

ILLINOIS INDEPENDENT  
TAX TRIBUNAL

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MILLERCOORS, LLC	)	
	)	
Petitioner,	)	
v.	)	No. 16 TT 122
	)	
ILLINOIS DEPARTMENT OF	)	
REVENUE,	)	
	)	Judge Brian F. Barov
	)	
Respondent.	)	

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DEPARTMENT'S ANSWER TO PETITION

NOW COME the Respondent, the Illinois Department of Revenue (the "Department"), by and through its attorney, Lisa Madigan, Illinois Attorney General, and for its Answer to Petitioner's Petition ("Petition"), hereby states as follows:

1. Petitioner's address is 3939 W. Highland Blvd., Milwaukee, Wisconsin 53208. Its phone number is (414) 931-4889 and its taxpayer identification number is 3921-5962.

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

2. Petitioner seeks relief from three Notices: The first is dated April 11, 2016 and concerns the period January 1, 2008 through June 30, 2009; the second is dated April 11, 2016 and concerns the period July 1, 2009 through December 31, 2010; the third is dated

April 12, 2016 and concerns the period January 1, 2011 through December 31, 2013. The Notices raise identical issues. Copies of the Notices are attached to this Petition.

**ANSWER:** The Department admits the existence, force and effect, at all relevant times, of the documents attached to Petitioner's Petition as Exhibits and referred to in paragraph 2 and state that such documents speak for themselves.

3. The amounts claimed due on each Notice is in excess of \$15,000, exclusive of penalties and interest.

**ANSWER:** The Department admits the existence, force and effect, at all relevant times, of the documents attached to Petitioner's Petition as Exhibits and referred to in paragraph 3 and state that such documents speak for themselves.

#### **BACKGROUND FACTS**

4. Petitioner is engaged in brewing Miller Lite, Coors Light, and other flagship brand beers.

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

5. Petitioner markets its beer throughout the United States using distributors, who market and sell the beer to grocery stores, bars, and other retailers, who in turn sell the beer to the ultimate consumers.

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

6. Petitioner supplies distributors with a wide variety of promotional merchandise, such as bar mats, bar towels, banners, table tents, tap handles, ball caps, t-shirts, aluminum bottle wraps, and other promotional items.

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

7. During the periods at issue, Petitioner purchased promotional items from, among others, Madden Communications, Inc., a privately-held company based in Illinois.

**ANSWER:** The Department admits the allegations contained in paragraph 7.

8. Petitioner normally resold these items to distributors, but in certain cases, it provided them to distributors free of charge.

**ANSWER:** The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 8 and therefore neither admits or denies the allegations.

9. In either instance, after Madden produced a quantity of promotional items, the items stayed in Madden's physical possession, at its facility in Bloomingdale, Illinois, until Madden received an order for shipment from Petitioner.

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

10. Upon receipt of the shipment order, Madden arranged for and completed shipping with third party carriers to deliver the items to the given distributor.

**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. In the case of items provided free of charge, Petitioner paid use tax to each applicable state where the items were physically delivered to the distributor.

**ANSWER:** The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 11 and therefore neither admits or denies the allegations.

12. The Department audited Petitioner and determined that Petitioner owed Illinois Use Tax on all promotional items purchased from Madden and provided free of charge to distributors outside Illinois. No credit was given for tax accrued and paid to other taxing jurisdictions based on the final shipping destination.

**ANSWER:** The Department admits the allegations contained in paragraph 12.

#### **ERRORS ALLEGED**

#### **COUNT I – The Department Erred in Proposing to Assess Use Tax On Promotional Items Given Free Of Charge to Distributors Outside Illinois**

13. The Department proposes assessing Petitioner with Illinois Use Tax on promotional merchandise purchased from Madden and provided free of charge to distributors outside Illinois.

**ANSWER:** The Department admits the allegations contained in paragraph 13.

14. In section 3-65, the Use Tax Act provides that:

If the seller of tangible personal property for use would not be taxable under the Retailers' Occupation Tax Act despite all elements of the sale occurring in Illinois, then the tax imposed by [the Use Tax] Act does not apply to the use of the tangible personal property in this State.

35 ILCS 105/3-65.

**ANSWER:** The Department admits the existence, force and effect, at all relevant times of the statutory provision set forth or referred to in paragraph 14 and state such provision speaks for itself.

15. As the result of this section, the Use Tax does not apply to Petitioner's "use" of the promotional items provided free of charge to distributors outside Illinois because, under

the administrative code, Madden was not taxable under the Retailers' Occupation Tax Act in connection with the sale of these items to Petitioner.

**ANSWER:** Although paragraph 15 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 15.

16. Specifically, under 86 Ill. Admin. Code § 130.605(d), the Retailers' Occupation tax does not apply to:

[G]ross receipts from sales in which the seller, by carrier (when the carrier is not also the purchaser) or by mail, under the terms of his or her agreement with the purchaser, delivers the goods from a point in this State to a point outside this State not to be returned to a point within this State. The fact that the purchaser actually arranges for the common carrier or pays the carrier that effects delivery does not destroy the exemption. However, it is critical that the seller is shown as the consignor or shipper on the bill of lading. If the purchaser is shown as either the consignor or the shipper, the exemption will not, apply.

**ANSWER:** The Department admits the existence, force and effect, at all relevant times of the regulation set forth or referred to in paragraph 16 and state such regulation speaks for itself.

