

**ILLINOIS INDEPENDENT TAX TRIBUNAL
CHICAGO, ILLINOIS**

EL BURRITO LOCO OF ILLINOIS, INC.,)	
Taxpayer)	
v.)	14-TT-0015
ILLINOIS DEPARTMENT OF REVENUE,)	
Department)	

ANSWER

NOW COMES the Department of Revenue of the State of Illinois (the “Department”), through its attorney, Lisa Madigan, Attorney General of and for the State of Illinois, and for its Answer to El Burrito Loco of Illinois, Inc.’s (the “Taxpayer”) Petition for Abatement of Fraud Penalties (the “Petition”) respectfully pleads as follows:

FACTS

1. El Burrito Loco of Illinois, Inc. (“EBL” or “Taxpayer”) is a restaurant that has been operating since 1991. EBL is located at 104 N. Bolingbrook Dr., Bolingbrook, IL 60440, 630-972-0005.

ANSWER: The information contained in Paragraph 1 is required by Illinois Independent Tax Tribunal Regulation (“Rule”) 310(a)(1)(A) (86 Ill. Adm. Code § 5000.310) and is not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). To the extent an answer is required, the Department admits the factual allegations contained in Paragraph 1.

2. All of the officers of EBL have immigrated to the United States and as a result have a limited understanding of English. One of EBL’s main officers, Baldomero Barrios, also have [sic] a very limited formal education having only completed the 4th grade in Mexico.

ANSWER: The Department has insufficient knowledge to form a belief as to the truth or falsity of the allegations of Paragraph 2 of the Taxpayer's Petition, and therefore neither admits nor denies said allegations, but demands strict proof thereof.

3. From inception, EBL has relied on an accountant for filling out and filing all of its tax returns as well as setting up its tax reporting processes. Given the limited understanding of the tax code and EBL's filing requirements possessed by its officers, EBL relied on the accountant for correct guidance and accurate filing of all of its returns.

ANSWER: The Department admits that, on information and belief, the Taxpayer has engaged the services of a certified public accountant named Michael Ramirez, and that such services included the preparation and filing of the Taxpayer's sales tax returns, and the preparation of the Taxpayer's federal and state income tax returns. To the extent Paragraph 3 of the Petition alleges that any other services were provided by said accountant, or any other accountant, the Department has insufficient knowledge to form a belief as to the truth or falsity of said allegations, and therefore neither admits nor denies said allegations, but demands strict proof thereof. To the extent Paragraph 3 of the Petition alleges that the Taxpayer's reliance on the services of said accountant, or of any other accountant, met a particular standard, Paragraph 3 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). The Department denies the remaining allegations in Paragraph 3 of the Petition and demands strict proof thereof.

4. The Illinois Department of Revenue (“Department”) conducted a sales tax audit of EBL for the periods from January 1, 2009 through June 30, 2009 and July 1, 2009 through June 30, 2011. The Department found that EBL had underreported its sales tax for the audit period and along with assessing an additional tax liability to EBL, the Department assessed additional amounts for penalties and interest. EBL has paid all of the tax liability was [sic] assessed by the Department but protests the fraud penalty that the Department has issued against it. EBL has also taken significant steps, such as changing its sales tax return preparation procedures, to avoid any future underpayments.

ANSWER: The Department admits the following factual allegations: (a) the Department conducted a sales tax audit of the Taxpayer for the periods of January 1, 2009 through June 30, 2009, and July 1, 2009 through June 30, 2011; (b) the Department issued two Notices of Tax Liability, dated October 30, 2013, to the Taxpayer, for the months contained within the corresponding periods of January 1, 2009 through June 30, 2009, and July 1, 2009 through June 30, 2011 (the “Notices of Tax Liability”); (c) the Department’s sales tax audit of the Taxpayer resulted in the determination that the Taxpayer had underreported its Illinois retailers’ occupation tax and use tax for such audit periods, and the assessment of additional tax, interest and penalties, including fraud penalties; (d) the Taxpayer paid tax in the amount of \$111,159.00 assessed by the Department; and, (e) the Taxpayer filed a protest with the Department’s Office of Administrative Hearings, dated December 30, 2013, seeking relief from only the fraud penalty, and such protest speaks for itself. To the extent Paragraph 4 of the Petition alleges that the Taxpayer has taken any steps to avoid future underpayments of any tax, the Department has insufficient knowledge to form a belief as to the truth or falsity of the

allegations, and therefore neither admits nor denies said allegations, but demands strict proof thereof. The Department denies the remaining allegations in Paragraph 4 of the Petition and demands strict proof thereof.

