

**ILLINOIS INDEPENDENT
TAX TRIBUNAL**

O & S CORP. d/b/a CITGO,)	
)	
Petitioner,)	
)	
v.)	No. 14 TT 151
)	
)	
ILLINOIS DEPARTMENT OF REVENUE,)	
)	
)	Chief Judge James Conway
)	
Respondent.)	

DEPARTMENT’S ANSWER TO PETITION

NOW COME the Respondent, the Illinois Department of Revenue (the “Department”), by and through its attorney, Lisa Madigan, Illinois Attorney General, and for its Answer to Petitioner’s Petition (“Petition”), hereby states as follows:

PARTIES

1. Petitioner, O & S Corp. d/b/a CITGO (“Petitioner”) is a corporation duly organized and existing under the laws of the State of Illinois.

ANSWER: The Department admits the allegations contained in paragraph 1.

2. Petitioner’s principal place of business is located at 10007 South Michigan Avenue, Chicago, Illinois.

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

3. Petitioner’s telephone number is (773) 785-5110.

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

4. Petitioner’s tax identification number is 01-0666669.

ANSWER: The Department admits the allegations contained in paragraph 7.

5. Respondent, Illinois Department of Revenue (the “Department”), 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 the allegations contained in paragraph 5.

JURISDICTION

6. Petitioner brings this action pursuant to the Illinois Independent Tax Tribunal Act (“Tribunal Act”), 35 ILCS 1010/1-1 to 35 ILCS 1010/1-100.

ANSWER: The Department admits the allegations contained in paragraph 6.

7. On or about June 5, 2014, the Department issued a Notice of Tax Liability to Petitioner asserting additional tax due in the amount of \$66,232.00 for the period of January 2008 through June 2013 (the “June 5 Notice”). (a copy of the June 5 Notice is attached hereto and incorporated herein as Exhibit “B”).

ANSWER: The Department admits the existence, force and effect, at all relevant times of the document attached to the Petition as Exhibit B and referred to in paragraph 7 and state that such document speaks for itself.

8. The Tribunal has jurisdiction pursuant to Sections 1-45 and 1-50 of the Tribunal Act over the Department’s determinations as reflected on the June 5 Notice, among other notices, where the amount at issue exceeds \$15,000.00, exclusive of penalties and interest and because Petitioner timely filed a protest within 60 days of the June 5 Notice. See 35 ILCS 1010/1-45 and 35 ILCS 1010/1-50.

ANSWER: Although paragraph 8 is not an allegation of material fact but a legal conclusion, the Department admits the allegations contained in paragraph 8.

BACKGROUND

9. Petitioner is a retail gas and mini mart engaged in, among other things, the sale of other tobacco products such as cigars and chewing tobacco. (“OTP”).

ANSWER: The Department admits the allegations contained in paragraph 9.

10. At some point in time prior to January 2008, sales agents of My Enterprises, Inc., (“MEI”) approached Petitioner to solicit the sale of OTP to Petitioner.

ANSWER: The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 10 and therefore neither admits or denies the allegations.

11. MEI's sales agents represented and otherwise held themselves out to Petitioner as operating from a location within the state of Illinois, despite having a business address listed as 8762 Louisiana St., Merrillville, IN 46410.

ANSWER: The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 11 and therefore neither admits or denies the allegations.

12. MEI sales agents represented to Petitioner that all requisite Illinois tobacco taxes would be paid prior to delivery by MEI, as distributor, and not by Petitioner, as was customary and ordinary in the State of Illinois.

ANSWER: The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 12 and therefore neither admits or denies the allegations.

13. Relying on MEI's representations, more specifically that the all requisite tobacco taxes would be paid by MEI, Petitioner purchased OTP from MEI during in the following months: February 2008 through December 2008, January 2009 through December 2009, January 2010 through July 2010, November 2010, December 2010, January 2011 through August 2011, October 2011 through December 2011, and January 2012 through May 2012.

ANSWER: The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 13 and therefore neither admits or denies the allegations.

14. Petitioner has no record of any OTP purchases from MEI during the months of January 2008, August 2010 through October 2010, September 2011, June 2012 through December 2012, and the entire year 2013.

ANSWER: The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 14 and therefore neither admits or denies the allegations.

