

**ILLINOIS INDEPENDENT
TAX TRIBUNAL**

O&S Corp. d/b/a CITGO,)	
)	
Petitioner,)	
)	
v.)	14 TT 151
)	
ILLINOIS DEPARTMENT)	Chief Judge James M. Conway
OF REVENUE,)	
)	
Respondent.)	

NOTICE OF FILING
CERTIFICATE OF SERVICE VIA EMAIL

To: Akram Zanayed
Akram Zanayed & Associates
8550 S. Harlem, Suite G
Bridgeview, IL 60455
Email: Zanayedlaw@gmail.com

PLEASE TAKE NOTICE that on **May 19, 2016**, the Respondent, Department of Revenue of the State of Illinois, filed with the Illinois Independent Tax Tribunal, 160 N. LaSalle Street, Room N506, Chicago, Illinois 60601, the Motion To Compel Compliance With Regulation 86 Ill.Admin.Code 5000.340, a copy of which is attached and served upon you via email, prior to the hour of 5:00 p.m.

Respectfully submitted,

Lisa Madigan, Attorney General
State of Illinois

Date: May 19, 2016 **By:** /s/ Michael R. Coveny
Michael R. Coveny
Special Assistant Attorney General

/s/Seth J. Schriftman
Seth J. Schriftman
Special Assistant Attorney General

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Motion To Compel Compliance With Regulation 86 Ill.Admin.Code 5000.340

NOW COMES the Department of Revenue of the State of Illinois (the “Respondent”), through its attorneys, Michael R. Coveny and Seth J. Schriftman, and respectfully move this Tribunal for an Order and argument based on the statements made below. This Motion is not agreed upon by the parties. In support thereof the Respondent states as follows:

1. Pursuant to the March 31, 2016 Order entered in this case, the parties have until May 20, 2016 to “submit a proposed pretrial order” and “an in-person final pretrial conference” is set for June 9, 2016.”
2. After various communications regarding this matter, on May 12, 2016, the Department provided the first comprehensive draft Pre-Trial Order and proposed Department exhibits to Petitioner’s counsel.
3. On the afternoon of May 18, 2016, the Petitioner’s counsel provided a draft Pre-Trial Order and indicated that it was to request in the Pre-Trial Order permission to file a *motion in limine*, based on the alleged hearsay of certain documents, fourteen days after May 20, 2016. The draft contained many factual allegations crossed out. Please See attached Exhibit 1.
4. According to the Tribunal’s Standing Order: “(g) *Motions in Limine*. All motions *in limine* must be filed with the pretrial order. The parties are directed to confer on all motions *in limine* before filing them.”
5. More importantly for this matter, 86 Ill.Admin.Code 5000.340 (the “Regulation”) provides:

General. The parties are required to stipulate, **to the fullest extent to which complete or qualified agreement can or fairly should be reached, all undisputed facts not privileged that are relevant to the pending controversy.**

Included in matters required to be stipulated are all facts, all documents and papers or contents or aspects thereof, **and all evidence that fairly should not be in dispute. When the truth or authenticity of facts or evidence claimed to be relevant by one party is not disputed, an objection on the ground of materiality or relevance may be noted by the adverse party but is not to be regarded as just cause for refusal to stipulate.** The requirement of stipulation applies under this Part without regard to where the burden of proof may lie with respect to the controversies involved. Documents or papers or other exhibits annexed to or filed with the stipulation shall be considered to be part of the stipulation. (emphasis added).

6. During the morning of May 19, 2016, counsel for the Department and the Petitioner had a telephone call to address: 1) trying to reach agreement on factual stipulations and 2) the timing of the Petitioner's *motion in limine* which will allege hearsay issues.
7. Petitioner's counsel stated, even after being told repeatedly about 86 Ill.Admin.Code 5000.340, that he would not agree to changing the vast majority of stipulations because of his allegation that that the facts are hearsay, or in his opinion, could not be verified.
8. The Department's counsel suggested various compromises, such as adding language including, "It is the Department's position that" or "subject to a hearsay objection" before such provisions, but that was flatly rejected by Petitioner's counsel.
9. Petitioner's counsel is aware that the Department was left with no alternative but to file this motion.
10. The Regulation does not have an analogous provision in a Circuit Court context and is meant to streamline the hearing process.
11. The Department has in good faith attempted to resolve this issue with Petitioner's counsel to no avail.
12. Because the Tribunal's March 31, 2016 Order requires the draft Pre-Trial Order to be submitted by tomorrow (May 20, 2016), the Department wants to resolve this dispute efficiently so it can meet this deadline or at least provide the draft Pre-Trial Order within a few business days of this deadline.
13. Thus, the Department respectfully requests an Order from this Tribunal to compel the Petitioner to abide by the Regulation.
14. Of course, the Department would be willing to orally discuss this Motion with the Tribunal and Petitioner's counsel.

