fact.

ERROR III

10. In reference to Sample month September 2010 (re: Location 87 *I* 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.

ANSWER: The Department denies the allegations contained in paragraph 10.

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 *I* Chicago *I* $655.76); (Location 101 *I* Skokie *I* $215.15) and (Location 87 *I* Wacker *I* $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.

ANSWER: The Department denies the allegations contained in paragraph 11.

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).

> **ANSWER:** Although paragraph 12 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 12.

WHEREFORE, the Department prays:

A) That Judgment be entered against the Petitioner and in favor of the Department in this matter;

B) That the Department's Notice of Tax Liability be determined to be correct.

C) That this Tribunal grant such other additional relief it deems just and proper

Respectfully Submitted,

LISA MADIGAN
Illinois Attorney General

By _____
Michael Coveny,
Assistant Attorney General

LISA MADIGAN
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By: Michael Coveny (312) 814-6697

AFFIDAVIT OF DONALD JOHNSON PURSUANT TO TRIBUNAL RULE 5000.310(b)(3)

1. I am currently employed by the Illinois Department of Revenue in the Audit Unit;

2. My current title is Revenue Auditor III;

3. I lack the personal knowledge required to either admit or deny the allegations alleged and neither admitted or denied in Petitioner's Petition paragraphs 4(b), 4(c)(1st sentence), and 4(d)(1st sentence).

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies that he verily believes the same to be true.

Donald Johnson

Donald Johnson
Revenue Auditor III
Illinois Department of Revenue

DATED: Oct. 14, 2015

CERTIFICATE OF SERVICE

I, Michael Coveny, an attorney for the Illinois Department of Revenue, state that I served a copy of the attached Department's Answer to Petitioner's Petition upon:

Paul A. Tanzillo
Tanzillo Gallucci, LLC
29 North Wacker Drive
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Chicago, IL 60606

By email attachment to paul@tglawgroup.net on October14, 2015

Michael Coveny,
Assistant Attorney General