

ILLINOIS INDEPENDENT
TAX TRIBUNAL

MACKENZIE LLC,)	
)	
Petitioner,)	
)	
v.)	No. 16 TT 50
)	
ILLINOIS DEPARTMENT OF)	
REVENUE,)	
)	Chief Judge James M. Conway
)	
Respondent.)	

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 Petitioner's Petition ("Petition"), hereby states as follows:

INTRODUCTION

1. Petitioner is a limited liability company formed under the laws of the State of Montana.

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

2. Its business address is 7255 W. Higgins Ave. Suite C, Missoula, Montana 59803.

ANSWER: The Department admits that Petitioner's mailing address is 7255 W. Higgins Avenue, Suite C, Missoula, Montana 59803. The Department further affirmatively states that all or nearly all of its official notices in this matter were

sent to the address of Petitioner's members in Huntley, Illinois. Such notices were apparently received at that address as they were all formally responded to.

3. The Notice was issued by the Department on September 22, 2014, assessing the amount of \$22,277 in tax, \$9,411.70 in penalties and \$9,298.14 in interest. A copy of the Notice is attached to this Petition.

ANSWER: The Department admits the existence, force and effect, at all relevant times of the document attached to the Petition as an Exhibit and referred to in paragraph 3 and states that such document speaks for itself.

JURISDICTION

4. The Tax Tribunal has jurisdiction pursuant to 35 ILCS 1010/1-45(a) because the alleged tax liability in question from the Illinois Use Tax Act and the aggregate amount at issue exceeds, \$15,000, exclusive of penalties and interest, and because Petitioner has remitted the \$500 filing fee.

ANSWER: The Department admits the allegations contained in paragraph 4.

5. The Tax Tribunal also has jurisdiction because a late discretionary hearing was granted on January 20, 2016 and this filing allowed a tax protest to be filed within 60 days of this letter. This filing is within that 60 day timeframe. A copy of the Late Discretionary Hearing Order is attached to this Petition.

ANSWER: The Department admits the allegations contained in paragraph 5.

BACKGROUND AND RELEVANT FACTS

6. Petitioner is organized as limited liability company as of May 30, 2007.

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

7. Petitioner's principal place of business is in Montana.

ANSWER: The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 7 and therefore neither admits or denies the allegations.

8. Petitioner's manager and registered agent is Action Service LLC located in Missoula, Montana.

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

9. Petitioner's purposes are: "A holding company for liability and estate protection."

ANSWER: The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 9 and therefore neither admits or denies the allegations.

10. Petitioner holds the vehicle at issue and other vehicles for the purposes of limiting legal liability.

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. On July 18, 2007, Petitioner purchased the vehicle at issue from Stouts RV Center located in Indiana.

ANSWER: The Department admits that the vehicle at issue was purchased from Stouts RV Center located in Indiana.

12. Petitioner was issued a certificate of title for the vehicle at issue on September 24, 2007.

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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. Petitioner purchased the vehicle in Indiana, and not in Illinois.

ANSWER: The Department admits that the vehicle at issue was purchased from Stouts RV Center located in Indiana.

14. The vehicle at issue is a large motor home, and has a weight in excess of 50,000 lbs.

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. Petitioner did not file an Illinois use tax return regarding its purchase of the vehicle in Indiana.

ANSWER: The Department admits the allegations contained in paragraph 15.

16. Immediately after the purchase in Indiana, Petitioner drove the vehicle from Indiana to Florida.

ANSWER: The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 16 and therefore neither admits or denies the allegations.

17. The vehicle was driven to and kept in the Riverbend Motorcoach Resort in Hendry County, Florida through the assessment date of March 31, 2008.

ANSWER: The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 17 and therefore neither admits or denies the allegations.

18. The vehicle was held in Lot 309 from purchase through the assessment date of March 31, 2008.

ANSWER: The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 18 and therefore neither admits or denies the allegations.

19. The vehicle was purchased for and used as a residence in North Dakota and each winter in Florida from its purchase date.

ANSWER: The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 19 and therefore neither admits or denies the allegations.

20. At no time from purchase date through March 31, 2008 was this vehicle ever located in Illinois.

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

21. The Petitioner was subsequently assessed a Notice of Tax Liability (Form EDA- 95, Auditor-prepared Motor Vehicle Use Tax Report) on September 22, 2014.

