

**ILLINOIS INDEPENDENT TAX TRIBUNAL**

TYSON FOODS, INC. & SUBSIDIARIES, )  
Arkansas companies )  
FEIN: 71-0225165 )  
 )  
Petitioners, )  
 )  
v. )  
 )  
ILLINOIS DEPARTMENT OF )  
REVENUE, )  
 )  
Respondent. )

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**PETITION**

Petitioner Tyson Foods, Inc. & Subsidiaries (“Tyson”), by and through its attorneys, and for its petition to the Illinois Independent Tax Tribunal (the “Tribunal”), hereby states the following:

**NATURE OF ACTION**

1. This is a petition requesting that the Tribunal review certain aspects of the determination of the Illinois Department of Revenue (the “Department”) as to Tyson’s Illinois Corporation Income and Personal Property Tax Replacement Income Tax (collectively, “Corporate Income Tax”) liability for its 52–53 week taxable years ended on or about<sup>1</sup> September 30, 2012 and on or about September 30, 2013 (hereinafter, FY 2012, and FY 2013<sup>2</sup>) (the “Audit Period”). The Department issued a Notice of Deficiency (“NOD”) to Tyson for each of FY 2012 and FY 2013 (attached hereto as Exhibit A).

<sup>1</sup> While all of the notices issued to Tyson that form the basis of the present dispute refer to Tyson’s fiscal years ending on “September 30,” Tyson operates on a 52-53 week tax year that ends on *or about* September 30.

<sup>2</sup> As used in this Petition, “FY” – or “fiscal year” – shall mean the taxable year ended on or about September 30 of the calendar year in question.

2. Tyson Foods, Inc. (“TFI”), during the Audit Period, was the common parent of the members of a group of unitary corporations filing combined Illinois income tax returns on Form IL-1120 under the name Tyson Foods, Inc. and Subsidiaries (for each year, the “Tyson Unitary Business Group,” or “Tyson”). The Tyson Unitary Business Group, as is pertinent here, included Tyson Sales & Distribution, Inc. (“TSD”) and Tyson Fresh Meats, Inc. (“TFM”). Tyson seeks relief from this Tribunal with respect to two issues.

3. First, Tyson seeks relief with respect to the Department’s erroneous assessment of Tyson related to the Illinois sales of its subsidiary, TSD. The Department determined that TSD had nexus in Illinois, and included TSD’s Illinois sales in Tyson’s numerator for Illinois sales apportionment purposes, based upon the erroneous conclusion that TSD’s actions in Illinois exceeded allowable activities under 15 U.S.C. § 381 (P.L. 86-272). TSD did not have Illinois nexus during these periods and its sales were properly excluded from the numerator of Tyson’s Illinois sales factor.

4. Second, Tyson seeks relief with respect to the Department’s erroneous assessment of Tyson related to the Illinois sales of another of its subsidiaries, TFM. The Department determined that the mere fact of TFM’s use of a freight forwarding warehouse in Ottawa, Illinois to consolidate shipments originating outside Illinois and destined for delivery to customers outside Illinois constituted shipments “from” a “place of storage” in Illinois. This determination is contrary to law and the Department’s own rulings. As such, TFM’s sales to non-Illinois customers that originated from plants outside of Illinois were properly excluded from the numerator of Tyson’s Illinois sales factor.

## PARTIES

5. TFI, a Delaware corporation headquartered in Springdale, Arkansas, is the parent corporation for both TSD and TFM, also both headquartered in Springdale, Arkansas. TSD is a Delaware corporation that is engaged in the business of marketing and distributing poultry products. TFM is a Delaware corporation that is engaged in the business of manufacturing beef and pork products.

6. The Illinois Department of Revenue is the Illinois agency charged with the administration and enforcement of Illinois' Corporate Income Tax.

## JURISDICTION

7. The Tribunal has jurisdiction over Tyson and this petition pursuant to 35 ILCS 1010/1-45 and 35 ILCS 5/908, 909 and 910.

## BACKGROUND

### **A. The Department's Audit of Tyson**

8. The Department conducted an audit of Tyson's activities over FY 2012 and FY 2013 (the "Audit"). The Department completed the Audit in late 2015, and, on February 9, 2016, issued Tyson two Notices of Deficiency ("NODs"), one for FY 2012 and one for FY 2013. With relevance to the present action, the Department made two adjustments to Tyson's income in each of those NODs, one relating to TSD and one relating to TFM.

### **B. TSD's Activities in Illinois and the Department's Audit Thereof**

9. TSD is headquartered in Springdale, Arkansas and conducted sales in Illinois during the Audit Period through both salespersons and independent brokers. TSD sold products to both independent distributors and end-customers in Illinois. All TSD sales were accepted at TSD's headquarters in Arkansas.

10. During the Audit Period, TSD salesmen and independent representatives, subject to any potential de minimis exceptions, engaged solely in the solicitation of sales and ancillary activities as permitted by P.L. 86-272; TSD did not own or lease an office in Illinois; TSD did not own or lease any tangible personal property in Illinois other than computers, printers and fax machines assigned to salesmen who worked from their homes; TSD had no inventory in Illinois; and TSD shipped or delivered product from outside Illinois to customers in Illinois.

11. In the “Explanation of Audit Adjustments” of each of the NODs (Exh. A), the Department stated: “We adjusted your sales factor to include in the numerator the Illinois destination sales of those companies in your unitary business group with Illinois nexus. [Public Law 86-272].”

12. These NODs provide no additional explanation regarding the basis for the Department’s nexus determination. The Department failed to provide any formal explanation either in the NODs or otherwise as to why it believes TSD (the entity presumably responsible for this adjustment) had nexus in Illinois during FY 2012 or FY 2013.

13. On information and belief, the Department did not conclude that the activities of TSD’s salesmen and independent representatives exceeded solicitation of sales, but rather focused on the fact that TSD had “payroll” in the state.

14. It is uncontested that TSD had salesmen who lived in Illinois and therefore were treated as Illinois payroll. The presence of salespersons in the state does not violate P.L. 86-272 so long as the salespersons were engaged in the solicitation of sales and

ancillary activities. There is no indication that the auditor determined that the salespersons engaged in activities not protected by P.L. 86-272.

15. The auditor's determination of nexus is improper because it apparently relies solely on the bare fact of payroll with no determination that the employees in question engaged in any activities not protected by PL 86-272.

16. Nevertheless, on February 9, 2016, the Department issued Tyson NODs for FY 2012, and FY 2013 (Exh. A), adjusting Tyson's sales factor by including an additional \$379,595,353 in the numerator for FY 2012 and an additional \$398,330,531 in the numerator for FY 2013.