15. This request is made for good cause and in good faith.

WHEREFORE, the Department respectfully requests that this Tribunal Order the Petitioner's counsel to comply with the Regulation and Tribunal Standing Order so that the draft Pre-Trial Order and Petitioner's *motion in limine* be provided in a timely fashion, and for any other relief that is just.

Respectfully submitted,

Illinois Department of Revenue
Respondent

By: /s/ Michael R. Coveny; Seth J. Schriftman
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FINAL PRETRIAL ORDER

This matter having come before the court at a pretrial conference, and AKRAM ZANAYED having appeared as counsel for Petitioner and MICHAEL COVENY and SETH SCHRIFTMAN having appeared as counsel for the Department, the following actions were taken:

(1). This matter originally involved eight Other Tobacco Products Tax Notices of Tax Liability (the “NTLs”), plus any applicable interest which has been accruing since the issuance of the NTLs. Jurisdiction is invoked under Sections 1-45 and 1-50 of the Tribunal Act.

Jurisdiction is not disputed.

(2). a. The litigator for the Petitioner is Akram Zanayed. His address is: Akram Zanayed & Associates, 8550 S. Harlem, Suite G, Bridgeview, IL 60455. His phone number is: 708-237-9000. His email address is: zanayedlaw@gmail.com.

b. The litigators for the Department are Michael R. Coveny and Seth J. Schriftman. Their address is: Illinois Department of Revenue, 100 W. Randolph Street, 7th Floor, Chicago, IL 60601. Mr. Coveny’s phone number is: 312-814-6697. Mr. Coveny’s email address is:

michael.coveny@illinois.gov. Mr. Schriftman’s phone number is: 312-814-1591. Mr. Schriftman’s email address is: seth.schriftman@illinois.gov.

(3). The Petitioner in this matter is O&S Corp. doing business as Citgo (“O&S”). The Respondent is the Illinois Department of Revenue (“the Department”). The parties stipulate that the following facts were true during the tax period relevant to this action (January 2008 through June 2013, also known as the “assessment period”) and that these facts are admitted into evidence in this action, upon being offered into evidence by the parties. Further, the following Statement of Uncontested Facts are submitted and are attached to and made a part of this order.

(a) Statement of Uncontested Facts:

1. O&S is a corporation duly organized and existing under the laws of the State of Illinois.

2. O&S does business as CITGO. Its principal place of business is located at 10007 South Michigan Avenue (also known as 100th and Michigan), Chicago, Illinois.
3. O&S, operating as a CITGO station, is a gasoline station and convenience store that sells gasoline, grocery items, cigarettes and OTP.
4. The “assessment period” for this matter is January 1, 2008 through June 30, 2013.
5. The audit and underlying 8 Notices of Tax Liability (“NTLs”) at issue concern only tobacco products (also referred to as “other tobacco products” or “OTP”). The original NTLs at issue are as follows:

- a. Letter CNXXXX595214X482 for the period of January 1, 2008 through June 30, 2009

Tax:	\$11,917.00
Late Payment Penalty:	\$4,767.00
Late Filing Penalty Increase:	\$477.00
Interest:	\$3,867.07
Assessment Total:	\$21,028.07

- b. Letter CNXXXX43369136X7 for the period of July 1, 2009 through December 31, 2012

Tax:	\$46,290.00
Late Payment Penalty:	\$9,259.00
Late Filing Penalty Increase:	\$927.00
Interest:	\$3,245.55
Assessment Total:	\$59,721.55

- c. Letter CNXXX15X74331841 for the period of January 1, 2013 through January 31, 2013

Tax:	\$1,055.00
Late Payment Penalty:	\$211.00
Late Filing Penalty Increase:	\$21.00
Interest:	\$13.41
Assessment Total:	\$1,300.41

- d. Letter CNXXXX96326192X4 for the period of February 1, 2013 through February 28, 2013

Tax:	\$1,272.00
Late Payment Penalty:	\$254.00
Late Filing Penalty Increase:	\$25.00
Interest:	\$16.55
Assessment Total:	\$1,567.55

- e. Letter CNXXX196989488X9 for the period of March 1, 2013 through March 31, 2013

Tax:	\$1,165.00
Late Payment Penalty:	\$233.00
Late Filing Penalty Increase:	\$23.00
Interest:	\$14.49
Assessment Total:	\$1,435.49