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

22. This Notice assessed as of March 31, 2008, \$22,277 in tax, \$4,445.85 in audit late payment penalty, \$4,705.85 in amnesty penalty, \$250 in audit late filing penalty, \$4,649.07 in interest and \$4,649.07 in amnesty interest.

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

APPLICABLE LAW AND CASES

23. The Petitioner relies upon the United States Constitution and the Illinois Use Tax Act (hereinafter "IITA") 35 ILCS Section 105 and Section 1402 to dispute the above referenced Illinois Use Tax.

ANSWER: Paragraph 23 is not a material allegation of fact but a statement of authority Petitioner intends to rely on and as such does not require an answer pursuant to Tribunal Rule 86 Ill. Adm. Code §5000.310(b).

24. The law relied upon includes:

The United States Constitution Article 4 Section 1:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

The United States constitution Article 1 Section 8 clause 3:

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

The Illinois Use Tax Act provides, in relevant part, as follows:

(35 ILCS 105/3) (from Ch. 120, par. 439.3)

Sec. 3. Tax imposed. A tax is imposed upon the privilege of using in this State tangible personal property purchased at retail from a retailer, including computer software, and including photographs, negatives, and positives that are the product of photoprocessing, but not including products of photoprocessing produced for use in motion pictures for commercial exhibition. Beginning January 1, 2001, prepaid telephone calling arrangements shall be considered tangible personal property subject to the tax imposed under this Act regardless of the form in which those arrangements may be embodied, transmitted, or fixed by any method now known or hereafter developed. Purchases of (1) electricity delivered to customers by wire; (2) natural or artificial gas that is delivered to

customers through pipes, pipelines, or mains; and (3) water that is delivered to customers through pipes, pipelines, or mains are not subject to tax under this Act. The provisions of this amendatory Act of the 98th General Assembly are declaratory of existing law as to the meaning and scope of this Act.

(Source: P.A. 98-583, eff. 1-1-14.)

(35 ILCS 105/3-55) (from Ch. 120, par. 439.3-55)

Sec. 3-55. Multistate exemption. To prevent actual or likely multistate taxation, the tax imposed by this Act does not apply to the use of tangible personal property in this State under the following circumstances:

(-e) The temporary storage, in this State, of tangible personal property that is acquired outside this State and that, after being brought into this State and stored here temporarily, is used solely outside this State or is physically attached to or incorporated into other tangible personal property that is used solely outside this State, or is altered by converting, fabricating, manufacturing, printing, processing, or shaping, and, as altered, is used solely outside this State.

(h) Except as provided in subsection (h-1), the use, in this State, of a motor vehicle that was sold in this State to a nonresident, even though the motor vehicle is delivered to the nonresident in this State, if the motor vehicle is not to be titled in this State, and if a drive-away permit is issued to the motor vehicle as provided in Section 3-603 of the Illinois Vehicle Code or if the nonresident purchaser has vehicle registration plates to transfer to the motor vehicle upon returning to his or her home state. The issuance of the drive-away permit or having the out-of-state registration plates to be transferred shall be prima facie evidence that the motor vehicle will not be titled in this State.

Irwin Industrial Tool Company v. Illinois Department of Revenue, 938 N.E.2d 459

(September 23, 2010)-The Illinois Supreme Court affirmed the Appellate Court's finding of sufficient physical connection between both the Taxpayer and the airplane and Illinois, so as to satisfy the "substantial nexus" requirement by repeated and prevalent contacts and allowed the Department to impose a use tax on the airplane adding:

"The airplane's frequent physical presence in Illinois, through the many take-offs and landings from Illinois runways, as well as the nights that it spent in Illinois, was not coincidental but was inherent in its basic purpose and function in this state."

Thomas v. Bridges, 144 So. 3d 1001 (May 7, 2014)-There was error to apply Louisiana law to pierce the LLC veil. The Court also held that taking actions to avoid sales tax is not illegal, citing the United States Supreme Court:

"The legal right of a taxpayer to decrease the amount of what would otherwise be his taxes, or altogether avoid them by means which the law permits, cannot be doubted."