**C. TFM's Shipment of Product Through Its Freight Forward Warehouse**

17. TFM is headquartered in Springdale, Arkansas, and operates thirteen beef and pork processing plants in the Midwest. It operates multiple plants in each of Iowa, Kansas and Nebraska, and one plant each in Illinois and several other states.

18. TFM products generally are delivered to customers in one of three ways. First, a customer may send trucks to a TFM plant to pick up its order. Second, if there is a full – or near-full – truckload of product, TFM may ship an entire order directly to a customer. Third, if a customer does not send its own truck to the plant, and it orders less than a full truckload of product, shipment may be made from the plant through one of TFM's freight forward warehouses.

19. With relevance to the present dispute, one of TFM's freight forward warehouses is located in Ottawa, Illinois (the "Ottawa FWH"). All goods arriving at the Ottawa FWH have already been sold to customers and are, as is pertinent here, in transit to customers in interstate commerce. No uncommitted goods were sent to the Ottawa FWH.

20. The primary purpose of shipping orders through the Ottawa FWH was to allow

products produced by multiple plants destined for a single customer or the same geographic area to be consolidated on a single truck and shipped more economically than if they were shipped separately direct from each of the various plants. TFM shipped the products through the Ottawa FWH to accommodate further shipping to a predetermined destination. The work TFM performed at the Ottawa FWH involved consolidating shipments from TFM's various plants to the same customer or geographic area. In many instances, it took less than a day for the product to be consolidated with other shipments and to continue on to the customer. No modifications, changes or alterations were made to any of the product while at the Ottawa FWH, and all goods at the Ottawa FWH already were committed to customers – they were not held at the Ottawa FWH for some indeterminate future sale, use or distribution. These goods were therefore in transit from the time they left the respective plants until delivery to TSD's customers.

21. During the Department's prior audits and ICB review of this same issue, the ICB issued an Action Decision in January 2015 (Exh. B), finding that "No change is warranted to the Tyson Fresh Meats, Inc. (TFM) throwback sales adjustment with respect to sales shipped from the Ottawa Illinois freight forwarding warehouse because under *Filterek, Inc. v. Department of Revenue*, 186 Ill. App. 3d 208, 541 N.E. 2d 1385, any storage, regardless of immediate shipment, was sufficient to meet the statutory requirement of shipment from an Illinois place of storage."

22. On information and belief, the Department relied on this same reasoning in determining that those TFM sales flowing through the Ottawa FWH during FY 2012 and FY 2013 should have been thrown back to Illinois. As a result, in the NODs issued to Tyson for FY 2012 and FY 2013, the Department stated: "We adjusted your sales by including in the numerator sales of tangible personal property originating in Illinois and

delivered to customers in states in which you are not taxable.” As a result, the Department adjusted Tyson’s sales factor by including an additional \$633,377,450 in the numerator for FY 2012 and an additional \$600,404,576 in the numerator for FY 2013.

## COUNT I

**Because TSD’s Activities in Illinois Do Not Exceed Mere Solicitation,  
the Department is Prohibited by PL 86-272 From Including Its Illinois Sales  
in the Numerator of Petitioner’s Illinois Sales Factor.**

23. Tyson incorporates in this Count I the allegations of paragraphs 1-22 of this Petition.

24. The State of Illinois is prohibited, pursuant to PL 86-272 from imposing a net income tax on a nonresident taxpayer who operates primarily in interstate commerce and whose activity within Illinois is limited to the solicitation of orders that are approved outside Illinois and filled by shipment or delivery from outside Illinois. 86 Ill. Adm. Code § 100.9720(c)(1)(C) further provides:

For the purposes of subsection (c)(1)(A) of this Section, a person shall not be considered to have engaged in business activities within a state during any taxable year merely by reason of sales in such state, or the solicitation of orders for sales in such state, of tangible personal property on behalf of such person by one or more independent contractors whose activities on behalf of such person in such state consist solely of making sales, or soliciting orders for sales, of tangible personal property.

25. Further, the regulations define “solicitation of orders” to mean “speech or conduct that explicitly or implicitly invites an order and activity ancillary to invitations for an order,” 86 Ill. Adm. Code § 100.9720(c)(2)(C), and states that in order to “be ancillary to invitations for orders, an activity must serve no independent business function for the seller apart from its connection to the solicitation of orders.” 86 Ill. Adm. Code § 100.9720(c)(2)(C)(i).

26. The Department's determination that TSD had nexus in Illinois during the Audit Period based on the bare fact that TSD had payroll in the state is erroneous and contrary to the facts.

27. Payroll in Illinois does not cause Petitioner to become subject to tax in Illinois, as the activities of TSD's employees, as described in the Background section *supra*, comprised the solicitation of sales and ancillary activities.

28. The Department has not identified, and is unable to identify, any activity engaged in by TSD personnel in Illinois that is not protected by PL 86-272.

29. As such, the Department's increase in Tyson's Illinois sales factor attributable to TSD's sales to Illinois customers by \$379,595,353 FY 2012, and \$398,330,531 for FY 2013, is in error.

WHEREFORE, Tyson prays this Tribunal to:

(a) find and declare that TSD's activities in Illinois during the Audit Period do not exceed the protections of PL 86-272;

(b) find and declare that TSD did not have nexus in Illinois during FY 2012 and FY 2013;

(c) direct the Department to adjust Tyson's Illinois sales factor by subtracting from the numerator \$379,595,353 for FY 2012 and \$398,330,531 for FY 2013;

(d) grant such other relief as is reasonable and proper.

## COUNT II

### **TFM's Sales Shipped Through the Ottawa FWH Should Not Be Thrown Back to Illinois.**

30. Tyson incorporates in this Count II the allegations of paragraphs 1-22 of this Petition.

31. The Department's apportionment regulations provide that "sales of tangible property are considered in Illinois if the property is delivered or shipped to a purchaser within

this state regardless of the f.o.b. point or other conditions of sale, or if property is shipped from an office, store, warehouse, factory or other place of storage in this state to a state where the taxpayer is not subject to income tax.” 86 Ill. Adm. Code § 100.3370(c)(1).

32. The express language of the regulation makes clear that there are two instances when a sale of tangible personal property is considered to be an Illinois sale. First, if the property is delivered to the customer at a location in Illinois, and second, “if the tangible personal property is shipped from an office, store, warehouse, factory or other place of storage” in Illinois to a state where the taxpayer is not subject to tax.

33. With respect to the first test, products shipped through the Ottawa FWH to customers in other states are neither delivered nor shipped to customers in Illinois; nor do customers take possession of the products in Illinois, as the Ottawa FWH is a TFM location, not a location associated with the customer. The Department has not asserted any disagreement with that conclusion.

