

**ILLINOIS INDEPENDENT
TAX TRIBUNAL**

PAUL M. CALDERONE,)	
 Petitioner)	
)	
 V)	No. 16 TT 116
ILLINOIS DEPARTMENT)	Judge Brian F. Barov
OF REVENUE,)	
 Respondent)	
)	

ANSWER

Now comes the Department of Revenue of the State of Illinois (“the Department”) by and through its attorney, Lisa Madigan, Attorney General of the State of Illinois, and for its Answer to Taxpayer’s Petition states as follows:

1. The Notice provides that the Department has determined the Petitioner is personally liable for the penalty imposed under Section 3-7 of the Illinois Uniform Penalty and Interest Act (35 ILCS 735/3-7), and has assessed a penalty against the Petitioner in the amount of \$477, 065.08 for the Monthly taxable periods ending June 30, 2009, December 31, 2009, June 30, 2012, and the seven consecutive monthly taxable periods ending April 30, 2015 through October 31, 2015, inclusive. A copy of the Notice is attached hereto and marked as Exhibit A. A list of the aforementioned ten monthly taxable periods at issue in this case also appears on the second page of the attached Notice (the "Notice Periods"). The Illinois Uniform Penalty and Interest Act (35 ILCS 735/3-1, et. seq.) is hereinafter referred to and cited as the "IUPIA."

ANSWER: The Department admits that a copy of the Notice was attached to the Petition as Exhibit

A. The Department states that the Notice speaks for itself and therefore denies the remaining allegations in paragraph 1 of the petition.

2. The Petitioner is an individual who resides at 214 S. Maple Lane, Prospect Heights, Illinois 60070-2536. The Petitioner's telephone number is (847) 712-3434. The NPL Penalty ID referenced in the Notice is 2520361.

ANSWER: The Department admits the allegations in paragraph 2 of the petition.

3. The taxpayer-corporation whose liability to the Department for additional sales taxes (and penalty and interest thereon) is the basis for the Department's assessment against the Petitioner under Section 3-7 of the IUPIA is LA WREL LIQUORS, INC., an Illinois corporation ("Lawrel"). Lawrel formerly operated a bar and liquor store located at 4471 W. Lawrence Avenue, in Chicago, Illinois. Lawrel, which no longer conducts any business operations, is presently insolvent and has been involuntarily dissolved by the Office of the Illinois Secretary of State. Lawrel's federal employer identification number is 36-4283938 and Lawrel's Illinois taxpayer account number is 3001-7785.

ANSWER: The Department admits the allegations in paragraph 3 of the petition.

4. The additional sales taxes (and penalty and interest thereon) assessed against Lawrel that are the basis for the Department's Penalty assessment against the Petitioner were determined by the Department after it conducted an audit of the Illinois Sales and Use Tax Returns (Illinois Department of Revenue Form ST-1) filed by Lawrel for the Notice Periods (individually referred to as "Sales Tax Return" and collectively referred to as "Sales Tax Returns").

ANSWER: The Department admits that most, but that not all of the additional sales taxes (and penalty and interest thereon) assessed against Lawrel that are the basis for the Department's Penalty assessment against the Petitioner were determined by the Department after it conducted an audit of

the Illinois Sales and Use Tax Returns filed by Lawrel for the Notice Periods. The Department denies the remaining allegations in paragraph 4 of the petition.

5. Lawrel was incorporated on March 3, 1998, but did not formally commence operating the aforementioned bar and liquor store until on or about October 1, 2000.

ANSWER: The Department lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 5 of the petition and therefore neither admits or denies said allegations.

6. During the Notice Periods: (a) the two Shareholders of Lawrel were Michael Calderone, of Grayslake, Illinois ("Michael"), who owned 75% of Lawrel's issued and outstanding capital stock, and the Petitioner, who owned 25% of Lawrel's issued and outstanding capital stock; (b) the two Directors of Lawrel were Michael and the Petitioner; (c) the Officers of Lawrel were Michael, who served as President, and the Petitioner, who served as Secretary; and (d) Michael served as Lawrel's Registered Agent (both during the Notice Periods and since the date of incorporation).

ANSWER: The Department lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 6 of the petition and therefore neither admits or denies said allegations.