Gregory v. Helvering, 293 U.S. 465 (1935).

ANSWER: The Department admits the existence, force and effect, at all relevant times of the statutory provisions and/or case law set forth or referred to in paragraph 24 and states that such statutory provisions and/or case law speaks for itself.

**ERROR I - USE TAX WAS ERRONEOUSLY ASSESSED AS THE VEHICLE AT
ISSUE WAS NOT IN ILLINOIS FROM THE VEHICLE PURCHASE DATE THRU
MARCH 31, 2008**

25. Petitioner realleges and reincorporates paragraphs 1-24 of the Petition herein.

ANSWER: The Department repeats and incorporates its answers to paragraphs 1-24 as if fully set forth herein.

26. Petitioner is not liable for use tax as the vehicle in question was not in Illinois prior to or on March 31, 2008.

ANSWER: Although paragraph 26 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 26.

27. The Illinois Use Tax Act (UTA) imposes a tax on the privilege of using tangible personal property at retail from a retailer, for use or consumption in Illinois. 35 ILCS 105/3.

ANSWER: The Department admits the existence, force and effect, at all relevant times of the statutory provision set forth or referred to in paragraph 27 and state such provision speaks for itself.

28. The vehicle was not physically present in Illinois from its purchase through March 31, 2008.

ANSWER: The Department denies the allegations contained in paragraph 28.

29. Since the vehicle was not physically present in Illinois at any time prior to or on March 31, 2008 it could not have been used in Illinois prior to or on March 31, 2008.

ANSWER: The Department denies the allegations contained in paragraph 29.

**ERROR II - USE TAX COULD NOT BE ASSESSED AS THE VEHICLE IN QUESTION
WAS OWNED BY A NONRESIDENT LLC**

30. Petitioner realleges and reincorporates paragraphs 1-24 of the Petition herein.

ANSWER: The Department repeats and incorporates its answers to paragraphs 1-24 as if fully set forth herein.

31. The vehicle in question was purchased and titled by MacKenzie LLC, a Montana LLC.

ANSWER: The Department admits that the vehicle in question was titled in the name of MacKenzie, LLC.

32. The vehicle at issue was used as a residence in both Florida and North Dakota.

ANSWER: The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 32 and therefore neither admits or denies the allegations.

33. The vehicle was used as a residence in Florida during the winters.

ANSWER: The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 33 and therefore neither admits or denies the allegations.

34. The vehicle was used a residence in North Dakota during summers.

ANSWER: The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 34 and therefore neither admits or denies the allegations.

35. MacKenzie LLC is a limited liability company that limits legal liability. This choice of entity is valid as is the business choice to incorporate in certain states to avail the corporation of favorable laws, i.e. Delaware corporations.

ANSWER: The Department admits that MacKenzie, LLC is a limited liability company formed under the laws of the State of Montana, but otherwise neither admits nor denies the remaining allegations as they are legal conclusions and not material allegations of fact, requiring no answer pursuant to Tribunal Rule 86 Ill. Adm. Code §5000.310(b).

36. MacKenzie LLC holds both the vehicle at issue in this case as well as other vehicles.

ANSWER: The Department admits the allegations contained in paragraph 36.

37. The transfer of the other vehicles were the subject of an Administrative Hearing case No.15-ST-117.

ANSWER: The Department admits the allegations contained in paragraph 37.

38. That Administrative Hearing case was dismissed on February 25, 2016, as the transfer of the vehicles was valid and the LLC itself was not challenged.

ANSWER: Paragraph 38 is not a material allegation of fact but Petitioner's version of a matter neither legally nor factually relevant to this matter and as such does not require an answer pursuant to Tribunal Rule 86 Ill. Adm. Code §5000.310(b).

39. Pursuant to 35 ILCS 105/3-55, this vehicle is exempt from tax as its owner, Mackenzie LLC, is a Montana LLC and therefore a non-resident of Illinois.

ANSWER: Although paragraph 39 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 39.

40. Under Section 3-55(e) and (h) of the Illinois Use Tax Act, a taxpayer's use of a motor vehicle is exempt if the taxpayer is not a resident of Illinois.

ANSWER: The Department admits the existence, force and effect, at all relevant times of the statutory provision set forth or referred to in paragraph 40 and state such provision speaks for itself.

