

**ILLINOIS INDEPENDENT TAX TRIBUNAL  
CHICAGO, ILLINOIS**

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<b>JASON SZMURLO,</b>	)	
<b>Petitioner,</b>	)	
	)	
v.	)	<b>Case No. 15 TT 187</b>
	)	
<b>DEPARTMENT OF REVENUE</b>	)	
<b>OF THE STATE OF ILLINOIS,</b>	)	
<b>Respondent.</b>	)	

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**ANSWER**

The Department of Revenue of the State of Illinois, by and through its attorney, Lisa Madigan, Attorney General of the State of Illinois, answers the Petition in this matter as follows:

**PARTIES**

1. The "Notice" was issued by the Department on or about 13 August 2012, assessing liability in the amount of \$43,355.00 in tax, \$17,617.00 in penalties, and \$12,154.34 in interest for taxable periods January 1, 2006 through September 30, 2010, pursuant to an audit of Jayko Enterprises, LLC by the Department of Revenue that concluded in May 2011 ("Audit"), with respect to the sale of smoking woodchips and similar products to restaurants by said entity.

**ANSWER:** The Department admits that on August 13, 2012, it issued a Notice of Penalty Liability (NPL) to the Petitioner assessing a penalty in the amount of \$75,116.58. The Department denies all other factual allegations in Paragraph 1. The Department further states that the NPL issued on August 13, 2012 is prima facie proof of the correctness of the Department's penalty. 35 ILCS 735/3-7.

2. Due to extremely poor communications with prior accountants and attorneys that have represented Taxpayers with respect to this matter, the Taxpayers are unclear as to the

procedural history regarding acceptance of Form EDA 105-R, the Notice of Penalty Liability, and does [sic] not have a copy of the initial Notice. Appended hereto as Exhibit A are copies of the Notice of Audit Results, as well as various Taxpayer Statements and Notices of Intent for Collection Activity that are currently in the Taxpayer's possession.

**ANSWER:** The Department admits that the Petitioner has attached an Exhibit A to his Petition. The Department lacks sufficient information to either admit or deny the remaining allegations in Paragraph 2 and therefore demands strict proof thereof. In addition, the use of the term "Taxpayers" is ambiguous because the Petition does not define the term "Taxpayers" or identify the "Taxpayers" referred to in Paragraph 2.

3. Petitioner filed a petition for a late discretionary hearing with the Department on or about 22 April 2015, seeking a [sic] relief with respect to the Notice. On 17 July 2015, the Chief Administrative Law Judge granted the request for a late discretionary hearing and referred the Petitioner to file this Petition, given that the protest amount exceeds \$15,000.00.

A true and correct copy of such determination is appended hereto as Exhibit B.

**ANSWER:** The Department admits the factual allegations contained in Paragraph 3.

4. Petitioner is an individual or stated by the Department to be a Responsible Officer of Jayko Enterprises, LLC a former Illinois limited liability company (dissolved on February 14, 2014), with a business address is [sic] 800 Bach Court, Woodstock, IL 60098. The business no longer maintains a telephone number. The Taxpayer Account number is 3860-1532. Petitioner's telephone number is 815-405-7552.

**ANSWER:** The Taxpayer Account Number and Petitioner's telephone number are required by Illinois Tax Tribunal Regulations Section 310(a)(1)(A) (86 Ill. Admin. Code §5000.310) and are not material allegations of fact that require an answer under Section 310(b)(2) of the Tax

Tribunal Regulations. Department admits that the Petitioner is a Responsible Officer of Jayko Enterprises, LLC. The Department lacks sufficient information to either admit or deny the remaining allegations in Paragraph 4 and therefore demands strict proof thereof.

5. Respondent, Illinois Department of Revenue, is an agency of the State of Illinois responsible for administering and enforcing the revenue laws of the State of Illinois.

**ANSWER:** The Department admits that the Department is an agency of the State of Illinois and that the Department is responsible for administering and enforcing the Illinois Retailers' Occupation Tax Act (35 ILCS 120/1 *et seq.*) and the Illinois Use Tax Act (35 ILCS 105/1 *et seq.*), which are relevant to the legal claims raised in the Petition. The term "revenue laws" is ambiguous and therefore, the Department denies all other allegations contained in Paragraph 5.

### **JURISDICTION**

6. The Tribunal has original jurisdiction over all Department determinations reflected on Notices of Penalty Liability, among other notices, when the amount at issue exceeds \$15,000.00, exclusive of penalties and interest. 35 ILCS Section 1010/1-45[.]

**ANSWER:** The Department admits the factual allegations contained in Paragraph 6.

### **BACKGROUND AND RELEVANT FACTS**

7. Jayko regularly filed ST-1 returns with respect to its business activity, indicating that a majority of its sales were exempt from Retailer[s'] Occupation Tax and/or Use Tax on the basis that they were made to resellers.