34. With respect to the second test, sales flowing through the Ottawa FWH are not “shipped from” the Ottawa FWH, they are shipped “through” it. When a TFM plant ships product to a customer through a FWH, that shipment should be considered to be in the uninterrupted stream of commerce until it is delivered to the customer to whom it was destined when it left the plant. As a result, the products should be considered to have been shipped from the respective plants and to have remained in interstate commerce until delivered to the customer outside Illinois.

35. The Ottawa FWH also cannot reasonably be considered “a place of storage” under the regulation. Storage is defined as “non-transitory, semi-permanent or long-term, containment, holding, leaving, or placement of goods or materials, usually with the intention of retrieving

them at a later time. It does not include the interim accumulation of a limited amount during processing, maintenance, or repair.” (See <http://www.businessdictionary.com/definition/storage.html>). This definition bears no resemblance whatsoever to the activity of the Ottawa FWH. Indeed, in all respects the activities at the Ottawa FWH are the opposite of this definition – as they are entirely transitory in nature, and designed not to “store” the products in question but to move them on to their destinations as quickly as possible.

36. The Department contends otherwise, concluding as follows in its ICB Action Decision regarding prior audit periods (which, on information and belief, form the basis for the Department’s assessment during this Audit Period): “No change is warranted to the Tyson Fresh Meats, Inc. (TFM) throwback sales adjustment with respect to sales shipped from the Ottawa Illinois freight forwarding warehouse because under *Filterek, Inc. v. Department of Revenue*, 186 Ill. App. 3d 208, 541 N.E. 2d 1385, any storage, regardless of immediate shipment, was sufficient to meet the statutory requirement of shipment from an Illinois place of storage.” (ICB Action Decision, Exh. B hereto.)

37. The Department’s reliance – much less its singular reliance – upon *Filterek* is misplaced. The facts of *Filterek* are readily distinguishable from TFM’s situation. Indeed, *Filterek* actually supports *Tyson’s* position.

38. In *Filterek*, the taxpayer, Filterek, Inc., purchased products from an affiliate, Filterek de Puerto Rico, which manufactured products in Puerto Rico and delivered them to Filterek, Inc. in Illinois. 186 Ill. App. 3d at 216. Filterek, Inc. then sold those products to out-of-state customers. *Id.* While Filterek attempted to characterize the sales as sales from Puerto Rico to non-Illinois customers that were merely “transshipped” through Illinois, the court specifically held that “the hearing officer’s findings do not support this characterization.” *Id.* Rather, the

court found that “Filterek purchased and held title to the products from Puerto Rico [and] Filterek was also responsible for reselling the product to out-of-State customers and for storing the product until delivery to the customers.” *Id.*

39. By contrast, title to the TFM product at issue did not change hands from the time it left the out-of-state plant until it was delivered to the out-of-state customer. There is also no dispute in this case that the TFM product at issue was merely transshipped through the Ottawa FWH. This is a critical distinction. Indeed, the court in *Filterek* took pains to make clear that the findings of the hearing officer did “not support” the characterization of the *Filterek* sales as having been transshipped through Illinois. 186 Ill. App. 3d at 216. Had the court found Filterek’s characterization to have been accurate – that the sales merely had been transshipped through Illinois – it appears the court would have reached the opposite result. Indeed, there would be no other reason to expressly reject Filterek’s characterization of the facts.

40. Providing further support for this conclusion are the Department’s own letter rulings, and analogous cases that the Department has looked to for guidance from other states adopting the Uniform Division for Income Tax Purposes Act (“UDITPA”). In 2014, the Department issued IT 14-0002 PLR (4/24/2014). There, the taxpayer (Company 3), an out-of-state retailer, sold product to its customer (Company 4) outside the state (indeed, outside the country). *Id.* at 3. Company 4 normally used an affiliate (Company 5) to effectuate shipment. *Id.* Company 5 also acted as a freight forwarder. *Id.* All product that was picked up by Company 5 was destined for delivery outside the country, but all shipments initially were shipped from Company 3’s facilities to Company 5’s facilities in Illinois to be consolidated with other products to be shipped to Company 4 outside the country. *Id.* Occasionally, Company 3 used a third party to ship the product from its facilities to Company 5’s freight forwarding

warehouse in Illinois. *Id.* No modifications, product changes or alterations were made to the product after it left Company 3's facilities. *Id.* Based upon these facts, the Department ruled:

In the instant case, the destination of Company 3's sales to Company 4 is Country. Your letter indicates that all products either picked up by Company 5, or delivered by third party carrier to Company 5 Illinois facilities, are destined for Company 4 or an affiliate's manufacturing facilities in Country. You also represent that neither Company 5 nor another person makes any modifications, product changes, or alterations to the property. Rather, the property is merely stored in Illinois by Company 5 for short periods of time, less than 2 days or perhaps only a few hours, in order to be consolidated with other products to be shipped to Country. Assuming these facts are true, shipment of the property does not terminate in Illinois. The products are shipped to Illinois merely to accommodate further shipping to a predetermined destination in Country, and the taxpayer is not engaged in a warehouse function in Illinois. Accordingly, the sales to TEMA are not sales within this State under the provisions of IITA Section 304(a)(3)(B)(i). See Matter of the Appeal of Mazda Motors of America (Central), Inc., 1994 WL 776168 (Cal. St. Bd. Eq. 1994) and Visiocorp USA, Inc. v. Mich. Dep't of Treas., 2011 WL 1938386 (Mich. Tax Tribunal 2011).

41. The same result should apply here. The shipment of TFM product to non-Illinois customers "does not terminate in Illinois." Rather, TFM's "products are shipped to Illinois merely to accommodate further shipping to a predetermined destination." TFM's products also are destined for delivery out-of-state before they ever enter Illinois, are in Illinois, typically, only "for short periods of time, less than 2 days or perhaps only a few hours, in order to be consolidated with other products to be shipped," to the same customer or geographic area, and no one makes any modifications, product changes, or alterations to the product from the time it leaves the plant to the time it is delivered to the out-of-state customer. As such, TFM – through its use of the Ottawa FWH – similarly "is not engaged in a warehouse function in Illinois," but is engaged in a shipping function in Illinois.