15. During the period of January 2008 through June 2013, Petitioner also purchased OTP from distributors, other than MEI, who paid all requisite taxes and that the Department takes no issues with.

ANSWER: The Department admits that it did not take exception to any of Petitioner's purchases of OTP from distributors other than MEI but is without knowledge or information sufficient to form a belief as to the remaining allegations contained in paragraph 15 and therefore neither admits or denies the allegations.

16. Upon information and belief, there are many similarly situated taxpayers, as Petitioner, in Illinois that have relied on the representations of MEI's sales agents to their detriment and are now the subject of tobacco products audits by the Department.

ANSWER: Paragraph 16 is not an allegation of material fact but a statement of Petitioner's belief or position and as such does not require an answer pursuant to Tribunal Rule 86 Ill.Adm.Code §5000.310(b).

PROCEDURAL HISTORY

17. The Department conducted a Tobacco Products Audit of the TP-1 returns filed by the Petitioner for the period of January 2008 through June 2013 (the "Audit Period").

ANSWER: The Department admits that it conducted an audit of Petitioner's books and records but denies that Petitioner filed any TP-1 returns for the Audit Period.

18. Petitioner fully cooperated during the Department's audit and made its books and records available for examination.

ANSWER: The Department denies the allegations contained in paragraph 18.

19. Petitioner produced copies of invoices to the Department in its possession custody or control related to OTP purchases it made from MEI during the Audit Period.

ANSWER: The Department admits the allegations contained in paragraph 19.

20. As part of the audit process, the Department obtained documents from MEI showing what was ordered and paid for by its customers, during the Audit Period, including the Petitioner. Further, the Department obtained information from the Indiana Department of Revenue providing reported sales by MEI to Petitioner. When compared to MEI's records and the Indiana Department's figures, the invoices furnished to the Department by Petitioner matched up in every instance.

ANSWER: The Department denies the allegations contained in paragraph 20.

21. On or about June 5, 2014, the Department issued the June 5 Notice to Petitioner asserting additional tax due of \$66,232.00, plus penalties and interest in the amount \$24,406.77 for the Audit Period. See Ex. B.

ANSWER: The Department admits the existence, force and effect, at all relevant times of the document attached to the Petition as Exhibit B and referred to in paragraph 21 and state that such document speaks for itself.

22. The Department's calculations for OTP purchases from MEI by Petitioner is itemized in the Department's report attached hereto and incorporated herein as Exhibit "C". The "amount" column includes all OTP purchases as reported by MEI to the Indiana Department of Revenue where an exact date is specified. See Ex. C.

ANSWER: The Department admits the existence, force and effect, at all relevant times of the document attached to The Petition as Exhibit C and referred to in paragraph 22 and state that such document speaks for itself.

23. In instances where no purchases were reported by MEI relating to Petitioner for a particular month or year during the Audit Period, the Department improperly estimated a value for a particular month or year by averaging purchases reported for the remaining months of that particular year. See Ex. C. Thus, the Department assumed MEI's reporting regarding the sales to Petitioner to be accurate and complete, except when MEI did not report sales to Petitioner. When MEI did not report sales to Petitioner, the Department assumed that MEI made a mistake in not reporting sales to Petitioner.

ANSWER: The Department denies that any of its estimates or computations are improper but otherwise admits the remaining allegations in paragraph 23.

24. In 2013, there was no record of any purchases of OTP, whatsoever, from MEI by Petitioner. In this instance, the Department improperly took the "overall average" for purchases made between January 2008 and December 2012 as its basis for its calculation for the year 2013.

ANSWER: The Department denies that any of its estimates or computations are improper but admits that it used projections or estimates to compute Petitioner's correct amount of OTP purchases, which estimates were necessary due to Petitioner's lack of adequate records.

25. The Department improperly failed to consider the possibility that there were no purchases made from MEI by Petitioner during these time periods and instead improperly assumed that purchases were made and assigned a speculative amount for which it assessed additional tax liability.

ANSWER: Although paragraph 25 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 25.

26. Additional taxes assessed against Petitioner for the Audit Period are set out in the Department's report attached hereto and incorporated herein as Group Exhibit "D". Pursuant to 35 ILCS 143110-10, the rate of tax calculated by the Department was 18% of the wholesale price of tobacco products sold or otherwise disposed of to retailers or consumers located in the state of Illinois prior to July 1, 2012 and 36% after July 1, 2012. See Group Ex. D.