7. A complete copy of Lawrel's Corporate Record Book, containing the Certificate and Articles of Incorporation, the By-Laws, the: Stock Certificates, the Minutes of the Initial Meetings of Shareholders and Directors (dated March 3, 1998), and the Minutes of the Annual Meetings of Shareholders and Directors (dated March 4, 1999), is attached hereto and marked as Exhibit B. No Minutes of the Annual Meetings of Shareholders and Directors were found to exist subsequent to the Minutes of the Annual Meetings of Shareholders and Directors, dated March 4, 1999, because the Shareholders and the Directors of Lawrel did not hold any such meetings after that date.

ANSWER: The Department lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 7 of the petition and therefore neither admits or denies said allegations.

8. A complete copy of the Domestic Corporation Annual Report ("Corporation Annual Report") filed by Lawrel with the Office of the Illinois Secretary of State for each of the years 2001 through 2016, inclusive, is attached hereto and marked as Exhibit C. Each Corporation Annual Report indicates that Michael was the President of Lawrel and the Petitioner was the Secretary of Lawrel. The Office of the Illinois Secretary of State rejected Lawrel's filing of the 2016 Corporation Annual Report due to the Respondent's assessment of additional sales taxes (and penalty and interest thereon) against Lawrel.

ANSWER: The Department states that the referenced documents speak for themselves and therefore deny the Petitioner's description thereof. The Department lacks knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in paragraph 8 of the petition and therefore neither admits or denies said allegations.

9. A copy of the Illinois Department of Revenue Form EFT-1, Authorization Agreement for Certain Electronic Payments, which Lawrel filed with the Respondent by facsimile on November 30, 2011 (the "Authorization Agreement"), is attached hereto and marked as Exhibit D. In Step 3 of the Authorization Agreement, Michael is listed as the "Designated Agent or Contact Person." The Instructions for the Authorization Agreement (see page 2 of the Form EFT-1) provide that a "Designated Agent or Contact Person" is the person who "will be transferring payments" or "the person who will be initiating and making the payment transfer."

ANSWER: The copy of the document attached to the Petition as Exhibit D appears on its face not to be a true and complete copy of the Form EFT-1 which Lawrel filed with Respondent in that various signature lines are blank. The Department therefore denies that said copy is a true and accurate copy of the EFT-1

filed with the Department. The Department further states that the document speaks for itself and therefore denies the Petitioner's description and characterization thereof.

10. During the Notice Periods, Michael, in his capacity as President of Lawrel, regularly performed the following duties: (a) he ran the day-to-day operations of the business; (b) he was an authorized signer on Lawrel's checking account and paid all of Lawrel's bills and expenses; (c) he signed and filed all Sales Tax Returns and signed all Lawrel checks remitted to the Respondent in payment of Lawrel's sales tax liabilities; (d) he signed and filed all federal and Illinois payroll tax returns and signed all Lawrel checks remitted to the Internal Revenue Service and the Respondent in payment of Lawrel's federal and Illinois payroll tax liabilities; and (e) he signed and filed all federal and Illinois income tax returns and signed all Lawrel checks remitted to the Internal Revenue Service and the Respondent in payment of Lawrel's federal and Illinois income tax liabilities.

ANSWER: The Department lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 10 of the petition and therefore neither admits or denies said allegations.

11. The following facts describe: the Petitioner's relationship with Lawrel both during the Notice Periods and since Lawrel's date of incorporation: (a) the Petitioner performed no management functions for Lawrel and had no duties related to the day-to-day operations of Lawrel's business; (b) the Petitioner was not *at any time* an authorized signer on Lawrel's checking account and, in fact, he never signed a check drawn on any checking account of Lawrel; (c) the Petitioner never paid any of Lawrel's bills or expenses; (d) the Petitioner never signed or filed any of Lawrel's Sales Tax Returns and never prepared or signed any Lawrel checks remitted to the Respondent in payment of Lawrel's sales tax liabilities; (e) the Petitioner never signed or filed any of Lawrel's federal or Illinois payroll tax returns and never prepared or signed any Lawrel checks remitted to the Internal Revenue Service or the Respondent in payment of Lawrel's federal or Illinois payroll tax liabilities; (f) the Petitioner never signed or filed any of Lawrel's federal or Illinois income tax returns and never prepared or

