

**ILLINOIS INDEPENDENT  
TAX TRIBUNAL**

---

---

<b>EXPRESS OF TINLEY PARK, INC.,</b>	)	
	)	
<b>Petitioner,</b>	)	
<b>v.</b>	)	<b>No. 16 TT 5</b>
	)	<b>Judge Brian F. Barov</b>
	)	
<b>ILLINOIS DEPARTMENT OF REVENUE,</b>	)	
	)	
<b>Respondent.</b>	)	

---

---

**DEPARTMENT’S ANSWER TO PETITION**

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

**PARTIES**

1. Petitioner is an Illinois corporation located at 8021 West 183rd Street, Suite F, Tinley Park, Illinois 60487 and can be reached at 708-898-8538.

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

2. Petitioner is represented by attorneys Anthony Calandriello, Lane M. Gensburg and Michael Gutting of Dale & Gensburg, P.C., located at 200 West Adams Street, Suite 2425, Chicago, Illinois 60606. Anthony Calandriello can be reached at 312-263-2200 or tcalandriello@dandgpc.com. Lane M. Gensburg can be reached at 312-263-2200 or lgensburg@dandgpc.com. Michael Gutting can be reached at 312-263-2200 or mgutting@dandgpc.com.

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

3. Petitioner's Illinois Business Tax number is 4074-6747.

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

4. The Department is an agency of the Executive Department of the State Government and is tasked with the enforcement and administration of Illinois tax laws. 20 ILCS 5/5-15.

**ANSWER:** The Department admits the existence, force and effect, at all relevant times of the statutory provision set forth or referred to in paragraph 4 and state such provision speaks for itself.

## NOTICES

### Retailers Occupation/Use Tax

5. On November 9, 2015, the Department issued a Notice of Tax Liability (the "NTL") to Petitioner asserting a total Retailers Occupation Tax/Use Tax ("ROT") liability of \$255,368.77, covering the period April 4, 2012 through January 31, 2014 (the "period at issue"). The total liability consists of \$174,992 in tax due, \$35,527 in late payment and late filing penalties, a \$34,691 negligence penalty and \$10,158.77 in interest. A copy of the NTL is attached hereto as **Exhibit A**.

**ANSWER:** The Department admits the existence, force and effect, at all relevant times of the document attached to the Petition as Exhibit A and referred to in paragraph 5 and state that such document speaks for itself.

## 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 *et seq.*

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

7. The Tribunal has jurisdiction over this matter pursuant to Section 1-45, and 1-50 of the Tribunal Act because Petitioner timely filed this Petition within 60 days of the Notice.

**ANSWER:** Although paragraph 7 is not an allegation of a material fact but a legal conclusion, the Department admits the allegation/legal conclusion contained in paragraph 7.

## BACKGROUND

8. Petitioner is a retailer of cigarettes, tobacco products and other general merchandise. The Department audited Petitioner's books and records for the period at issue.

**ANSWER:** The Department admits the allegations contained in paragraph 8.

9. The ROT audit liability stated in the NTL is based on projections whereby the Department multiplied Petitioner's purchases by a percentage markup to project Petitioner's total sales for the period at issue. The Department credited Petitioner for its taxable sales reported on its sales tax returns for the period at issue and applied the high tax sales rate to the projected additional taxable sales and imposed a negligence penalty on the Petitioner's estimated ROT liability.

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

## COUNT I

### The Department's Audit Methodology Overstates Petitioner's ROT Liability

10. Petitioner realleges and incorporates by reference the allegations made in paragraphs 1 through 9 above as and for this paragraph 10.

**ANSWER:** The Department repeats and incorporates its answers to paragraphs 1-10 as if fully set forth herein.

11. The 17% markup utilized by the Department to project Petitioner's cigarette sales was arbitrary, too high and overstated those sales. Petitioner's actual markup was far less than 17%.

**ANSWER:** Although paragraph 11 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 11.

12. The Department further erred in not allowing any reduction in projected sales for spoilage and theft loss and by failing to consider Petitioner's sales promotions.

**ANSWER:** Although paragraph 12 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 12.

13. The Department erred in applying the high tax sales rate to all of the Petitioner's projected additional taxable sales. Petitioner maintains that a portion of its general merchandise sales were low tax or non-taxable merchandise sales.