17. Under its agreements with Petitioner, the seller, Madden, arranged for carriers to deliver the promotional items from its facility in Illinois to distributors in other jurisdictions, not to be returned to this State.

**ANSWER:** The Department denies the allegations contained in paragraph 17.

18. The relevant bills of lading showed the seller, Madden, as the consignor or shipper.

**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. Under 86 Ill. Admin. Code § 130.605(d), Madden was not subject to Retailers' Occupation Tax in connection with its sales of these items to Petitioner, with the result that under 35 ILCS 105/3-65, Petitioner was not subject to Use Tax on their "use" in Illinois.

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

20. The Department erred in concluding to the contrary.

**ANSWER:** Although paragraph 20 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 20.

WHEREFORE, the Department prays:

- A) That Judgment be entered against the Petitioner and in favor of the Department in Count I of this matter;
- B) That the Department's Notices of Tax Liability be determined to be correct;
- C) That this Tribunal grant such other additional relief it deems just and proper.

**COUNT II – The Department Erred in Denying Requested Use Tax Refunds  
For Promotional Items Distributed Across the Country**

21. Petitioner also purchased promotional merchandise from vendors, other than Madden, who shipped the merchandise directly to distributors across the country.

**ANSWER:** The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 21 and therefore neither admits or denies the allegations.

22. Petitioner accrued and paid Illinois Use Tax on this merchandise, even though a portion of the items were shipped from vendors in other states, to distributors located outside of Illinois.

**ANSWER:** The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 22 and therefore neither admits or denies the allegations.

23. Given the age of the transactions, Petitioner did not retain the records detailing the out-of- state shipment of this merchandise.

**ANSWER:** The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 23 and therefore neither admits or denies the allegations.

24. Petitioner also purchased promotional items from other out-of-state vendors, who shipped the items to Illinois, where the property was temporarily stored in Illinois, either at headquarters where the marketing function occurs or at the Madden warehouse in Bloomingdale, before its shipment to distributors in other states.

**ANSWER:** The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 24 and therefore neither admits or denies the allegations.

25. Petitioner did not retain records documenting the out-of-state shipment of these items either.

**ANSWER:** The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 25 and therefore neither admits or denies the allegations.

26. In the absence of such records, during the course of the audit, Petitioner requested a refund of the Use Tax accrued on the merchandise described in this Count based on its net sales per state.

**ANSWER:** The Department admits the allegations contained in paragraph 26.

27. In other words, because only 5.37% of Petitioner's net product sales were to purchasers in Illinois, it requested a refund of 94.63% of the Use Tax accrued on the merchandise described in this Count.

**ANSWER:** The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 27 and therefore neither admits or denies the allegations.

28. The Department disallowed this request in computing the amount proposed due on the Notices.

**ANSWER:** The Department admits the allegations contained in paragraph 28.

29. The Department erred in disallowing this request.

**ANSWER:** Although paragraph 29 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 29.

WHEREFORE, the Department prays:

- A) That Judgment be entered against the Petitioner and in favor of the Department in Count II of this matter;
- B) That the Department's Notices of Tax Liability be determined to be correct;
- C) That this Tribunal grant such other additional relief it deems just and proper.

### **COUNT III – The Department Erred in Proposing To Assess Late Payment Penalties**

30. The Notices propose late payment penalties for the periods at issue.

**ANSWER:** The Department admits the existence, force and effect, at all relevant times, of the documents attached to Petitioner's Petition as Exhibits and referred to in paragraph 30 and state that such documents speak for themselves.

31. Based on the results of the prior audit, Petitioner reasonably believed that there was no Use Tax on promotional merchandise purchased from Madden and provided free of charge to distributors outside Illinois.

**ANSWER:** The Department denies the allegations contained in paragraph 31.

32. Petitioner did not seek to avoid paying taxes on the promotional items, since it accrued and remitted taxes on these items in the states where physical delivery occurred to distributors.

**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. Petitioner exercised ordinary business care and prudence in determining its Use Tax liability for the periods at issue.

**ANSWER:** Although paragraph 33 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 33.

WHEREFORE, the Department prays:

- A) That Judgment be entered against the Petitioner and in favor of the Department in Count III of this matter;
- B) That the Department's Notices of Tax Liability be determined to be correct;

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

LISA MADIGAN  
ILLINOIS ATTORNEY GENERAL  
REVENUE LITIGATION BUREAU  
100 W. RANDOLPH ST., RM. 13-216  
CHICAGO, IL 60601  
By: Michael Coveny (312) 814-4142

Respectfully Submitted,  
  
LISA MADIGAN  
Illinois Attorney General

By  \_\_\_\_\_  
Michael Coveny,  
Assistant Attorney General

STATE OF WISCONSIN

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AFFIDAVIT AS TO LACK OF SUFFICIENT KNOWLEDGE

I, ED SHOLTES, 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 8, 10-11, 18, 21-25, 27 and 32 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.

  
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Ed Sholtes  
Revenue Auditor  
Illinois Department of Revenue

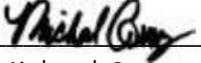
Date: 8-11-16

CERTIFICATE OF SERVICE

I, Michael Coveny, an attorney for the Illinois Department of Revenue, state that I served a copy of the attached Department's Answer to Petitioner's Petition upon:

Brian Browdy  
Ryan Law Firm, LLP  
311 South Wacker Drive  
Suite 4800  
Chicago, IL 60606

By email to [brian.browdy@ryanlawllp.com](mailto:brian.browdy@ryanlawllp.com) on August 12, 2016

  
Michael Coveny