signed any Lawrel checks remitted to the Internal Revenue Service or the Respondent in payment of Lawrel's federal or Illinois income tax liabilities; (g) the Petitioner's employment relationship with Lawrel was limited to working approximately one-half day (or about six hours) per week, mainly performing clerical duties, such as unloading delivery trucks, stocking store shelves, and other similar tasks (Lawrel paid the Petitioner a modest hourly rate for such services and reported such income payments to the Petitioner on Internal Revenue Service Form W-2); (h) as Secretary of Lawrel, the Petitioner had no authority to pay any of Lawrel's bills or expenses or to sign or file any Of Lawrel's Sales Tax Returns or to pay any of Lawrel's sales tax liabilities (see Article IV, Section 7 of Lawler's By-Laws, attached hereto and marked as Exhibit B); and (i) due to his limited role in the business activities of Lawrel, the Petitioner never discussed Lawrel's financial condition or tax filing and payment status with either Michael or Lawrel's Accountant.

ANSWER: The Department lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 11 of the petition and therefore neither admits or denies said allegations.

12. According to the Affidavit in Support of Petition filed by Paul M. Calderon in the Illinois Independent Tax Tribunal (the "Accountant's Affidavit"), executed by Anthony F. Angelico, Lawrel's Independent Accountant ("Lawrell's Accountant"), which is attached hereto and ~marked as Exhibit E, Lawrel's Accountant dealt only with Michael in connection with the preparation and filing of Lawrel's sales, payroll, and income tax returns. According to the Accountant's Affidavit, this is true not only during the Notice Periods, but also since Lawrel's commencement of business operations on October 1, 2000.

ANSWER: The Department states that the subject affidavit speaks for itself and therefore denies the allegations in paragraph 12 of the petition.

13. Section 3-7 of the IUPIA provides, in pertinent part, as follows:

Any officer or employee of any taxpayer subject to the provisions of a tax Act administered by the Department who has the control, supervision or responsibility of filing returns and making payment of the amount of any trust tax imposed in accordance with that Act and who wilfully fails to file the return or make the payment to the Department or wilfully attempts in any other manner to evade or defeat the tax shall be personally liable for a penalty equal to the total amount of tax unpaid by the taxpayer including interest and penalties thereon.

35 ILCS 735/3-7(a).

ANSWER: The allegations in paragraph 13 of the petition consist primarily of legal conclusions and are therefore denied.

14. Liability under Section 3-7(a) of the IUPIA is "derivative in nature" and arises "[o]nly where the corporation has incurred retailers' occupation tax liability and is unable to pay such amounts to the Department of Revenue" *McLean v. Dept. of Revenue*, 326 Ill. App. 3d 667, 673-74 (1st Dist. 2001). "Personal liability ... which survives dissolution of the corporation, may be imposed only upon corporate officers or employees who are responsible for the filing of retailers' occupation tax returns and payment of taxes due, and who have 'wilfully' failed to file such returns or remit such taxes." *Id.* at 674. Issuance of the Notice of Penalty Liability by the Respondent creates a rebuttable presumption that the person named in such Notice of Penalty Liability is a "responsible person" who "wilfully failed to pay the amount of taxes due." IUPIA Sec. 3-7(a); *Branson v. Dept. of Revenue*, 168 Ill. 2d 247, 262-63 (1995). The presumption is rebuttable where such person provides "sufficient evidence to disprove" that he is either not a "responsible person" or did not wilfully fail "to file returns and pay taxes." *Branson v. Dept. of Revenue*, at 262.

ANSWER: The allegations in paragraph 14 of the petition consist primarily of legal conclusions and are therefore denied.

15. In *Mclean v. Dept. of Revenue*, the Court held that the defendant, who was a majority shareholder and the Chairman of the corporation's Board of Directors, was nevertheless not a "responsible party" during the tax periods in which he was not involved in the corporation's day-to-day business decisions, rarely visited the corporation's business premises, and signed only two corporate checks. However, with respect to later tax periods, the Court held that the defendant was a "responsible party" because he had become significantly involved in the corporation's day-to-day business activities. *Id.* at 675.

