

ILLINOIS INDEPENDENT
TAX TRIBUNAL

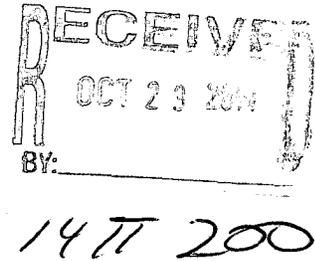
WALTER E. POGUE,

Petitioner,

vs.

ILLINOIS DEPARTMENT
OF REVENUE,

Respondent.



PETITION

The Petitioner, WALTER E. POGUE, (“Petitioner”), hereby petitions the Illinois Independent Tax Tribunal to review and reverse and/or modify the Notice of Tax Liability (“Notice”) issued by the Illinois Department of Revenue (“Department”), for the reasons stated below:

INTRODUCTION

1. The “Notice” was issued by the Department on August 21, 2014, assessing personal liability in the amount of \$143,913.82 for the unpaid tax debt of Cardinal EMS, Ltd. (“Cardinal”). A copy of the “Notice” is attached to this Petition.

2. Petitioner is an individual with an address of 14011 N. McCauley Lane, Mount Vernon, Illinois, and a telephone number of (618) 316-4478. The Taxpayer ID is [REDACTED].

3. Petitioner is a shareholder with a 51% ownership interest in Nottus, Inc, a Washington corporation ("Nottus"). Nottus' Taxpayer Account Number (FEIN) is 27-3533018.

4. Nottus has filed a timely Petition with the Illinois Independent Tax Tribunal to review and reverse and/or modify the Notice of Tax Liability issued by the Illinois Department of Revenue against it. The case is known as Nottus, Inc. v. Illinois Department of Revenue, 14-TT-167.

5. The Illinois Income Tax Act permits a purchaser to be held personally liable for any debt incurred by a seller where the purchaser acquires a major part of a taxpayer's assets.

6. Petitioner should not be held personally liable for the unpaid tax debt of Cardinal because Nottus did not purchase or acquire a major part of Cardinal's assets, or in the alternative, Petitioner is not and has never been a responsible officer, partner, or individual of Cardinal under 35 ILCS 5/1002(d).

7. Furthermore, the penalty imposed upon Petitioner by the Department is not supported by the plain language of the Illinois Bulk Sales Act.

8. According to the Bulk Sales Act, a purchaser who fails to file proper notice of sale with the Department shall be personally liable for the amount owed but unpaid up to the amount of the reasonable value of the property acquired by the purchaser.

9. Therefore, in the event that the Act is found to be applicable to Nottus's purchase or transfer of any of Cardinal's assets, and in the further event that Petitioner is found to be a responsible officer, partner, or individual of Cardinal, then personal liability against the Petitioner should be limited to no more than the reasonable value of the property acquired.

BACKGROUND AND RELEVANT FACTS

10. On August 21, 2014, the Department issued a "Collection Action - Assessment and Notice of Intent" to Petitioner for the unpaid tax debt of Cardinal. The determination letter provides that Petitioner is personally liable in the amount of \$143,913.82 for Nottus' failure to properly notify the Illinois Department of Revenue's Bulk Sales Unit of Nottus' purchase of certain Cardinal assets and due to Petitioner's "status as a responsible officer, partner, or individual of CARDINAL EMS LTD."

11. Nottus has not purchased or transferred any of Cardinal's assets, or in the alternative, has purchased or transferred less than \$143,913.82 of Cardinal's assets.

12. Petitioner is not and has never been a responsible officer, partner or individual of Cardinal.

APPLICABLE LAW

13. Illinois law permits a purchaser to be held personally liable for any debt incurred by a seller if the purchaser does not comply with the bulk sale reporting requirement. However, the Income Tax Act only applies to circumstances where a purchaser acquires a major part of a taxpayer's assets.

14. The Illinois Income Tax Act reads in pertinent part:

"If any taxpayer, outside the usual course of his business, sells or transfers the **major part** of any one or more of (A) the stock of goods which he is engaged in the business of selling, or (B) the furniture or fixtures, or (C) the machinery and equipment, or (D) the real property, of any business that is subject to the provisions of this Act, the purchaser or transferee of such assets shall, no later than 10 business days after the sale or transfer, file a notice of sale or transfer of business assets with the Chicago office of the Department. . . ."