**ANSWER:** Although paragraph 13 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 13.

14. The Department did not adequately reduce Petitioner's projected sales for the period at issue to account for ending inventory.

**ANSWER:** Although paragraph 14 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 14.

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 Notice of Tax Liability be determined to be correct;
- C) That this Tribunal grant such other additional relief it deems just and proper.

## COUNT II

### **All Negligence Penalties Should be Abated**

15. Petitioner realleges and incorporates by reference the allegations made in paragraphs 1 through 14, as and for this paragraph 15.

**ANSWER:** The Department repeats and incorporates its answers to paragraphs 1-15 as if fully set forth herein.

16. In its NTLs, the Department assessed negligence penalties in an amount totaling \$ 34,691.

**ANSWER:** The Department admits the existence, force and effect, at all relevant times of the document attached to the Petition as Exhibit A and referred to in paragraph 16 and state that such document speaks for itself.

17. Illinois provides that a negligence penalty is applicable only where a return is prepared negligently, and defines negligence to constitute any failure to make a reasonable attempt to comply with the provisions of any tax Act and includes careless, reckless, or intentional disregard of the law or regulations. 35 ILCS 735/3-5. Illinois law further provides that no negligence penalty shall be imposed if it is shown that the failure to comply with the Tax Act is due to reasonable cause; and that a taxpayer is not negligent if the taxpayer shows substantial authority to support the return as filed. *Id.*

**ANSWER:** The Department admits the existence, force and effect, at all relevant times of the statutory provision set forth or referred to in paragraph 17 and state such provision speaks for itself.

18. Any understatement of ROT tax determined to be owed by Petition was not attributable to negligence as Petition did not act negligently in the preparation and filing of its ROT returns for the period in question, and any liability determined to exist was attributable to reasonable cause.

**ANSWER:** Although paragraph 18 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 18.

19. The Department's determination that Petitioner owed negligence penalties is not supported by fact or law.

**ANSWER:** Although paragraph 19 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 19.

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 Notice of Tax Liability be determined to be correct.
- C) That this Tribunal grant such other additional relief it deems just and proper

### **COUNT III**

#### **All Failure to File and Pay Penalties Should be abated for Reasonable Cause**

20. Petitioner realleges and incorporates by reference the allegations made in paragraphs 1 through 19 as and for this paragraph 20.

**ANSWER:** The Department repeats and incorporates its answers to paragraphs 1-19 as if fully set forth herein.

21. Illinois law provides that failure to file and pay penalties do not apply if a taxpayer shows that his failure to file or pay tax at the required time 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 21 and state such provision speaks for itself.

22. The most important factor to be considered in making a determination to abate a late filing or payment penalty is the extent to which the taxpayer makes a good faith effort to determine its proper tax liability and to file and pay its proper tax liability in a timely fashion. See 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 22 and state such regulation speaks for itself.

23. A taxpayer will be considered to have made a good faith effort to determine, file and pay its proper tax liability if it exercised ordinary business care and prudence in doing so. See 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 23 and state such regulation speaks for itself.

24. Petitioner's failure to timely file and pay its ROT liabilities during the period at issue was due to reasonable cause warranting abatement of the late filing and late payment penalties.

**ANSWER:** Although paragraph 24 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 24.

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 Notice of Tax Liability be determined to be correct;

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

LISA MADIGAN  
ILLINOIS ATTORNEY GENERAL  
REVENUE LITIGATION BUREAU  
100 W. RANDOLPH ST., RM. 13-216  
CHICAGO, IL 60601  
By: Michael Coveny (312) 814-6697

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:

Lane M. Gensburg / Anthony Calandriello / Michael Gutting  
Dale & Gensburg, P.C.  
200 West Adams Street / Suite 2425  
Chicago, IL 60558

By email attachment to [lgensburg@dandgpc.com](mailto:lgensburg@dandgpc.com), [tclandriello@dandgpc.com](mailto:tclandriello@dandgpc.com) and [mgutting@dandgpc.com](mailto:mgutting@dandgpc.com) on February 17, 2016



---

Michael Coveny,  
Assistant Attorney General