ANSWER: The allegations in paragraph 15 of the petition consist primarily of legal conclusions and are therefore denied.

16. Similarly, in *May v. Dept. of Revenue*, 14 TT 135, a case involving a corporation's non-payment of Illinois income tax withheld from its employees, this Court held that the petitioner, who was a minority shareholder and officer (vice president) of the corporation, was a "responsible party" because he had a duty to supervise employees working on the job site every day, provided daily payroll reports, and signed payroll checks for himself and other employees. *Id.* at 6. However, with respect to the second part of the statutory test - that he wilfully failed to file returns and pay taxes - the Court held that for tax periods in which the corporation's bills were being paid and checks were clearing the bank, the petitioner successfully rebutted the presumption that he wilfully failed to file returns and pay taxes. *Id.* at 9. But the Court held that the petitioner did not rebut the presumption during a later tax period where his "failure to take action in the face of actual specific knowledge of the company's financial distress was a willful failure to pay the company's withholding taxes." *Id.*

ANSWER: The allegations in paragraph 16 of the petition consist primarily of legal conclusions and are therefore denied.

17. In *The Department of Revenue of the State of Illinois v. John Doe*, 04-ST-0000, a

Department of Revenue Administrative Hearings case, Administrative Law Judge Charles E, McClellan held that the taxpayer, who was a minority shareholder and President of the corporation, and who did sign some corporate checks, did not wilfully fail to file returns and pay taxes because the other two shareholders ran the day-to-day operations of the business, the taxpayer had no control over corporate business affairs, and the taxpayer did not participate in decisions concerning the payment of creditors.

ANSWER: The allegations in paragraph 17 of the petition consist primarily of legal conclusions and are therefore denied.

18. The Respondent's Notice of Penalty Liability is based upon the following errors:

A. The Respondent erred in determining that the Petitioner was a responsible party under Section 3-7(a) of the IUPIA because the Petitioner did not have the control, supervision or responsibility of filing returns and making payments of sales taxes.

B. The Respondent erred in determining that the Petitioner wilfully failed to file sales tax returns and make payments of sales taxes to the Respondent under Section 3-7(a) of the IUPIA because the Petitioner did not have the control, supervision or responsibility of filing returns and making payments of sales taxes, nor was the Petitioner aware of the status of the payment of Lawrel's various creditors.

ANSWER: The allegations in paragraph 18 of the petition consist primarily of legal and / or factual conclusions and are denied.

WHEREFORE, the Department prays that the Tribunal enter an order:

- a. denying the prayer for relief in the Petitioner's Petition in its entirety;
- b. finding that the Notice of Penalty Liability at issue is correct as issued;

- c. ordering judgment in favor of the Department and against the Taxpayer; and granting such further relief as this Tribunal deems appropriate under the circumstances.

Respectfully Submitted,

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State of Illinois

By: 

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**ILLINOIS INDEPENDENT TAX TRIBUNAL
CHICAGO, ILLINOIS**

PAUL M. CALDERONE)	
)	
v.)	16-TT-116
)	Judge Brian F. Barov
STATE OF ILLINOIS)	
DEPARTMENT OF REVENUE)	

**AFFIDAVIT OF BRIAN GOLDBERG
PURSUANT TO TRIBUNAL RULE 5000.310(b)(3)**

1. I am currently employed by the Illinois Department of Revenue in the Legal Services Bureau.
2. My current title is Deputy General Counsel.
3. I lack the personal knowledge required to either admit or deny the allegations alleged and neither admitted or denied in Petitioner's Petition paragraphs 5, 6, 7,8,10 and 11.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies that he (she) verily believes the same to be true.



Brian Goldberg
Deputy General Counsel
Illinois Department of Revenue

DATED: 7/6/16

PROOF OF SERVICE

The undersigned, an attorney, certifies that a copy of the attached Department's Answer was sent via first class mail, postage prepaid, to Jeffrey A. Peters, Attorney at Law, 25 S. Salem Avenue, Arlington Heights, IL 60005 on July 6, 2016.



George Foster
Special Assistant
Attorney General

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