- f. Letter CNXXXXX623797448 for the period of April 1, 2013 through April 30, 2013

Tax:	\$1,511.00
Late Payment Penalty:	\$302.00
Late Filing Penalty Increase:	\$30.00
Interest:	\$18.90
Assessment Total:	\$1,861.90

- g. Letter CNXXX1131X34X8X9 for the period of May 1, 2013 through May 31, 2013

Tax:	\$1,511.00
Late Payment Penalty:	\$302.00
Late Filing Penalty Increase:	\$30.00
Interest:	\$18.90
Assessment Total:	\$1,861.90

- h. Letter CNXXXX5496355528 for the period of June 1, 2013 through June 30, 2013

Tax:	\$1,511.00
Late Payment Penalty:	\$302.00
Late Filing Penalty Increase:	\$30.00

Interest: \$18.90
Assessment Total: \$1,861.90

6. Since the petition in this matter was filed, the Department has agreed to abate the assessment for the periods of June 2012 through June 2013. This results in the rescission of six of the NTLs at issue: Letters CNXXX15X74331841, CNXXXX96326192X4, CNXXX196989488X9, CNXXXX623797448, CNXXX1131X34X8X9, and CNXXXX5496355528.

7. Also, updated projections for September 2011 and the rescission of the assessments for the June 2012 through December 2012 period have modified NTL letters CNXXXX595214X482 and CNXXXX43369136X7, which assess tax, interest and penalties as of March 3, 2016, as follows:

- a. Letter CNXXXX595214X482 for the period of January 1, 2008 through June 30, 2009

Tax: \$12,106.00
Late Payment Penalty: \$4,842.00
Late Filing Penalty Increase: \$484.00
Interest: \$4,920.00
Assessment Total: \$22,352.00

- b. Letter CNXXXX43369136X7 for the period of July 1, 2009 through December 31, 2012

Tax: \$38,749.00
Late Payment Penalty: \$7,750.00
Late Filing Penalty Increase: \$775.00
Interest: \$5,098.00
Assessment Total: \$52,372.00

8. NTLs CNXXXX595214X482 and CNXXXX595214X482, as updated through schedules created by the auditor Ray Barnes, are now the updated liabilities at issue in this matter. Interest continues to accrue for these assessments at their normal rates.

9. The audit was conducted by Revenue Auditor Ray Barnes.

10. During the assessment period O&S purchased and sold OTP.

11. The audit was initiated, through an Audit Initiation Letter, on or about August 28, 2013 for the assessment period.

12. During the audit, the auditor reviewed some OTP purchase invoices, bank statements, cancelled checks, and income tax returns.

13. During the audit, the auditor reviewed several invoices from My Enterprise, Inc. (“My Enterprise”) which were in possession of O&S. ~~My Enterprise was located in Indiana and did not pay Illinois’s OTP Tax.~~

~~14.—The My Enterprise Returns were initially provided from the Indiana Department of Revenue to the Illinois Department of Revenue.~~

~~15.—During the audit, the auditor compared the several My Enterprise invoices that were received from O&S with My Enterprise Returns dated within the time period of the assessment period, which were in the Department’s possession. The information from the O&S invoices, including dates and amounts, matched up with the information found within the My Enterprise Returns.~~

16. During the audit, O&S was represented by and worked through an accountant, Mr. Najjar.

~~17.—During the audit, the auditor cross-referenced the My Enterprise invoices that were provided on behalf of O&S with My Enterprise Returns in his possession.~~

~~18.—During the audit, the auditor made his OTP assessment based on the My Enterprise Returns available to the Department as corroborated by the several My Enterprise invoices that were in possession of O&S.~~

~~19.—During the audit, the auditor had available My Enterprise Returns for 48 of the 66 months covered during the assessment period. These available months included February 2008 through July 2010, November 2010 through August 2011, and October 2011 through May 2012.~~

~~20.—During the audit, for the assessment period of 2008 through 2011, the auditor used annual estimates of months for which there were My Enterprise Returns to derive his assessments for months where there was not My Enterprise Return information.~~

~~21.—During the audit, purchase invoices were provided from Illinois vendors for 10 of the 66 months at issue during the assessment period. These assessments for these ten months (June 2012 through March 2013) were adjusted to reduce the estimated purchases by the purchases from Illinois vendors. For 2012 through June 2013, the estimated purchases used during this period were based on actual purchase information in the Department’s possession from the January 2008 through May 2012 assessment period.~~

22. Auditor Barnes conducted this audit from approximately August 27, 2013 through May 1, 2014.

(b) Statement of Uncontested Points of Law:

This Statement of Law shall not waive the right of either party to introduce, in a motion, brief, or hearing, other law (including statutory, regulatory, and case law) not at variance with the law cited herein.

