

2. Tap House Oswego accepts the Tax Tribunal's designation of its office in Cook County to conduct the hearing in this matter.

Facts Common to all Counts

The Parties

3. Tap House Oswego is a limited liability company maintaining its principal office at 708 South Vermont Street, Palatine, Illinois 60067-7139.
4. Tap House Oswego is engaged in the restaurant/bar business, and was so engaged in Illinois during the taxable periods at issue in this petition.
5. The Illinois Department of Revenue is an executive agency authorized, among other functions, to administer and enforce the provisions of the Illinois Retailers' Occupation Tax Act, and the Illinois Use Tax Act. 20 ILCS 2505/2505-25; 20 ILCS 2505/2505-90.

The Retailers' Occupation Tax Act, the Use Tax Act and the Uniform Penalty and Interest Act

6. The Retailers' Occupation Tax Act (the "ROTA") imposes a tax on persons engaged in the occupation of selling tangible personal property at retail in Illinois, the Retailers Occupation Tax (the "ROT"). 35 ILCS 120/1 *et seq.*
7. The Use Tax Act (the "UTA") imposes a tax on a purchaser of tangible personal property for use or consumption, and not for resale, from a retailer, the Use Tax (the "UT"). 35 ILCS 105/1 *et. seq.*
8. The ROT is imposed on the gross receipts from a taxable retail sale.

9. The UT is imposed on the purchase price of a taxable retail purchase.
10. The Illinois Uniform Penalty and Interest Act (the "UPIA") provides that:

If any return or amended return is filed with intent to defraud, in addition to any penalty imposed under Section 3-3 of this Act, a penalty shall be imposed in an amount equal to 50% of any resulting deficiency.

35 ILCS 735/3-6(a).

The Department's Audit

11. The Department's audit staff and management received access to Tap House Oswego's books and records supporting its Illinois state tax returns.
12. The Department's audit of Tap House Oswego included the taxable periods January 2010 through June 2012 (the "Years at Issue").
13. On information and belief, the Department's auditor prepared a corrected return for Tap House Oswego's Retailers' Occupation Tax liability pursuant to section 4 of the ROTA (35 ILCS 120/4). Said section provides in pertinent part as follows:

As soon as practicable after any return is filed, the Department shall examine such return and shall, if necessary, correct such return according to its best judgment and information. . . . In the event that the return is corrected for any reason other than a mathematical error, any return so corrected by the Department shall be prima facie correct and shall be prima facie evidence of the correctness of the amount of tax due, as shown therein.

* * *

Proof of such correction by the Department may be made at any hearing before the Department or in any legal proceeding by a reproduced copy or computer print-out of the Department's record relating thereto in the name of the

Department under the certificate of the Director of Revenue.
. . . Such certified reproduced copy or computer print-out shall without further proof, be admitted into evidence before the Department or in any legal proceeding and shall be prima facie proof of the correctness of the amount of tax due, as shown therein.

35 ILCS 120/4.

14. On information and belief, the Department's auditor assessed a fraud penalty on Tap House Oswego due to the fact that the Department's auditor's method of calculating gross receipts led to an alleged tax liability that was more than double the gross receipts that had been reported by Tap House Oswego.

The Controversy

15. The Department audited Tap House Oswego's Illinois sales and use tax returns for the Years at Issue.
16. On June 11, 2014, the Department issued to Tap House Oswego a Notice of Tax Liability for the Years at Issue, proposing an assessment in the amount of \$454,843.24 in tax, interest, late payment penalty and fraud penalty. A copy of the Notice of Tax Liability is attached hereto as **Exhibit 1.**

COUNT I

The Department's Calculation of Tap House Oswego's Gross Receipts was not According to its Best Judgment and the Information

17. As previously noted, Section 4 of the ROTA requires that "the Department shall examine such return and shall, if necessary, correct such return according to its best judgment and information." 35 ILCS 130/4.
18. On information and belief during the Department's audit, Tap House Oswego provided the Department's auditor with all of the information and records that were requested.
19. The Department's auditor's calculated gross receipts and corrected return were not produced with a minimum standard of reasonableness because the Department's auditor did not use his or her best judgment and the information that was provided by Tap House Oswego.

WHEREFORE, Tap House Oswego prays that the Tax Tribunal find and determine that the assessment issued against Tap House Oswego violates section 4 of the ROTA and must therefore be cancelled or withdrawn.

COUNT II

Tap House Oswego's Failure to Pay the Alleged Additional Tax was due to Reasonable Cause

20. Section 3-8 of the UPIA provides that penalties, other than a fraud penalty, "shall not apply if the taxpayer shows that his failure to . . . pay tax at the required time was due to reasonable cause." 35 ILCS 735/3-8.

21. Tap House Oswego made a good faith effort to determine the correct reporting of its sales and use tax liability through the exercise of ordinary business care and prudence.

22. Tap House Oswego acted with reasonable cause and therefore, under section 3-8 of the UPIA, no penalty should apply to the audit assessment that the Department assessed against Tap House Oswego.

WHEREFORE, Tap House Oswego prays that the Tax Tribunal find and determine that the penalty assessed against Tap House Oswego violates section 3-8 of the UPIA and must therefore be cancelled or withdrawn.

COUNT III

Tap House Oswego had no Intent to Defraud the Department

23. As previously noted, section 3-6 of the UPIA provides that:

If any return or amended return is filed with intent to defraud, in addition to any penalty imposed under Section 3-3 of this Act, a penalty shall be imposed in an amount equal to 50% of any resulting deficiency.