42. The Michigan Tax Tribunal case cited by the Department in the PLR also supports the same result. In *Visiocorp USA, Inc. v. Mich. Dep't of Treas.*, 2011 WL 1938386 (Mich. Tax Tribunal 2011), the Tribunal held:

[T]he Tribunal determines that Petitioner's sales are not in the State of Michigan and are therefore not subject to SBT. First, when Petitioner ships products to the purchaser the shipping is completed in two distinct steps. Initially, Petitioner ships the product to a cross dock facility in Michigan where they are held before shipment to the final destination outside of Michigan. Respondent would like the Tribunal to believe that when the product is first shipped to the cross dock facility the shipment is complete and the sale was therefore in Michigan. However, the product is ultimately shipped to the purchaser, an out-of-state entity. The mere fact that the product is first transported to a cross dock facility in Michigan for consolidation of shipment does not render the sale of the property within Michigan and thus subject to SBT. The sale of the product was made to a purchaser outside of Michigan and the property and was ultimately shipped to the out-of-state purchaser.

43. The United States Supreme Court determined decades ago that when products leave a plant destined for a customer, the shipment is considered to be in transit (interstate commerce) until the property is delivered to the customer, even where those products pause during shipment at a freight warehouse or while awaiting other transportation logistics. *See, e.g., Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 567 (1943); *Dahnke-Walker Co. v. Bondurant*, 257 U.S. 282 (1921); *Joy Oil C. v. State Tax Commission*, 337 U.S. 286, 290-91 (1949).

44. In *Jacksonville Paper Co.*, the question was whether certain forwarding warehouses of Jacksonville Paper Co. were engaged in interstate commerce, and thus subject to the Fair Labor Standards Act. 317 U.S. at 565. The shipments in question originated outside the state, were transhipped through the warehouses in question, and delivered within the State to the customer. *Id.* at 567. The activities of the warehouses were described as follows: "goods were

unloaded from the trucks, brought into the warehouse, checked, reloaded, and sent on to the customer during the same day or as early as was convenient.” *Id.* The Administrator of the Wage and Hour Division of the U.S. Department of Labor urged that “any pause at the warehouse is sufficient to deprive the remainder of the journey of its interstate status.” *Id.* at 567. In rejecting that position, the Court held:

The entry of the goods into the warehouse interrupts but does not necessarily terminate their interstate journey. A temporary pause in their transit does not mean that they are no longer ‘in commerce’ within the meaning of the Act. As in the case of an agency (cf. *De Loach v. Crowley’s Inc.*, 128 F.2d 378) if the halt in the movement of the goods is a convenient intermediate step in the process of getting them to their final destinations, they remain ‘in commerce’ until they reach those points. Then there is a practical continuity of movement of the goods until they reach the customers for whom they are intended. That is sufficient. Any other test would allow formalities to conceal the continuous nature of the interstate transit which constitutes commerce... If there is a practical continuity of movement from the manufacturers or suppliers without the state, through respondent’s warehouse and on to customers whose prior orders or contracts are being filled, the interstate journey is not ended by reason of a temporary holding of the goods at the warehouse. [*Id.*, at 568-69]

45. Each of these authorities supports the conclusion that the Department’s NODs adjusting Tyson’s sales factor for FY 2012 and FY 2013, were in error.

WHEREFORE, Tyson prays this Tribunal to:

(a) find and declare that TFM’s use of the Ottawa FWH does not constitute the shipment of property “from an office, store, warehouse, factory or other place of storage” in Illinois;

(b) direct the Department to adjust Tyson’s Illinois sales factor by subtracting from the numerator \$633,377,450 for FY 2012 and \$600,404,576 for FY 2013;

(c) grant such other relief as is reasonable and proper.

### COUNT III

#### **Application of the Throwback Rule to TFM Violates the Commerce Clause of the United States Constitution.**

46. Tyson incorporates in this Count III the allegations of paragraphs 1-22 and 30-45 of this Petition.

47. A state tax affecting interstate commerce must meet a four-pronged test to survive a commerce clause challenge: (1) the tax must be applied to an activity that has a “substantial nexus” with the taxing state; (2) the tax must be “fairly apportioned” to activities carried on by the taxpayer in the taxing state; (3) the tax must not discriminate against interstate commerce; and (4) the tax must be “fairly related” to services provided by the taxing state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 277–279, 287 (1977).

48. As applied to TFM’s sales shipped through the Ottawa FWH, the Department’s determination that income earned from the sale of products originating from plants outside Illinois and delivered to customers outside Illinois should be thrown back to Illinois merely because those products were consolidated, mid-shipment, at the Ottawa FWH, violates *Complete Auto*’s fair apportionment requirement.

49. In order to meet the fair apportionment prong of *Complete Auto*, the tax must meet both an “internal consistency” and an “external consistency” test. *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983). Under the “internal consistency” test, the tax must not result in multiple taxation if every state were to impose the same tax. Under the “external consistency” test, a state is precluded from taxing value attributable to income earned outside of the state. Put differently, states are precluded from extraterritorial taxation. Here, requiring the entirety of all sales flowing through the Ottawa FWH to be thrown back to Illinois when the production occurred, and the customer was located, outside Illinois would permit

Illinois to tax value that is attributable to activity occurring almost entirely outside its borders.

50. FY 2012 is illustrative. In that year, the taxpayer threw back \$486,809,851 to Illinois based on sales shipped from TFM's Illinois manufacturing facility. However, the Department's assessment that the taxpayer throw back to Illinois all TFM sales from the Ottawa FWH, increased throwback sales by \$633,377,450 – a 130% increase.

51. Thus, as applied here to sales neither originating nor delivered to customers in Illinois, the application of 86 Ill. Adm. Code § 100.3370(c)(1) to require TFM to throw back all sales flowing through the Ottawa FWH is invalid under the Commerce Clause. *See Hans Rees' Sons, Inc. v. North Carolina, ex rel. Maxwell*, 283 U.S. 123, 51 S. Ct. 385 (1931) (holding that “the statutory method, as applied to the appellant's business for the years in question operated unreasonably and arbitrarily, in attributing to North Carolina a percentage of income out of all appropriate proportion to the business transacted by the appellant in that State. In this view, the taxes as laid were beyond the State's authority.”).

WHEREFORE, Tyson prays this Tribunal to:

(a) find and declare that the Department's application of 86 Ill. Adm. Code § 100.3370(c)(1) to require TFM to throw back all sales flowing through the Ottawa FWH is invalid under the Commerce Clause;

(b) direct the Department to adjust Tyson's Illinois sales factor by subtracting from the numerator \$633,377,450 for FY 2012 and \$600,404,576 for FY 2013 ;

(c) grant such other relief as is reasonable and proper.

#### COUNT IV

***In the Alternative, Tyson is Entitled to an Alternate Method of Allocation Pursuant to IITA Section 304(f).***

52. Tyson incorporates in this Count IV the factual allegations of paragraphs 1-22 and 30-51 of this Petition.

53. In the alternative to the relief sought in Counts II and III, Tyson is entitled,

pursuant to IITA Section 304(f), to an alternate method of allocation of its business income in order to achieve an equitable apportionment thereof.