1. The assessment at issue is based on the Tobacco Products Tax Act of 1995 (the "Act"). (35 ILCS 143/10-1, *et. seq.*). Thus, the provisions of this Act, including definitions for distributors and retailers and the OTP taxes imposed (35 ILCS 143/10-5; 35 ILCS 143/10-10) are relevant for this matter.
2. Taxpayers subject to the Tobacco Products Tax Act of 1995 are subject to the Act's recordkeeping and filing requirements. (35 ILCS 143/10-35; 35 ILCS 143/10-36; 35 ILCS 143/10-40.)
3. The Act incorporates by reference much of the Retailers' Occupation Tax Act ("ROTA") (35 ILCS 120/1, *et. seq.*) as well as the Uniform Penalty and Interest Act (35 ILCS 735/1, *et. seq.*). (35 ILCS 143/10-45). ROTA, as incorporated into the Act, provides that in the current situation the Department's determination regarding the taxation of OTP is *prima facie* correct and that reproduced copies of documents created or maintained by the Department are *prima facie* evidence when covered with a Certificate of the Director. (35 ILCS 120/5).
4. The requirements related to OTP Tax, including requirements related to maintaining books and records, are also as discussed in 86 Ill.Admin.Code 660.5, *et. seq.*
5. Relevant portions and related regulations for the Uniform Penalty and Interest Act (35 ILCS 735/3-1, *et. seq.*), and the Tobacco Products Tax Act of 1995 (35 ILCS 143/10-1, *et. seq.*), and other applicable statutory and regulatory provisions may be utilized as necessary during a hearing, brief, or motion in this proceeding.
6. Case law regarding the proper assessment of such an audit, the books and records required to be maintained by a Taxpayer, etc. may be utilized as needed.

(c) a schedule by each party of exhibits (all exhibits shall be marked for identification before the hearing), including documents, summaries, charts, and other items expected to be offered into evidence, which include the following:

Petitioner's Exhibits [Akram – Put In]:

Exhibit Number	Date	Description	Relevance	Objection
	None-	Petitioner shall rely	upon Department	Exhibits and its
	Motion in	Limine		

Department’s Exhibits (all Covered with a Certificate of the Director):

Exhibit Number	Date	Description	Relevance	Objection
1	2014-15	Notices of Tax Liability for Assessment Period with Updates of Liability for the First Two Notices	Relevant to underlying audit assessment and updated assessment.	
2	2008-2012	Sealed Certificate of Records of the Indiana Department of Revenue covering Indiana My Enterprise Audit Documents and My Enterprise Return Schedule [Confidential – Subject to Protective Order]	Relevant to underlying audit assessment and use of My Enterprise information.	Objection-Hearsay Objection-Motion in Limine
3	2013-2014	Audit Narrative and Audit History Worksheet	Relevant to underlying audit assessment and use of My Enterprise information.	Objection-Hearsay Objection- Motion in Limine
4	2013-2014	Audit File Work Papers	Relevant to underlying audit assessment and updated assessment.	
5	2016	Audit Re-assessment Papers	Relevant to underlying audit assessment and updated assessment.	

Non-objected to exhibits will be received in evidence by operation of this Order, without any need for further foundation testimony;

(d) Witnesses will be as follows:

1. Ray Barnes for the Department. Mr. Barnes is an Illinois Department of

Audit. Revenue Auditor who conducted and will testify regarding the underlying
in He will also testify regarding the appropriateness of what information was used
the Audit to reach his assessment.

the 2. Attaf Mousa for the Petitioner, although the Department reserves the right to
from call Mr. Mousa for direct examination. He will testify about the operation of
business, sales of tobacco products, purchase of tobacco products, purchase
My Enterprise, and the audit results.

3. Louis Najjar for the Petitioner, although the Department reserves the right to
call Mr. Najjar for direct examination. He was the accountant during this audit.
He will testify that the auditor was given all OTP invoices, including
approximately five invoices from My Enterprise which are now lost.

(e) There will be no expert witnesses.

(f) The Department will not be filing a motion *in limine*. The Petitioner is filing a
motion *in limine* [AKRAM FILL IN] [Petitioner is requesting 14 days to complete
the Motion in Limine](#)

(g) The hearing should be scheduled for one day.

Administrative Law Judge

Date: May 20, 2016

Attorney for Petitioner

Attorneys for the Department