35 ILCS 735/3-6(a).

24. The Department's regulations under the UPIA provide that "[i]f any return or amended return is filed with intent to defraud . . . a penalty will be imposed in an amount equal to 50% of any resulting deficiency." 86 Ill. Admin. Code § 700.330(a).

25. On information and belief, the Department's auditor assessed a fraud penalty on Tap House Oswego due to the fact that the Department's

auditor's method of calculating gross receipts led to an alleged tax liability that was more than double the gross receipts that had been reported by Tap House Oswego.

26. At no time did Tap House Oswego intend to defraud the State of Illinois.

WHEREFORE, Tap House Oswego prays that the Tax Tribunal find and determine that the fraud penalty assessed against Tap House Oswego violates section 3-6 of the UPIA and must therefore be cancelled or withdrawn; and

WHEREFORE, Tap House Oswego prays that the Tax Tribunal enter an Order determining that the total tax previously paid by Tap House Oswego during the audit periods in respect of their sales and use tax liabilities was the correct tax paid.

Respectfully submitted,

TAP HOUSE GRILL OSWEGO LLC

By:



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EXHIBIT 1

Notice of Tax Liability

for Form EDA-105-R, ROT Audit Report



#BWNKMGV
#CNXX XX48 2994 6566#
TAP HOUSE GRILL OSWEGO LLC
708 S VERMONT ST
PALATINE IL 60067-7139

June 11, 2014



Letter ID: CNXXXX4829946566

Account ID: 3926-3428



We have audited your account for the reporting periods January 01, 2010, through June 30, 2012. As a result we have assessed the amounts shown below

	<u>Liability</u>	<u>Payments/Credit</u>	<u>Unpaid Balance</u>
Tax	258,543.00	0.00	258,543.00
Late Payment Penalty Increase	51,709.00	0.00	51,709.00
Fraud Penalty	127,376.00	0.00	127,376.00
Interest	17,215.24	0.00	17,215.24
Assessment Total	\$454,843.24	\$0.00	\$454,843.24

If you agree, pay the assessment total as soon as possible to minimize additional penalty and interest. Mail a copy of this notice and your payment with the voucher on the enclosed Taxpayer Statement. By including a copy of this notice, your payment will be properly applied to the audit liability.

If you do not agree, you may contest this notice by following the instructions listed below.

- If the amount of this tax liability, exclusive of penalty and interest, is more than \$15,000, or if no tax liability is assessed but the total penalties and interest is more than \$15,000, file a petition with the Illinois Independent Tax Tribunal within 60 days of this notice. Your petition must be in accordance with the rules of practice and procedure provided by the Tribunal (35 ILCS 1010/1-1, *et seq.*).
- In all other cases that do not fall within the jurisdiction of the Illinois Independent Tax Tribunal, file a protest with us, the Illinois Department of Revenue, and request an administrative hearing within 60 days of the date of this notice, which is **August 11, 2014**. Submit your protest on Form AH-4, Protest and Request for Administrative Hearing with the Illinois Department of Revenue (available on our website at tax.illinois.gov). Mail form AH-4 along with a copy of this notice to the address on the form. 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.
- Instead of filing a petition with the Illinois Independent Tax Tribunal or a protest with us, the Illinois Department of Revenue, you may instead, under Sections 2a and 2a.1 of the State Officers and Employees Money Disposition Act (30 ILCS 230/2a, 230/2a.1), pay the total liability under protest using Form RR-374, Notice of Payment Under Protest (available on our website at tax.illinois.gov), and file a complaint with the circuit court for a review of our determination.

If you do not protest this notice or pay the assessment total in full, we may take collection action against you for the balance due, which may include levy of your wages and bank accounts, filing of a tax lien, or other action to satisfy your liability.

If you have questions, write or call us weekdays between 8:00 a.m. and 4:00 p.m. Our contact information is listed below.

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

217 785-6579

IN THE
ILLINOIS INDEPENDENT TAX TRIBUNAL
COOK COUNTY, ILLINOIS

TAP HOUSE GRILL OSWEGO LLC)
)
Taxpayer Account ID: 3926-3428)
Taxpayer Telephone No.: (847) 485-8111)
Tax Type: ROT / UT)
TPE: 1/1/2010 – 6/30/2012)
)
v.)
)
ILLINOIS DEPARTMENT OF REVENUE.)

RECEIVED
AUG 11 2014
BY: _____

No. _____

(17771)-6

NOTICE OF FILING OF PETITION OF THE TAXPAYER

TO: Mr. Brian A. Hamer
Director of the Illinois Department of Revenue
100 West Randolph Street, Suite 7-500
Chicago, Illinois 60601

PLEASE TAKE NOTICE that on August 11, 2014, Tap House Grill Oswego LLC ("Tap House Oswego"), through its counsel Reed Smith LLP, filed with the Clerk of the Illinois Independent Tax Tribunal, Cook County, Illinois, its Petition of the Taxpayer, a copy of which is attached hereto and herewith served upon you.

Dated: August 11, 2014

TAP HOUSE GRILL OSWEGO LLC

By:



Adam P. Beckerink, one of its attorneys.

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CERTIFICATE OF SERVICE

I, the undersigned, an attorney, hereby certify that I caused to be served upon the individual listed below a copy of the Petition of the Taxpayer by messenger on this 11th day of August, 2014 before 5:00 p.m.

Mr. Brian A. Hamer
Director of the Illinois Department of Revenue
100 West Randolph Street, Suite 7-500
Chicago, Illinois 60601


Adam P. Beckerink