54. Under the Department's regulations, "IITA Section 304(f) provides that if the allocation and apportionment provisions of subsections (a) through (e) do not fairly represent the extent of a person's business activity in this State, the person's may petition for or the Director of Revenue may require, in respect of all or any part of the person's business activity, if reasonable: (1) separate accounting; (2) the exclusion of any one or more factors; (3) the inclusion of one or more additional factors which will fairly represent the person's business activities in this State; or (4) the employment of any other method to effectuate an equitable allocation and apportionment of the person's business income." 86 Ill. Adm. Code, § 100.3390(a).

55. As above, Tyson's apportionment calculations as filed with the Department for FY 2012, for example, demonstrate that throwing back sales from the Ottawa FWH results in more the doubling TFM's throwback sales for the year, leading to a significant increase in the taxpayer's sales factor.

56. Such a result is distortive. An alternative methodology, specific to allocating Illinois throwback sales related to the transactions traveling through the Ottawa FWH should be applied. An allocation providing for throwback based on the plant from which the products were originally shipped would more fairly and equitably reflect the business conducted in Illinois.

WHEREFORE, Tyson prays this Tribunal to:

(a) find and declare, pursuant to IITA Section 304(f), that the allocation and apportionment provisions of subsections (a) through (e) as applied by the Department to TFM's sales flowing through the Ottawa FWH do not fairly represent the extent of TFM's business activity in Illinois;

(b) find and declare that that the Department should apply an alternative allocation with respect to sales flowing through the Ottawa FWH applying throwback based on the plant from which the products were originally shipped;

(c) direct the Department to adjust Tyson's Illinois sales factor by subtracting from the numerator \$633,377,450 for FY 2012 and \$600,404,576 for FY 2013;

(d) grant such other relief as is reasonable and proper.

## COUNT V

### ***In the Alternative, the Penalties and Amnesty Interest Assessed Against Tyson Should Be Abated.***

57. Tyson incorporates in this Count V the allegations of paragraphs 1-56 of this Petition.

58. For the reasons articulated in Counts I-IV, the Department should withdraw those portions of its NOD's to Tyson based upon its erroneous findings that TSD had nexus in Illinois and that TFM's sales flowing through the Ottawa FWH should be thrown back to Illinois. If, however, TSD is determined by this Tribunal to have nexus in Illinois, Tyson pleads in the alternative that – for all of the reasons set forth in Counts I-IV above – it had more than a reasonable basis for excluding TSD's sales to Illinois customers from the numerator of its Illinois sales factor. Similarly, if TFM's sales flowing through the Ottawa FWH are determined to have shipped from a place of storage in Illinois, Tyson pleads in the alternative that – for all of the reasons set forth in Counts I-IV above – it had more than a reasonable basis for determining that sales flowing through TFM's Ottawa FWH should not be thrown back to Illinois. Accordingly, Tyson is entitled to abatement of the late-payment penalties and amnesty interest assessed by the Department.

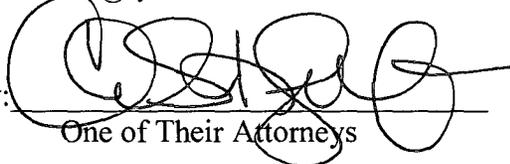
59. Section 3-8 of the Uniform Penalty and Interest Act (35 ILCS 735/3-8), entitled "No penalties if reasonable cause exists," provides in relevant part that: "The penalties imposed under the provisions of Sections 3-3, 3-4, 3-5, and 3-7.5 of this Act shall not apply if the taxpayer shows that his failure to file a return or pay tax at the required time was due to

reasonable cause. Reasonable cause shall be determined in each situation in accordance with the rules and regulations promulgated by the Department.” While not specifically included in 35 ILCS 735/3-8, amnesty interest (i.e., the doubling of the otherwise appropriate interest rate) is effectively an additional penalty upon Tyson, which is in excess of the cost of the use of funds and thus not properly characterized as “interest.”

60. For the reasons set forth in Counts I-IV, Tyson had *at a minimum* reasonable cause to believe that it was properly excluding TSD’s sales to Illinois customers from its Illinois sales factor, and that sales flowing through TFM’s Ottawa FWH should not be thrown back to Illinois. If it is ultimately determined that TSD’s and TFM’s income tax reporting was erroneous, however, Tyson should not be made to pay late-payment penalties or amnesty interest with respect thereto.

**TYSON FOODS, INC. &  
SUBSIDIARIES**

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Chicago, IL 60603  
Telephone: 312-853-7000  
Facsimile: 312-853-7036  
sheyman@sidley.com  
cschafer@sidley.com

**EXHIBIT LIST**

<b><u>Ex. #</u></b>	<b><u>Description</u></b>
<b>A</b>	Notices of Deficiency for Fiscal Years 2012 and 2013
<b>B</b>	January 14, 2015 ICB Action Decision

**Notice of Deficiency**  
**for Form IL-1120, Corporation Income and Replacement Tax Return**



February 9, 2016



**Letter ID:** CNXXX17261423520

#BWNKMGV  
#CNXX X172 6142 3520#  
TYSON FOODS INC & SUB  
ATTN: MARK B ELSER/CP131  
PO BOX 2020  
SPRINGDALE AR 72765-2020

**Taxpayer ID:** 71-0225165  
**Audit ID:** A602267648  
**Reporting period:** September 2012  
**Total Deficiency:** \$2,738,175.81  
**Balance due:** \$2,738,175.81

We have audited your account for the reporting period listed above. The attached statement explains the computation of your deficiency and the balance due. **Illinois law requires that we notify you of this deficiency and your rights.**

**If you agree to this deficiency**, pay the total balance due as soon as possible to minimize penalty and interest assessed. Make your check payable to the "Illinois Department of Revenue", write your taxpayer ID on your check, and mail a copy of this notice along with your payment.

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

- **If the amount of this tax deficiency, exclusive of penalty and interest is more than \$15,000, or if no tax deficiency 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**, file a protest with us, the Illinois Department of Revenue, within **60 days** of the date of this notice. If you file a protest on time, we must reconsider the proposed deficiency, and if requested, grant you or your authorized representative and administrative hearing. 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. Submit your protest on Form EAR-14, Format for Filing a Protest for Income Tax, (available on our website at [tax.illinois.gov](http://tax.illinois.gov)). If we do not receive your protest within **60 days**, this deficiency will become final. A protest of this notice does not preserve your rights under any other notice.
- **In any case**, 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](http://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.