41. In Irwin v. IDOR, the Illinois Supreme Court explained that an items' frequent physical presence in Illinois was not coincidental but was inherent in its basic purpose and function in this state.

ANSWER: The Department admits the existence, force and effect, at all relevant times of the case law set forth or referred to in paragraph 41 and states such case law speaks for itself.

42. In Thomas v. Bridges, the Louisiana Supreme Court found that the Montana LLC which held the vehicle at issue was legal and that "use of particular business entities to avoid taxes and other liabilities, far from being fraudulent, is a common legal practice." 144 So.3d 1001, 1007.

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

43. Thus a non resident LLC that owns a vehicle for a basic purpose and function that is performed in a State or States other than Illinois is not subject to Illinois Use Tax if that vehicle was not in Illinois. In addition, even if the non resident LLC's vehicle was temporarily in Illinois it would not be subject to Illinois use tax if the presence was coincidental and not inherent in its basic purpose and function.

ANSWER: Although paragraph 43 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 43.

ERROR III ABATEMENT OF PENALTIES

44. Petitioner realleges and reincorporates paragraphs 1- 24 of the Petition herein.

ANSWER: The Department repeats and incorporates its answers to paragraphs 1-24 as if fully set forth herein.

45. Petitioner contends that the Department erred in assessing Petitioner \$4,445.85 in audit late payment penalty, \$4,705.85 in amnesty penalty, \$250 in audit late filing penalty, \$4,649.07 in interest and \$4,649.07 in amnesty interest.

ANSWER: Paragraph 45 is not a material allegation of fact but a recitation of Petitioner's contentions or beliefs and as such does not require an answer pursuant to Tribunal Rule 86 Ill. Adm. Code §5000.310(b).

46. The Petitioner does not owe any Illinois Use Tax to the State of Illinois as alleged by the Department on the Notices of Tax Deficiency, and therefore no penalties or interest may be assessed by the Department. Notwithstanding, even if any tax is due, any penalties assessed on such tax should be abated for reasonable cause. 35 ILCS 735-3/8.

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. The Petitioner has relied in good faith on its understanding of Illinois law with respect to these transactions.

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. The Department's regulation on reasonable cause looks to whether the taxpayer "made a good faith effort" and exercised "ordinary business care in prudence". Illinois Admin. Code tit. 86 Section 700.400.

ANSWER: The Department admits the existence, force and effect, at all relevant times of the regulation set forth or referred to in paragraph 48 and state such regulation speaks for itself.

WHEREFORE, the Department prays:

- A) That Judgment be entered against the Petitioner and in favor of the Department on all Counts or Errors in 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.

Illinois Department of Revenue
100 West Randolph Street, 7-900
Chicago, IL. 60601
(312) 814-6697; FAX (312) 814-4344

Respectfully submitted,



Michael Coveny
Special Assistant Attorney General

STATE OF ILLINOIS)
) SS
COUNTY OF SANGAMON)

AFFIDAVIT AS TO LACK OF SUFFICIENT KNOWLEDGE

I, JASON POLING, being first duly sworn, deposes and says that I am an employee of the Illinois Department of Revenue, that I have read the foregoing Department's Answer to Petitioner's Petition to the Illinois Independent Tax Tribunal, that I am well acquainted with its contents, and under penalties as provided by law pursuant to 735 ILCS 5/1-109 of the Illinois Code of Civil Procedure, I certify that I lack the required personal knowledge to either admit or deny paragraphs 7, 9, 10, 12, 14, 16-19, 32-34 pursuant to 735 ILCS 5/2-610(b) and Tribunal Rule 5000.310(b)(3). I hereby certify that the statements set forth in this affidavit are true and correct to the best of my knowledge, information and belief.



Jason Poling
Revenue Auditor
Illinois Department of Revenue

Date: 7-8-2016

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 Verified Answer to Petitioner's Verified Petition upon:

David J. Kupiec / Natalie M. Martin
Kupiec & Martin, LLC
600 W. Van Buren Street
Suite 202
Chicago, IL 60607

By email to dkupiec@kupiecandmartin.com and nmartin@kupiecandmartin.com on July 8, 2016.