LAW

5. The standard used by Illinois Courts in evaluating the application of a fraud penalty in the context of sales tax is “clear and convincing evidence.” While the taxpayer bears the burden of proving that an assessment proposed by the Department is not correct, when the issue relates to the imposition of a fraud penalty, the Department bears the burden of showing the existence of fraud by clear and convincing evidence. *The Department of Revenue of State [sic] of Illinois v. “Anaheim Liquors, Inc.”*, ST 00-11, 8 (2000).

ANSWER: Paragraph 5 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). The Department admits the existence, force and effect of the case law quoted in Paragraph 5 and states that the case law speaks for itself.

6. Illinois Courts consider the circumstances, including a Taxpayer’s experience and intent, when determining whether fraud exists in a given situation. Two decisions by the Department’s Administrative Hearings Division, as discussed below, are particularly relevant to the issue of fraud and the clear and convincing standard as it relates to EBL.

ANSWER: Paragraph 6 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). The Department denies any factual allegations contained in Paragraph 6 and demands strict proof thereof.

ANALYSIS

7. The clear and convincing standard and its application to fraud were addressed by the Administrative Law Judges in “*Anaheim Liquors*” and *The Department of Revenue of State [sic] of Illinois v. “Orleans Food & Liquor, Inc.”*, ST 01-30 (2001). The circumstances surrounding both of these cases bare resemblance to the circumstances surrounding EBL during the audit period. In both cases, the judges found that the Department failed to meet its burden of producing clear and convincing evidence that the Taxpayer’s underreporting and subsequent underpayment of tax was due to fraud.

ANSWER: Paragraph 7 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). The Department admits the existence, force and effect of the case law quoted in Paragraph 7 and states that the case law speaks for itself. The Department denies any factual allegations contained in Paragraph 7 and demands strict proof thereof.

8. In “*Anaheim Liquors*”, the Taxpayer was found to have underreported its sales by 52% on its Illinois sales tax returns after an audit performed by the Department. During the audit, Taxpayer was only able to provide the Department with all of the cash register Z tapes for one of the audit years. For the other audit years, the Taxpayer could only produce some of the cash register Z tapes for the rest of the audit period.

ANSWER: Paragraph 8 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). The Department admits the existence, force and effect of the case law quoted in Paragraph 8 and states that the case law speaks for itself.

9. In this case, EBL was also found to have underreported its sales by about 50%. However in contrast to the Taxpayer in "*Anaheim Liquors*", EBL fully cooperated with the Department's audit and was able to produce most of the information requested by the Department.

ANSWER: Paragraph 9 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). The Department admits the existence, force and effect of the case law quoted in Paragraph 9 and states that the case law speaks for itself. The Department denies any factual allegations contained in Paragraph 9 and demands strict proof thereof.

10. In "*Orleans Food & Liquor*", the Taxpayer relied on an accountant for preparing its monthly sales tax and corporate returns. The Taxpayer's owner's formal education consisted of three years of high school. The accountant stated that he had explained the sales tax forms to the owner but he still did not understand how they were prepared or filed. The accountant also stated that he prepared the sales tax returns based on the information provided by the owner even though he believed the owner was not giving him all of the sales records. The owner stated that he was under the impression that the sales tax returns he signed and payments he remitted were for the correct amount of tax. While the court in "*Orleans Food & Liquor*" acknowledged that the owner did not keep adequate books and records in accordance with Department regulations, it was unable to conclude any fraud [sic] on the Taxpayer's part and the Department failed to produce any documentation to substantiate any claim otherwise.

ANSWER: Paragraph 10 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). The Department

admits the existence, force and effect of the case law quoted in Paragraph 10 and states that the case law speaks for itself.

