

**ILLINOIS INDEPENDENT
TAX TRIBUNAL**

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

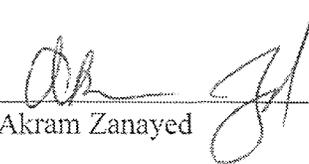
NOTICE OF FILING

To: Seth Schriftman	Michael R. Coveny
Special Assistant Attorney General	Special Assistant Attorney General
Illinois Department of Revenue	Illinois Department of Revenue
Seth.Schriftman@illinois.gov	Michael.Coveny@illinois.gov

PLEASE TAKE NOTICE THAT ON May 23, 2016 the undersigned filed or caused to be filed, the following:

MOTION IN LIMINE

a copy of which is hereto attached for your reference.

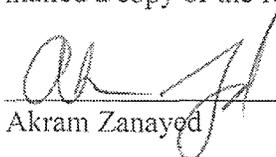


Akram Zanayed

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CERTIFICATE OF SERVICE

I, Akram Zanayed, an attorney, hereby certify that I e-mailed a copy of the foregoing to each party to whom it is addressed to on May 23, 2016.



Akram Zanayed

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MOTION IN LIMINE

Now comes the Petitioner, O & S Corp. d/b/a Citgo, by and through their attorneys Akram Zanyed and Associates and files this Motion in Limine requesting that certain evidence be prohibited from being offered into evidence in this case and in favor of said motion, Petitioner states as follows:

The Department of Revenue seeks to enter into evidence, information regarding alleged purchases by Petitioner of other tobacco products from an entity known as My Enterprise, Inc. The Petitioner seeks to have any information, whether direct or indirect, tendered from the Indiana Department of Revenue, My Enterprises Inc. or any other entity other than Petitioner be excluded from being entered into evidence in this matter. In support of said Motion, Petitioner states as follows:

STATEMENTS OF FACT

The Department of Revenue selected the Petitioner (a gas station/mini mart business) for an audit for sales tax and subsequently other tobacco products tax. Books and records were tendered including all invoices, bank statements and other documentation to satisfy the Department as to the Sales Tax reliability. The Illinois Department of Revenue (herein referred to as "Department") decided after examining books and records, there would be no disagreement as to the sales tax portion of the audit. However, they did determine there was an amount due for other tobacco products. The books and records of the Petitioner included a relatively small amount of invoices for other tobacco products. The invoices tendered included some invoices from My Enterprises, Inc. Since the My Enterprise invoices were misplaced during the audit, it is impossible to determine at this point exactly how much was purchased from My Enterprises Inc. but the Petitioner and the auditor agree that there were only a "few" invoices (Petitioner estimated at 5) tendered by the Petitioner.

The petitioner is a convenience store and service station. The vast majority of its

income and expenses do not relate to tobacco in any way. At the time of the audit, the Petitioner's accountant was working with Mr. Ray Barnes from the Illinois Department of Revenue to resolve the matter. As part of the documentation presented to Mr. Barnes, Mr. Najjar gave Mr. Barnes a small number of My Enterprises, Inc. invoices. For reasons not known at this time, the auditor failed to schedule these invoices or keep track of said invoices. The audit had moved from the accountant to one attorney and then a second attorney, and the documentation was not seen after the auditor reviewed the invoices. The invoices were last seen at the accountants' office with the auditor. Unfortunately, after a diligent and exhausting search, those invoices have not been recovered.

At the conclusion of the audit, Mr. Barnes stated to the Petitioner through its agent that based solely upon information obtained from My Enterprises Inc. there would be an assessment for OTP assessed against the Petitioner. The Department asserted that My Enterprises, Inc. provided them with third party invoices stating the amount of purchases that the Petitioner purchased from My Enterprises, Inc.

The Petitioner at all times during the audit denied making all of said purchases. With the exception of obtaining a document claiming that the purchases were made, there was no proof, such as canceled checks, signed invoices, or any other information, to show that the amount of purchases made pursuant to documents allegedly obtained from My Enterprises, Inc., were actually delivered or purchased by the Petitioner. The Petitioner, through the accountant, on numerous occasions, objected to the allegation of additional purchases provided by My Enterprises, Inc. asserting instead that few purchases made (in the supplied invoices) and provided to the auditor were the only invoices that were purchased from My Enterprises, Inc.

The auditor also suggested that it is possible that a third party would have purchased the items from My Enterprises, Inc and delivered them to the Petitioner which would explain why the invoices were not with the Petitioner. However, the Department never provided any proof of any third party who may have made the purchases and the Petitioner does not have any invoices from any such third party who is not an Illinois seller of other tobacco products.