If you have questions, call us at the telephone number shown below.

Sincerely,

Constance Beard  
Director

ILLINOIS DEPARTMENT OF REVENUE  
AUDIT BUREAU  
PO BOX 19012  
SPRINGFIELD IL 62794-9012

(217) 785-6711

cc: Tyson Foods Inc & Sub  
4201 S Ashland Ave  
Chicago IL 60609-2305

---

## **Bankruptcy Information**

If you are currently under the protection of the Federal Bankruptcy Court, contact us and provide the bankruptcy number and the bankruptcy court. The bankruptcy automatic stay does not change the fact you are required to file tax returns.

## **Taxpayer Bill of Rights**

- You have the right to call the Department of Revenue for help in resolving tax problems.
- You have the right to privacy and confidentiality under most tax laws.
- You have the right to respond, within specified time periods, to Department notices by asking questions, paying the amount due, or providing proof to refute the Department's findings.
- You have the right to appeal Department decisions, in many instances, within specified time periods, by asking for Department review, by filing a petition with the Illinois Independent Tax Tribunal, or by filing a complaint in circuit court.
- If you have overpaid your taxes, you have the right, within specified time periods, to file for a credit (or, in some cases, a refund) of that overpayment.

The full text of the Taxpayers' Bill of Rights is contained in the Illinois Compiled Statutes, 20 ILCS 2520/1 et seq.

## Statement

Date: February 9, 2016  
Name: TYSON FOODS INC & SUB  
Taxpayer ID: 71-0225165  
Letter ID: CNXXX17261423520

The attached EDA-27, Explanation of Adjustments, details your audit adjustments.

### Computation of deficiency

Reporting period: 30-Sep-2012

Income or loss	
Federal taxable income	\$601,469,533.00
Net operating loss deduction	\$0.00
Income tax and replacement tax deduction	\$2,645,585.00
Illinois bonus depreciation addition	\$184,708,034.00
Related party expenses additions	\$104,993,244.00
Other additions	\$0.00
Base income or loss	
Foreign dividends subtraction	\$4,073,790.00
Illinois bonus depreciation subtraction	\$122,352,416.00
Related party expenses subtraction	\$89,309,985.00
Other subtractions	\$11,188,426.00
Total subtractions	\$226,924,617.00
Base income or net loss	\$666,891,779.00
Income allocable to Illinois	
Non-business income or loss	\$0.00
Non-unitary partnership bus. income or loss	-\$5,388,683.00
Business income or loss	\$672,280,462.00
Apportionment formula	
Total sales everywhere	\$32,082,388,572.00
Total Illinois sales	\$2,979,016,928.00
Apportionment factor	0.092856
Business income/loss apportionable to IL	\$62,425,275.00
Nonbusiness income/loss allocable to IL	\$0.00
Non-unitary part. business income app. to IL	\$0.00
Base income or net loss allocable to IL	\$62,425,275.00
Net income	
Base income or net loss	\$62,425,275.00
IL net loss deduction (NLD)	\$0.00
Net income	\$62,425,275.00
Net replacement tax	
Replacement tax	\$1,560,632.00
Recapture of investment credits	\$0.00
Replacement tax before credits	\$1,560,632.00
Replacement tax investment credits	\$0.00
Net replacement tax	\$1,560,632.00

## Statement

Date: February 9, 2016  
Name: TYSON FOODS INC & SUB  
Taxpayer ID: 71-0225165  
Letter ID: CNXXX17261423520

### Computation of deficiency

Reporting period: 30-Sep-2012

Net income tax	
Income tax	\$4,369,769.00
Recapture of investment credits	\$0.00
Income tax before credits	\$4,369,769.00
Income tax investment credits	\$7,150.00
Net income tax	\$4,362,619.00
Refund or balance due	
Net replacement tax	\$1,560,632.00
Net income tax	\$4,362,619.00
Total net income and replacement tax due	\$5,923,251.00
Minus tax previously assessed	-\$3,757,919.00
Total tax deficiency	\$2,165,332.00
Plus late-filing penalty	\$250.00
UPIA-5 late-payment penalty (Audit)	\$433,066.40
Plus interest on tax through February 9, 2016	\$139,527.41
Total deficiency	* \$2,738,175.81
If you intend to pay under protest, you must pay this total deficiency amount.	

### Computation of balance due

Reporting period: 30-Sep-2012

Balance due	* \$2,738,175.81
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# Explanation of Audit Adjustments

## Income Tax



February 9, 2016

#BWNKMGV  
#CNXX X156 64X7 44X9#  
TYSON FOODS INC & SUB  
ATTN: MARK B ELSE/CP131  
PO BOX 2020  
SPRINGDALE AR 72765-2020



Letter ID: CNXXX15664X744X9

Taxpayer ID: 71-0225165

Account ID: 04705-77920

Audit ID: A602267648

Reporting period: September 2012

### Explanation of adjustments for tax period ending 09/30/2012

	<u>Income change</u>	<u>Tax impact</u>
We adjusted your addition modifications to reflect the correct addback of the federal bonus depreciation, or the correct reversal of the Illinois depreciation for bonus depreciation assets in the last year you are allowed a federal depreciation deduction, as required to be shown on the Form IL-4562. [35 ILCS 5/203(b)(2)(E-10), (b)(2)(E-11), (c)(2)(G-10), (c)(2)(G-11), (d)(2)(D-5), (d)(2)(D-6)]	\$47,360,217.00	\$97,440.00
We adjusted your subtraction modifications for foreign dividends on Schedule J, Foreign Dividends, to reflect the correct amount as allowed by Illinois law. [35 ILCS 5/203(b)(2)(G), (b)(2)(O), (h)]	-\$465,032.00	\$9,744.00
We adjusted your subtraction modifications to reflect the correct amount of Illinois depreciation related to bonus depreciation, assets, and the reversal of the bonus depreciation addback for an asset in the last year you are allowed a federal depreciation deduction for that asset, as required to be shown on Form IL-4562. [35 ILCS 5/203(b)(2)(T), (c)(2)(R), (d)(2)(O)]	\$22,328,299.00	-\$46,425.00
We adjusted your sales by including in the numerator sales of tangible personal property originating in Illinois and delivered to customers in states in which you are not taxable. [86 IL Adm. Code 100.3370(c)(1)(F); 86 IL Adm. Code 100.3200]	\$633,377,450.00	\$1,312,154.00
We adjusted your sales factor to exclude royalties since the gross receipts from license, sale, etc., from patents did not exceed 50% of total receipts. [35 ILCS 5/304(a)(3)(B-2)]	-\$2,899,128.00	\$6,020.00
We adjusted your sales factor to include in the numerator the Illinois destination sales of those companies in your unitary business group with Illinois nexus. [Public Law 86-272]	\$379,595,353.00	\$786,399.00
Interest on tax has been computed as allowed by Illinois law. [35ILCS 735/3-2]		
We are imposing a late-filing or nonfiling penalty because you did not file a processable return by the due date (including any extensions). This penalty is figured at the rate of 2 percent of the amount of tax required to be shown due on your return, after subtracting any payments made or credits allowed by the due date of the return. This penalty cannot exceed \$250. [35 ILCS 735/3-3(a-10)]		
We are imposing a penalty because you did not pay the amount shown due on the Form IL-870, Waiver of Restrictions, within 30 days after the "Date of Issuance" shown on the form. Once an audit has been initiated, the late payment penalty is assessed at 15% of the late payment. Failure to pay the amount due or invoke protest rights within 30 days from the "Date of Issuance" on the Form IL-870, results in this penalty increasing to 20%. [35 ILCS 735/3-3(b-20)(2)]		