ANSWER: The Department admits the existence, force and effect, at all relevant times of the document attached to the Petition as Exhibit D and referred to in paragraph 26 and state that such document speaks for itself. The further Department admits the existence, force and effect, at all relevant times of the statutory provision set forth or referred to in paragraph 26 and state such provision speaks for itself.

27. The Department gave a credit for any taxes paid for OTP purchases made by other distributors during the Audit Period. These credits are reflected in the Department's report attached hereto and incorporated herein as Exhibit "E".

ANSWER: The Department admits the existence, force and effect, at all relevant times of the document attached to the Petition as Exhibit F and referred to in paragraph 276 and state that such document speaks for itself.

28. Petitioner timely filed this Petition and properly invoked the jurisdiction of the Tax Tribunal.

ANSWER: Although paragraph 28 is not an allegation of material fact but a legal conclusion, the Department admits the allegations/legal conclusions contained in paragraph 28.

30. For the reasons set forth below, Petitioner seeks an order canceling the June 5 Notice, abating all penalties set out in the June 5 Notice, and enjoining the Department from taking any action to assess, lien, levy offset or in any other way prosecuting and collecting the additional tax purportedly due on the June 5 Notice.

ANSWER: Paragraph 30 is not an allegation of material fact but a statement of Petitioner's request for relief and as such does not require an answer pursuant to Tribunal Rule 86 Ill.Adm.Code §5000.310(b).

COUNT I

MEI AND NOT PETITIONER IS RESPONSIBLE FOR ANY ADDITIONAL TAX LIABILITY ASSESSED BY THE DEPARTMENT

31. Petitioner hereby restates and realleges the allegations contained in paragraphs 1 through 30 as if fully set forth herein.

ANSWER: The Department repeats and incorporates its answers to paragraphs 1-30 as if fully set forth herein.

32. An "apparent agent" is a person who, whether authorized or not, reasonably appears to others to be authorized to act as an agent for such other person. See *First American Title Ins. Co. v. TCF Bank F.A.*, 286 Ill.App.3d 268, 274 676 N.E.2d 1003, 1008 (2nd Dist. 1997). A principal is bound equally by the authority that he actually gives his agent and by that he appears to give. See *Lvnch v. Board of Education of Collinsville Community Unit District No. 10*, 82 Ill. 2d 415,426,412 N.E.2d 447,455 (Ill. S. Ct. 1980).

ANSWER: The Department admits the existence, force and effect, at all relevant times of the case law set forth or referred to in paragraph 32 and state such case law speaks for itself.

33. MEI's sales agents acted with the apparent authority of MEI when they transacted business in Illinois on behalf of MEI and represented to Petitioner that all Illinois tobacco taxes would be paid prior to delivery by MEI, as distributor, and not by Petitioner, as was customary and ordinary in the state of Illinois.

ANSWER: Paragraph 33 is not an allegation of material fact but a statement of Petitioner's belief or position and as such does not require an answer pursuant to Tribunal Rule 86 Ill.Adm.Code §5000.310(b).

34. Because MEI transacted the business of OTP sales in Illinois and based upon the representations of MEI's sales agents, MEI availed itself to the tax laws of Illinois and MEI, not Petitioner, should be responsible for any tax liability associated with MEI's OTP sales to Petitioner.

ANSWER: Although paragraph 34 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 34.

WHEREFORE, the Department prays:

- A) That Judgment be entered against the Petitioner and in favor of the Department in Count I of this matter;
- B) That the Department's Notices of Tax Liability be determined to be correct.
- C) That this Tribunal grant such other additional relief it deems just and proper

COUNT II

THE AUDIT SHOULD BE NULLIFIED AND THE JUNE 5 NOTICE SHOULD BE CANCELED AS THE DEPARTMENT'S AUDIT METHODS WERE IMPROPER ANY ADDITIONAL TAX LIABILITY, IF ANY, WAS GROSSLY OVERSTATED

35. Petitioner hereby restates and realleges the allegations contained in paragraphs 1 through 30 as if fully set forth herein.

ANSWER: The Department repeats and incorporates its answers to paragraphs 1-30 as if fully set forth herein.

36. During the course of the audit, representatives of the Department used incorrect methods to determine Petitioner's alleged additional tax liability.