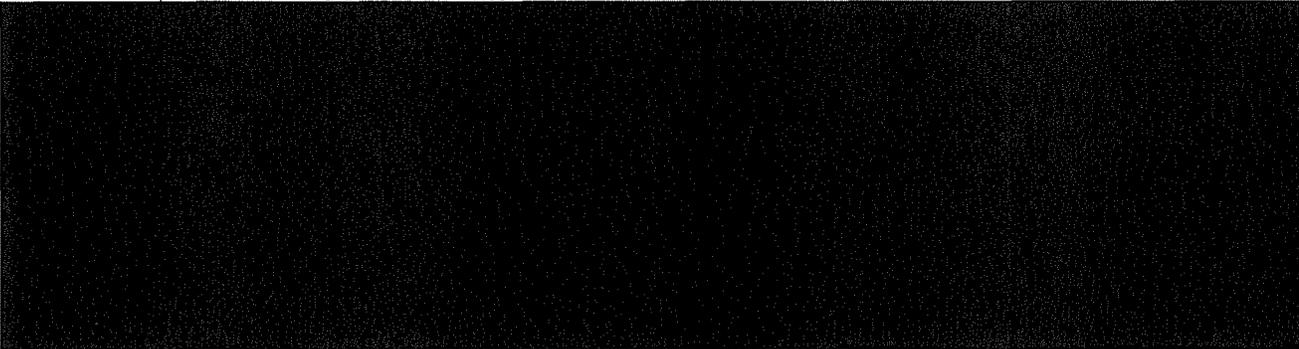
Thereafter, the Petitioner requested both an informal conference and later this petition, to have the assessment abated. In addition, the Department assessed an additional liability based on estimates not even provided by My Enterprises, Inc. However, that assessment has now been withdrawn and is therefore not an issue in this case. The sole support for this assessment is from the belief that My Enterprises, Inc. sold certain other tobacco products to the Petitioner. During discovery, the only information provided to the Petitioner in this matter was documentation obtained from the Indiana Department of Revenue, suggesting that My Enterprises, Inc. provided information to the Indiana Department of Revenue which alleges that My Enterprises, Inc. may have sold some other tobacco products to the Petitioner. The Department is not attempting to call any person from My Enterprises, Inc. to testify in this matter regarding the purchases and has no documentation from My Enterprises, Inc. that would verify that the purchases were made by the Petitioner. The Petitioner seeks to have all the evidence regarding My Enterprises, Inc. omitted from this hearing.

DISCUSSION

The Department by introducing the Notice of Tax Liability into evidence under the

certificate of the Director presented prima facie proof that the taxpayer owes the tax, penalties and interest due in the amount proposed. 35 ILCS 5/904(a): Balla v. Department of Revenue, 168 Ill. App. 3d 293, 296, 421 N.E.2d 236, 238 (1st Dist. 1981). The Department's prima facie case is a rebuttable presumption. Branson V. Department of Revenue 168 Ill. 2d 247, 260, 659 N.E.2d 961, 968 (1985). The sole basis for the Liability is documentation obtained from the Indiana Department of Revenue provided the Illinois Department of Revenue with information that they obtained from My Enterprises, Inc. pursuant to an audit that the Indiana Department of Revenue conducted against My Enterprises, Inc.

The Department seeks to enter into evidence the information provided by the Indiana Department of Revenue as evidence that the purchases were made. This evidence is clearly hearsay evidence and should be excluded.



HEARSAY EVIDENCE NOT ALLOWED

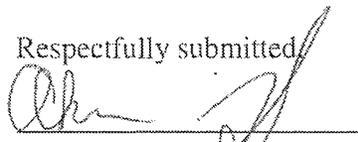
Hearsay evidence is not allowed in these proceedings. An exception to the hearsay rule would be the business records exception to hearsay. However, the information that is being used is not information prepared by the Indiana Department of Revenue but instead prepared by My Enterprises Inc., an entity that is not testifying in this matter. A proponent who seeks to admit documents under the business records exception to the hearsay rule must lay an adequate foundation through the testimony of the custodian of the records or another person familiar with the business and its mode of operation. Land and lakes Co. v. Industrial Commission APP. 2 Dist.2005, 296 Ill.Dec. 26, 359 Ill.App.3d 582, 834 N.E.2d 38. Nor can the Indiana Department of Revenue representative testify regarding the records. Under the business records exception to hearsay rule, only business records are admissible, and not testimony of witness who makes reference to business records. Northern Illinois Gas Co. v. Vincent DiVito Const., App. 2 Dist. 1991, 157 Ill.Dec. 825, 214 Ill.App. 3d 203, 573 N.E.2d 243. In our case there will be no testimony from a My Enterprises Inc. representative so no adequate foundation may be laid under the business records exception to the hearsay rule and therefore the evidence is therefore inadmissible as hearsay.

Allowing the evidence is highly prejudicial to the Petitioner. Because the Department seeks to use third party evidence, the Petitioner is prohibited from cross examining the business representative or other representatives of the business regarding manner of delivery, signatures on invoices, manner of payment and other details that would more clearly indicate whether or not the sales were actually made. The Respondent does not have invoices that have been claimed to have been sold to Petitioner.

Therefore, any evidence to be presented in this case by the Department should be

excluded. Once the Department excludes this evidence, the assessment itself cannot stand. This information was the sole basis for the assessment. It is not relevant that the Petitioner may have made some purchases from My Enterprises, Inc. That information was not used in the audit. In fact, the auditor specifically disregarded that information and did not even make a list of invoices purchased in his audit package. Similarly, the assessment cannot stand on any type of admissions made by the Petitioner. The Respondent is clearly stating that their basis for this audit is based on information from a third party whose information cannot be entered into evidence in this case. Accordingly, the evidence should not be allowed and the assessment should be abated.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Akram Zanayed', written over a horizontal line.

Akram Zanayed
Attorney for Petitioner

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