**Notice of Deficiency**  
**for Form IL-1120, Corporation Income and Replacement Tax Return**



February 9, 2016



**Letter ID:** CNXXXX85523624X7

#BWNKMGV  
#CNXX XX85 5236 24X7#  
TYSON FOODS INC & SUB  
ATTN: MARK B ELSER/CP131  
PO BOX 2020  
SPRINGDALE AR 72765-2020

**Taxpayer ID:** 71-0225165  
**Audit ID:** A602267648  
**Reporting period:** September 2013  
**Total Deficiency:** \$4,251,320.84  
**Balance due:** \$4,251,320.84

We have audited your account for the reporting period listed above. The attached statement explains the computation of your deficiency and the balance due. **Illinois law requires that we notify you of this deficiency and your rights.**

**If you agree to this deficiency**, pay the total balance due as soon as possible to minimize penalty and interest assessed. Make your check payable to the "Illinois Department of Revenue", write your taxpayer ID on your check, and mail a copy of this notice along with your payment.

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- **In all other cases**, file a protest with us, the Illinois Department of Revenue, within **60 days** of the date of this notice. If you file a protest on time, we must reconsider the proposed deficiency, and if requested, grant you or your authorized representative and administrative hearing. 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. Submit your protest on Form EAR-14, Format for Filing a Protest for Income Tax, (available on our website at [tax.illinois.gov](http://tax.illinois.gov)). If we do not receive your protest within **60 days**, this deficiency will become final. A protest of this notice does not preserve your rights under any other notice.
- **In any case**, 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](http://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.

If you have questions, call us at the telephone number shown below.

Sincerely,

Constance Beard  
Director

ILLINOIS DEPARTMENT OF REVENUE  
AUDIT BUREAU  
PO BOX 19012  
SPRINGFIELD IL 62794-9012

(217) 785-6711

cc: Tyson Foods Inc & Sub  
4201 S Ashland Ave  
Chicago IL 60609-2305

## **Bankruptcy Information**

If you are currently under the protection of the Federal Bankruptcy Court, contact us and provide the bankruptcy number and the bankruptcy court. The bankruptcy automatic stay does not change the fact you are required to file tax returns.

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- You have the right to call the Department of Revenue for help in resolving tax problems.
- You have the right to privacy and confidentiality under most tax laws.
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- You have the right to appeal Department decisions, in many instances, within specified time periods, by asking for Department review, by filing a petition with the Illinois Independent Tax Tribunal, or by filing a complaint in circuit court.
- If you have overpaid your taxes, you have the right, within specified time periods, to file for a credit (or, in some cases, a refund) of that overpayment.

The full text of the Taxpayers' Bill of Rights is contained in the Illinois Compiled Statutes, 20 ILCS 2520/1 et seq.

# Statement

Date: February 9, 2016  
Name: TYSON FOODS INC & SUB  
Taxpayer ID: 71-0225165  
Letter ID: CNXXXX85523624X7

The attached EDA-27, Explanation of Adjustments, details your audit adjustments.

## Computation of deficiency

Reporting period: 30-Sep-2013

Income or loss	
Federal taxable income	\$1,061,421,796.00
Net operating loss deduction	\$0.00
Income tax and replacement tax deduction	\$7,151,979.00
Illinois bonus depreciation addition	\$196,052,728.00
Related party expenses additions	\$110,074,944.00
Other additions	\$0.00
Base income or loss	
Foreign dividends subtraction	\$4,662,649.00
Illinois bonus depreciation subtraction	\$106,442,557.00
Related party expenses subtraction	\$81,568,305.00
Other subtractions	\$14,333,046.00
Total subtractions	\$207,006,557.00
Base income or net loss	\$1,167,694,890.00
Income allocable to Illinois	
Non-business income or loss	\$0.00
Non-unitary partnership bus. income or loss	\$1,579,005.00
Business income or loss	\$1,166,115,885.00
Apportionment formula	
Total sales everywhere	\$32,905,277,430.00
Total Illinois sales	\$3,087,323,374.00
Apportionment factor	0.093825
Business income/loss apportionable to IL	\$109,410,823.00
Nonbusiness income/loss allocable to IL	\$0.00
Non-unitary part. business income app. to IL	\$0.00
Base income or net loss allocable to IL	\$109,410,823.00
Net income	
Base income or net loss	\$109,410,823.00
IL net loss deduction (NLD)	\$0.00
Net income	\$109,410,823.00
Net replacement tax	
Replacement tax	\$2,735,271.00
Recapture of investment credits	\$0.00
Replacement tax before credits	\$2,735,271.00
Replacement tax investment credits	\$0.00
Net replacement tax	\$2,735,271.00

# Statement

Date: February 9, 2016  
Name: TYSON FOODS INC & SUB  
Taxpayer ID: 71-0225165  
Letter ID: CNXXXX85523624X7

## Computation of deficiency

Reporting period: 30-Sep-2013

Net income tax	
Income tax	\$7,658,758.00
Recapture of investment credits	\$0.00
Income tax before credits	\$7,658,758.00
Income tax investment credits	\$7,380.00
Net income tax	\$7,651,378.00
Refund or balance due	
Net replacement tax	\$2,735,271.00
Net income tax	\$7,651,378.00
Total net income and replacement tax due	\$10,386,649.00
Minus tax previously assessed	-\$7,021,560.00
Total tax deficiency	\$3,365,089.00
Plus late-filing penalty	\$250.00
UPIA-5 late-payment penalty (Audit)	\$673,017.80
Plus interest on tax through February 9, 2016	\$212,964.04
Total deficiency	* \$4,251,320.84
If you intend to pay under protest, you must pay this total deficiency amount.	