**ANSWER:** The Department admits the factual allegations contained in Paragraph 7.

8. Jayko was primarily engaged in the business of selling smoking woodchips and similar products to restaurants ("Resellers") for use in the preparation of smoke-flavored foods

sold to restaurant patrons. Reseller clients included restaurants such as Adobo Grill, Aigredoux, Blackbird, Brazzaz, Charlie Trotter's, Fogo De Chao, Jake Melnick's Corner Tap, Spiaggia, Vinci, and various others in Chicago and the surrounding suburbs.

**ANSWER:** The Department lacks sufficient information to either admit or deny the allegations in Paragraph 8. The Department further states that the NPL issued on August 13, 2012 is prima facie proof of the correctness of the Department's penalty. 35 ILCS 735/3-7.

9. Jayko regularly collected Reseller Certificates from the Resellers with respect to such sales.

**ANSWER:** The Department lacks sufficient information to either admit or deny the allegations in Paragraph 9. The Department further states that the NPL issued on August 13, 2012 is prima facie proof of the correctness of the Department's penalty. 35 ILCS 735/3-7.

10. The goods sold to Resellers were for purposes of flavoring the food, similar to an herb, spice or other ingredient.

**ANSWER:** The Department lacks sufficient information to either admit or deny the allegations in Paragraph 10. The Department further states that the NPL issued on August 13, 2012 is prima facie proof of the correctness of the Department's penalty. 35 ILCS 735/3-7.

11. Barbequed foods are nearly always advertised as "smoky," with even the species of wood being included in the description. Attached as Exhibit C is a statement obtained from a local chef, Kirk Bachmann, regarding the use of smoke in food preparation as a preservative and source of flavor.

**ANSWER:** The Department admits that there is a statement attached as Exhibit C. The Department lacks sufficient information to either admit or deny the allegations in Paragraph 11.

The Department further states that the NPL issued on August 13, 2012 is prima facie proof of the correctness of the Department's penalty. 35 ILCS 735/3-7.

12. To the best of Taxpayers' knowledge, its goods were not necessary to or used by its purchasers for the purpose of cooking food products, but merely for the purpose of infusing a smoke flavoring into the food products.

**ANSWER:** Paragraph 12 is vague and contains an opinion, not a material allegation of fact. Therefore Paragraph 12 does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations. To the extent an answer is required, the Department lacks sufficient information to either admit or deny the allegations in Paragraph. The Department further states that the NPL issued on August 13, 2012 is prima facie proof of the correctness of the Department's penalty. 35 ILCS 735/3-7. In addition, the reference to "Taxpayers" is ambiguous because the Petition does not define the term "Taxpayers" or identify the "Taxpayers" referred to in Paragraph 12.

#### **APPLICABLE LAW**

13. Pursuant to 35 ILCS 120/1, "property purchased is deemed to be purchased for the purpose of resale, despite first being used, to the extent to which it is resold as an ingredient of an intentionally produced product or byproduct of manufacturing."

**ANSWER:** The Department admits the existence, force and effect of section 1 of the Retailers' Occupation Tax Act (35 ILCS 120/1) and states that the statute speaks for itself.

14. Further, pursuant to 35 ILCS 120/2c, a "sale shall be made tax-free on the ground of being a sale for resale if the purchaser has an active registration number or resale number from

the Department and furnishes that number to the seller in connection with certifying to the seller that any sale to such purchaser is nontaxable because of being a sale for resale.”

**ANSWER:** The Department admits the existence, force and effect of section 2c of the Retailers’ Occupation Tax Act (35 ILCS 120/2c) and states that the statute speaks for itself.

15. Illinois law provides that late penalties do not apply if a taxpayer shows that its failure to pay tax was due to reasonable cause. 35 ILCS 735/3-8.

**ANSWER:** Paragraph 15 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations. The Department admits the existence, force and effect of the Uniform Penalty and Interest Act (35 ILCS 735/3-1 *et seq.*) and states that the statute speaks for itself.

16. The most important factor to be considered in making a determination to abate a penalty will be the extent to which the taxpayer made a good faith effort to determine its proper tax liability and to pay its proper tax liability in a timely fashion, and a taxpayer will be considered to have made a good faith effort to determine, file and pay its proper tax liability if it exercised ordinary business care and prudence in doing so. 86 Ill. Admin Code 700.400(b).

**ANSWER:** Paragraph 16 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations. The Department admits the existence, force and effect of its regulations and states that the regulations speak for themselves.

### **ERRORS**

17. It is Taxpayers’ understanding that, through the course of the Audit, the auditor took the position that, unlike rosemary or apples (which are similarly used), the smoking

woodchips were used as part of the manufacturing process and not as an ingredient of the finished food products sold by the Resellers at retail.