11. EBL's use of an accountant for preparing and filing its tax returns is comparable to the circumstances surrounding the Taxpayer in "*Orleans Food & Liquor*". Mr. Barrios' formal education consisted of the completion of the 4th grade in Mexico and all of its owners are first generation immigrants to the United States. While the owners understand how to run a restaurant, they have a very limited understanding of tax law and the filing requirements at the state and local levels. As a result, EBL relied on the expertise of their accountant who directly filed the sales tax returns electronically. EBL operated under the impression that the accountant was filing correct sales tax returns and that the payments being made were correct under Illinois law.

ANSWER: Paragraph 11 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). The Department admits the existence, force and effect of the case law quoted in Paragraph 11 and states that the case law speaks for itself. The Department denies any factual allegations contained in Paragraph 11 of the Petition and demands strict proof thereof.

The Department is in the process of obtaining the notarized copy of the Affidavit of Timothy Beavers, attached to this Answer to the Taxpayer's Petition, and shall file such shortly, upon receipt.

WHEREFORE, the Department prays that the Tribunal enter an order to:

- a. deny each prayer for relief in the Taxpayer's Petition;
- b. find that the Notices of Tax Liability are correct as issued;
- c. find that the Department's assessment of the fraud penalties contained in the Notices of Tax Liability was appropriate and conformed with the law;
- d. order judgment in favor of the Department and against the Taxpayer; and
- e. grant such further relief as this Tribunal deems appropriate under the circumstances.

Respectfully Submitted,

LISA MADIGAN
Attorney General
State of Illinois

By:



Daniel A. Edelstein
Special Assistant Attorney General

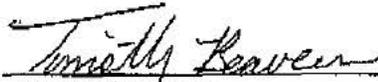
Daniel A. Edelstein
Special Assistant Attorney General
Illinois Department of Revenue
Office of Legal Services
100 W. Randolph St., 7-900
Chicago, IL 60601
Telephone: (312) 814-3120
Facsimile: (312) 814-4344
Email: Daniel.Edelstein@Illinois.gov

STATE OF ILLINOIS)
) SS
COUNTY OF _____)

AFFIDAVIT

I, Timothy Beavers, being first duly sworn, on oath depose and say as follows:

1. That I am a Revenue Auditor in the Audit Bureau of the Illinois Department of Revenue.
2. That I am authorized to and do make this affidavit as agent of Brian Hamer, the director of the Department, under his express certification.
3. That I have knowledge of the facts relating to the claim as set forth in the foregoing ANSWER of the Department.
4. That the matters and things set out in said ANSWER are true, in substance and in fact.
5. That the statements of the Department, in said ANSWER, that the Department has insufficient knowledge to form a belief, are true.
6. Further affiant sayeth not.



Timothy Beavers
Revenue Auditor
Audit Bureau
Illinois Department of Revenue

Subscribed and sworn to
before me this _____ day of March, 2014

NOTARY PUBLIC

**ILLINOIS INDEPENDENT TAX TRIBUNAL
CHICAGO, ILLINOIS**

EL BURRITO LOCO OF ILLINOIS, INC.,)	
Taxpayer)	
v.)	14-TT-0015
ILLINOIS DEPARTMENT OF REVENUE,)	
Department)	

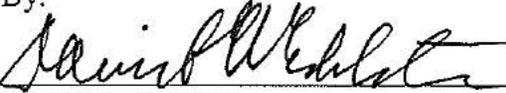
CERTIFICATE OF SERVICE VIA EMAIL

To: Umang Desai
The Law Office of Judi Smith
1155 S. Washington St., Suite 101
Naperville, IL 60540
Email: udesai@judismithlaw.com

PLEASE TAKE NOTICE that on March 13, 2014, the undersigned at the office of the Illinois Department of Revenue, Office of Legal Services, 100 W. Randolph St., 7-900, Chicago, IL 60601, served the attached ANSWER via email on counsel for the Taxpayer, as listed above.

LISA MADIGAN
Attorney General
State of Illinois

Date: March 13, 2014

By: 

Daniel A. Edelstein
Special Assistant Attorney General
Illinois Department of Revenue
Office of Legal Services
100 W. Randolph St., 7-900
Chicago, IL 60601
Phone: (312) 814-3120
Fax: (312) 814-4344
Email: Daniel.Edelstein@Illinois.gov