## Computation of balance due

Reporting period: 30-Sep-2013

Balance due	* \$4,251,320.84
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# Explanation of Audit Adjustments

## Income Tax



February 9, 2016

#BWNKMGV  
#CNXX XX97 4574 2247#  
TYSON FOODS INC & SUB  
ATTN: MARK B ELSER/CP131  
PO BOX 2020  
SPRINGDALE AR 72765-2020



Letter ID: CNXXXX9745742247

Taxpayer ID: 71-0225165  
Account ID: 04705-77920  
Audit ID: A602267648  
Reporting period: September 2013

<u>Explanation of adjustments for tax period ending 09/30/2013</u>	<u>Income change</u>	<u>Tax impact</u>
We adjusted your addition modifications to reflect the correct addback of the federal bonus depreciation, or the correct reversal of the Illinois depreciation for bonus depreciation assets in the last year you are allowed a federal depreciation deduction, as required to be shown on the Form IL-4562. [35 ILCS 5/203(b)(2)(E-10), (b)(2)(E-11), (c)(2)(G-10), (c)(2)(G-11), (d)(2)(D-5), (d)(2)(D-6)]	\$10,637,090.00	\$33,651.00
We adjusted your subtraction modifications for foreign dividends on Schedule J, Foreign Dividends, to reflect the correct amount as allowed by Illinois law. [35 ILCS 5/203(b)(2)(G), (b)(2)(O), (h)]	-\$425,979.00	\$14,470.00
We adjusted your subtraction modifications to reflect the correct amount of Illinois depreciation related to bonus depreciation, assets, and the reversal of the bonus depreciation addback for an asset in the last year you are allowed a federal depreciation deduction for that asset, as required to be shown on Form IL-4562. [35 ILCS 5/203(b)(2)(T), (c)(2)(R), (d)(2)(O)]	\$10,639,796.00	-\$35,670.00
We adjusted your sales by including in the numerator sales of tangible personal property originating in Illinois and delivered to customers in states in which you are not taxable. [86 IL Adm. Code 100.3370(c)(1)(F); 86 IL Adm. Code 100.3200]	\$600,404,576.00	\$1,997,282.00
We adjusted your sales factor to exclude royalties since the gross receipts from license, sale, etc., from patents did not exceed 50% of total receipts. [35 ILCS 5/304(a)(3)(B-2)]	-\$932,066.00	\$30,286.00
We adjusted your sales factor to include in the numerator the Illinois destination sales of those companies in your unitary business group with Illinois nexus. [Public Law 86-272]	\$398,330,531.00	\$1,325,070.00
Interest on tax has been computed as allowed by Illinois law. [35ILCS 735/3-2]		
We are imposing a late-filing or nonfiling penalty because you did not file a processable return by the due date (including any extensions). This penalty is figured at the rate of 2 percent of the amount of tax required to be shown due on your return, after subtracting any payments made or credits allowed by the due date of the return. This penalty cannot exceed \$250. [35 ILCS 735/3-3(a-10)]		
We are imposing a penalty because you did not pay the amount shown due on the Form IL-870, Waiver of Restrictions, within 30 days after the "Date of Issuance" shown on the form. Once an audit has been initiated, the late payment penalty is assessed at 15% of the late payment. Failure to pay the amount due or invoke protest rights within 30 days from the "Date of Issuance" on the Form IL-870, results in this penalty increasing to 20%. [35 ILCS 735/3-3(b-20)(2)]		





**Illinois Department of Revenue**

Informal Conference Board  
Louise Calvert, Administrator  
100 West Randolph Street, 7-286  
Chicago, Illinois 60601  
Phone: 312 814-1722  
Fax: 312-814-3109

**RE: TAXPAYER: Tyson Foods Inc. and Subs**  
**DOCKET NO.: 12-0328**  
**TAXPAYER ID: 71-0225165**  
**AUDIT ID: A622795392**  
**TAX YEARS: 9/05-9/07**

**TAXPAYER: Tyson Foods Inc. and Subs**  
**DOCKET NO.: 12-0423**  
**TAXPAYER ID: 71-0225165**  
**AUDIT ID: A1212963456**  
**TAX YEARS: 9/08-9/09**

**ACTION DECISION**

The Informal Conference Board has reviewed the Illinois Department of Revenue Audit Bureau's proposed adjustments in this matter and, based upon information supplied during the review process, finds that some of the proposed adjustments should be revised. No change is to be made to the remaining proposed adjustments.

The Audit Bureau is instructed to make the following adjustments:

- A. Exclude Kentucky sales from the proposed throwback sales adjustment for Tyson Hog Markets, Inc.
- B. Revise the proposed bonus depreciation adjustment to reflect the corrected adjustment shown on the revised workpapers provided to the taxpayer on 11/5/13, and to which the Taxpayer has agreed.
- C. Exclude Carneco Foods LLC from the taxpayer's unitary business group since there is insufficient information to establish the exercise of centralized management of the partnership.

Tyson Sales & Distribution, Inc. (TSD) has Illinois nexus since there are sufficient activities in Illinois which are not protected by P.L. 86-272.

No change is warranted to the Tyson Hog Markets, Inc. (THM) throwback sales adjustment with respect to sales to Wisconsin since the Taxpayer did not provide any documentation on this issue.

No change is warranted to the Tyson Fresh Meats, Inc. (TFM) throwback sales adjustment with respect to sales shipped from the Ottawa Illinois freight forwarding warehouse because under *Filterek, Inc. v. Department of Revenue*, 186 Ill. App. 3d 208,

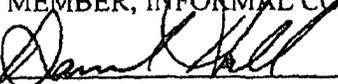
541 N.E. 2d 1385, any storage, regardless of immediate shipment, was sufficient to meet the statutory requirement of shipment from an Illinois place of storage.

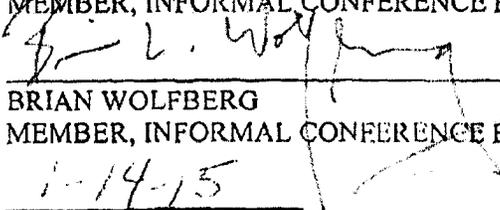
The Audit Bureau is instructed to conclude and process the audit in a manner consistent with this decision.

Taxpayer Request for Audit Adjustments is Granted in Part.

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GAIL A. NIEMANN  
MEMBER, INFORMAL CONFERENCE BOARD

  
DAN HALL  
MEMBER, INFORMAL CONFERENCE BOARD

  
BRIAN WOLFBERG  
MEMBER, INFORMAL CONFERENCE BOARD

1-14-15  
DATE ENTERED