**ANSWER:** Paragraph 17 is vague and contains the opinion of unidentified and undefined “Taxpayers,” not a material allegation of fact. Therefore Paragraph 17 does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations. To the extent an answer is required, the Department denies any factual allegations contained in Paragraph 17 and demands strict proof thereof. The Department further states that the NPL issued on August 13, 2012 is prima facie proof of the correctness of the Department’s penalty. 35 ILCS 735/3-7.

18. It is further Taxpayers’ understanding that as a result of the processing nature of the goods, the Auditor determined that 20% of the sales price of the goods was not a sale for resale (as it was production waste), and issued the corresponding ST-1 assessment upon Jayko for the additional tax, penalties, and interest on 20% of the woodchip sales for the audit period.

**ANSWER:** Paragraph 18 is vague and contains the opinion of unidentified and undefined “Taxpayers,” not a material allegation of fact. Therefore Paragraph 18 does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations. To the extent an answer is required, the Department denies any factual allegations contained in Paragraph 18 and demands strict proof thereof. The Department further states that the NPL issued on August 13, 2012 is prima facie proof of the correctness of the Department’s penalty. 35 ILCS 735/3-7.

19. The Auditor acknowledged that the sales in question were primarily for resale. The Auditor’s position in the instant case is equivalent to disallowing a Reseller Certificate for the portion of a sale comprised of apple peels or rosemary stems. There are many items yielding waste or leftover food products sold to Resellers which do not invalidate the producer-Reseller relationship or require a proportionate allocation.

**ANSWER:** The Department denies that the auditor acknowledged that the sales in question were primarily for resale. The Department states that the remainder of Paragraph 19 is vague and contains opinions, not material allegations of fact. Therefore the remainder of Paragraph 19 does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations. To the extent an answer is required, the Department denies any factual allegations contained in Paragraph 19 and demands strict proof thereof. The Department further states that the NPL issued on August 13, 2012 is prima facie proof of the correctness of the Department's penalty. 35 ILCS 735/3-7.

20. The audit determination puts Illinois producers at unreasonable risk, as is would be difficult, even upon inquiry of the Resellers, to ascertain the amount of residue such as ash (or peels or stems) and ensure that they reach the same waste/resale ratio allocation as a potential Department auditor. Petitioner respectfully suggests that such position is contrary to applicable law.

**ANSWER:** Paragraph 20 contains an opinion and a legal conclusion, not material allegations of fact. Therefore Paragraph 20 does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations. To the extent an answer is required, the Department denies any factual allegations contained in Paragraph 20 and demands strict proof thereof.

21. Even if the tax assessment on the residual ash component of the smoking woodchips is appropriate under applicable regulations, the Petitioner reasonably relied upon the Reseller Certificates (as provided in 35 ILCS 120/2c) in determining, collecting, reporting, and remitting its ST-1 liabilities, and therefore should not be responsible for any penalties or interest associated with the failure to timely remit the taxes allegedly due based on the Auditor's assessment of the impact of the ash residue portion of the goods sold.

**ANSWER:** Paragraph 21 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations. The Department further states that the NPL issued on August 13, 2012 is prima facie proof of the correctness of the Department's penalty. 35 ILCS 735/3-7.

22. The Department has been engaged in collection activity against petitioner since 2012, and has collected approximately \$30,000.00 through bank account and wage garnishments upon Petitioner.

**ANSWER:** The Department lacks sufficient information to either admit or deny the allegations in Paragraph 22 and therefore demands strict proof thereof.

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

- a. Deny the Petitioner's request that the "Notice" be modified or cancelled;
- b. Find that the Petitioner is liable for the penalty assessed in the Department's NPL;
- c. Enter judgment in favor of the Department and against the Petitioner; and
- d. Grant any further relief this Tribunal deems just and appropriate.

Respectfully submitted,

Lisa Madigan  
Attorney General of the State of Illinois

By: s/ Paula M. Hunter  
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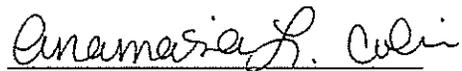
**AFFIDAVIT OF ANAMARIA COLON**  
**PURSUANT TO TRIBUNAL RULE 5000.310(b)(3)**

STATE OF ILLINOIS  
COUNTY OF COOK

Under penalties as provided by Section 1-109 of the Code of Civil Procedure, 735 ILCS §5/1-109, I, Anamaria Colon, being first duly sworn on oath, depose, and state as follows:

1. I am currently employed by the Illinois Department of Revenue.
2. My current title is Revenue Auditor.
3. I conducted an audit of Jayko Enterprises, LLC.
4. I lack the personal knowledge required to either admit or deny the allegations alleged in the Petition paragraphs 2, 4, 8 through 12, and 22.
5. I am an adult resident of the State of Illinois and can truthfully and competently testify as to the matters contained herein based upon my own personal knowledge.

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, I hereby certify that the statements set forth in this Affidavit are true and correct to the best of my knowledge and belief.

  
Anamaria Colon  
Revenue Auditor  
Illinois Department of Revenue