STATE OF ILLINOIS
INDEPENDENT TAX TRIBUNAL
COUNTY OF COOK

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FEB 10 2014
BY:_____

14-115

THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS	)	Letter ID:	CNXXXX9X39542727 & CNXXX1977696X965
	)	IBT:	2307-4175
v.	)	Period:	Jan. 1, 2009 - June 30, 2009 & July 1, 2009 - June 30 2011
El Burrito Loco of Illinois, Inc., Taxpayer	)		

PETITION FOR ABATEMENT OF FRAUD PENALTIES

NOW COMES THE TAXPAYER, El Burrito Loco of Illinois, Inc., through its attorneys, THE LAW OFFICE OF JUDI SMITH, LLC, and for its petition for abatement of fraud penalties states 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.

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 a very limited formal education having only completed the 4th grade in Mexico.

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.

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 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.

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 of Illinois v. "Anaheim Liquors, Inc."*, ST 00-11, 8 (2000).

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.

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 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.

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.

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.

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 on the Taxpayer's part and the Department failed to produce any documentation to substantiate any claim otherwise.

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.

WHEREFORE, Taxpayer respectfully requests judgment in its favor for abatement of the fraud penalties assessed as a result of the Department's audit for the aforementioned periods.

Date: February 6, 2014

Respectfully submitted,

The Law Office of Judi Smith, LLC
Attorney for Taxpayer

By: _____
Umang Desai, one of its Attorneys

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Notice of Tax Liability

for Form EDA-105-R, ROT Audit Report

STATE OF
Illinois
DEPARTMENT OF REVENUE
tax.illinois.gov

#BWNKMGV
#CNXX XX9X 3954 2727#
EL BURRITO LOCO OF IL INC
ATTN POA-THE LAW OFFICE OF JUDI SMITH
1155 S WASHINGTON ST STE 101
NAPERVILLE IL 60540-7966

October 30, 2013

Letter ID: CNXXXX9X39542727

Account ID: 2307-4175

We have audited your account for the reporting periods January 01, 2009, through June 30, 2009. As a result we have assessed the amounts shown below

	Liability	Payments/Credit	Unpaid Balance
Fraud Penalty	26,294.00	0.00	26,294.00
Assessment Total	$26,294.00	$0.00	**$26,294.00**

If you do not agree, you may file a protest and request an administrative hearing within 60 days of the date of this notice, which is **December 30, 2013**. Your request must be in writing, clearly indicate that you want to protest, and explain in detail why you do not agree with our actions. 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.

If you have questions, please write us or call our Springfield office weekdays between 8:00 a.m. and 4:00 p.m. Our address and telephone number are listed below.

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

217 785-6579

Notice of Tax Liability

for Form EDA-105-R, ROT Audit Report

STATE OF
Illinois
DEPARTMENT OF REVENUE
tax.illinois.gov

#BWNKMGV
#CNXX X197 7696 X965#
EL BURRITO LOCO OF IL INC
ATTN: POA-THE LAW OFFICE OF JUDI SMITH
1155 S WASHINGTON ST STE 101
NAPERVILLE IL 60540-7966

October 30, 2013

Letter ID: CNXXX1977696X965

Account ID: 2307-4175

We have audited your account for the reporting periods July 01, 2009, through June 30, 2011. As a result we have assessed the amounts shown below.

	Liability	Payments/Credit	Unpaid Balance
Fraud Penalty	41,626.00	0.00	41,626.00
Assessment Total	$41,626.00	$0.00	**$41,626.00**

If you do not agree, you may file a protest and request an administrative hearing within 60 days of the date of this notice, which is **December 30, 2013**. Your request must be in writing, clearly indicate that you want to protest, and explain in detail why you do not agree with our actions. 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.

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