ANSWER: Although paragraph 36 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 36.

37. Specifically, on audit, the Department relied on purchase figures reported by MEI to the Indiana Department of Revenue on one hand and estimated purchases on the other hand for several months during 2008 through 2012 and all of 2013 when it did not have supporting documentation evidencing that any purchases were made, whatsoever, by Petitioner from MEI during those time periods. See Ex. C.

ANSWER: The Department admits the existence, force and effect, at all relevant times of the document attached to the Petition as Exhibit C and referred to in paragraph 37 and state that such document speaks for itself. The Department further admits that it used projections or estimates to compute Petitioner's correct amount of OTP purchases, which estimates were necessary due to Petitioner's lack of adequate records.

38. The Department's wrongful audit methods and speculative calculations resulted in artificially inflated tax liability for which Petitioner is not liable.

ANSWER: Although paragraph 38 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 38.

WHEREFORE, the Department prays:

- A) That Judgment be entered against the Petitioner and in favor of the Department in Count II of this matter;
- B) That the Department's Notices of Tax Liability be determined to be correct.
- C) That this Tribunal grant such other additional relief it deems just and proper

COUNT III

PENALTIES MUST BE ABATED FOR REASONABLE CAUSE

39. Petitioner hereby restates and realleges the allegations contained in paragraphs 1 Through 30 as if fully set forth herein.

ANSWER: The Department repeats and incorporates its answers to paragraphs 1-30 as if fully set forth herein.

40. Any penalties assessed must be abated for reasonable cause.

ANSWER: Although paragraph 40 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 40.

41. The Department has assessed penalties in the June 5 Notice.

ANSWER: The Department admits the existence, force and effect, at all relevant times of the copy of the Notices of Tax Liability attached to the Petition as Exhibit B and referred to in paragraph 41 and state that such documents speak for themselves.

42. Under Illinois law, no penalties shall be imposed on a taxpayer if his failure to pay tax was due to reasonable cause. See 35 ILCS 735/3-8.

ANSWER: The Department admits the existence, force and effect, at all relevant times of the statutory provision set forth or referred to in paragraph 42 and state such provision speaks for itself.

43. Under Illinois regulations, "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 his proper tax liability and file his proper liability on a timely fashion. 86 Ill. Admin. Code § 700.400(b).

ANSWER: The Department admits the existence, force and effect, at all relevant times of the regulation set forth or referred to in paragraph 43 and state such regulation speaks for itself.

44. A taxpayer is considered to have made a good faith effort to determine and file and pay his tax liability if he exercised ordinary business care and prudence in doing so." 86 Ill.

Admin. Code § 700.400(c).

ANSWER: The Department admits the existence, force and effect, at all relevant times of the regulation set forth or referred to in paragraph 44 and state such regulation speaks for itself.

45. The taxpayer's filing history is also considered in determining whether the taxpayer acted in good faith. 86 Ill. Admin. Code § 700.400(d).

ANSWER: The Department admits the existence, force and effect, at all relevant times of the regulation set forth or referred to in paragraph 45 and state such regulation speaks for itself.

46. Petitioner made a good faith effort to determine its proper tax liability and to file and pay its proper liability in a timely fashion.

ANSWER: Although paragraph 46 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 46.

47. Petitioner exercised ordinary business care and prudence in determining its proper tax liability and filing and paying its proper liability in a timely fashion.

ANSWER: Although paragraph 47 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 47.

48. Petitioner has a history of timely tax returns and paying the requisite taxes to the Department.

ANSWER: Although paragraph 48 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 48.

49. The penalties imposed by the Department must be abated for reasonable cause.

ANSWER: Although paragraph 48 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 48.

WHEREFORE, the Department prays:

- A) That Judgment be entered against the Petitioner and in favor of the Department on Count II;
- B) That the Department's Notices of Tax Liability be determined to be correct;

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

LISA MADIGAN
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Respectfully Submitted,

LISA MADIGAN
Illinois Attorney General



By _____
Michael Coveny,
Assistant Attorney General

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:

Akram Zanayed
Akram Zanayed & Associates
8500 South Harlem Avenue
Suite G
Bridgeview, IL 60455

By email to zanayedlaw@gmail.com on October 20, 2014.



Michael Coveny,
Assistant Attorney General