35 ILCS 5/902 (West 2014) (emphasis added).

15. The Illinois courts have held that the purchase of a major part of a company's

business assets refers to the purchase of greater than fifty percent of the assets. *Zenith Radio Distributing Corporation v. Mateer* (1941), 311 Ill.App.263, 266, 35 N.E.2d 815; see also *Continental Casualty Co. v. Burlington Truck Lines, Inc.* (1966), 70 Ill.App.2d 405, 217 N.E.2d 293.

16.This rationale is evidenced in *U.S. v. Goldblatt Bros.* (1942), 128 F.2d 576. In *Goldblatt*, defendant was charged by the trial court with violation of the Act for failure to report a transfer of assets to the plaintiff creditor. Defendant, owner of a chain of department stores, purchased the bulk of assets owned by a shoe repair company in a sale outside the regular course of business. The appellate court determined that the purchase – which included all of the physical assets, machinery and equipment used for the shoe repair business – constituted purchase of a major part of the company’s assets, and was subject to the bulk sales reporting requirement. Thus, the defendant was found to have violated the Act and the decision of the trial court was affirmed.

17.The Illinois Bulk Sales Act also places a financial limit on any liability imposed upon a purchaser of another company’s assets. The Act reads in pertinent part:

“If the purchaser or transferee fails to file the above described notice of sale with the Department within the prescribed time, the purchaser or transferee shall be personally liable to the Department for the amount owed hereunder by the seller or transferor but unpaid, **up to the amount of the reasonable value of the property acquired** by the purchaser or transferee.”

35 ILCS 5/902 (West 2014) (emphasis added).

ERROR I

18.Petitioner was erroneously held personally liable by the Department for the unpaid tax debt of Cardinal. Petitioner should not be held liable because Nottus did not purchase or

transfer a major part of Cardinal's assets.

19. Considering the plain language of the Income Tax Act as cited above, there is no evidence that Nottus purchased or transferred a major part of Cardinal's assets. As such, notice was not required by Nottus to the Department under the Act, and personal liability of Cardinal's debts should not attach to Petitioner.

20. The Illinois case law provided above also establishes that a purchase of a major part of a company's business assets refers to the purchase or transfer of greater than fifty percent of that company's assets.

21. The *Goldblatt* case cited herein is also easily distinguishable from the Petitioner's case. *Goldblatt* involved the purchase of *all* of the physical assets, machinery and equipment used for the business. Here, Nottus has not purchased or transferred any such assets.

ERROR II

22. Even if the Act is found to be applicable to Nottus' purchase or transfer of certain Cardinal assets, the Department erroneously assessed personal liability to Petitioner based on an erroneous finding that Petitioner was a "responsible officer, partner, or individual" of Cardinal.

23. In fact, Petitioner is not and has never been a responsible officer, partner, or individual of Cardinal under 35 ILCS 5/1002(d).

24. As such, if the Income Tax Act is determined to apply to Nottus's purchase or transfer of any of Cardinal's assets, which no such evidence exists as of this Petition, Petitioner would still have no liability to the Department because Petitioner was not a responsible officer, partner or individual of Cardinal.

ERROR III

25. Even if the Act is found to be applicable to Nottus's purchase of certain Cardinal assets and Petitioner is found to be a responsible officer, partner, or individual of Cardinal, the Department erroneously exceeded the limit of Petitioner's personal liability as set forth in the Illinois Bulk Sales Act.

26. According to the Act, personal liability should be limited to no more than the reasonable value of the property acquired or transferred.

27. As such, if the Income Tax Act is determined to apply to Nottus's purchase of any of Cardinal's assets, which no such evidence exists as of this Petition, Petitioner would at most be liable to the Department for no more than the reasonable value of the assets acquired by Nottus from Cardinal.

CONCLUSION AND RELIEF REQUESTED

28. As indicated by both statutory and case law, the Income Tax Act was intended to apply to circumstances in which a purchaser acquires a major part of a company's assets. A purchase or transfer equaling significantly less than fifty percent of the assets, as is the case with Nottus, is not subject to the provisions or penalties of the Act. Therefore, Petitioner requests that the Illinois Department of Revenue rescind its collection action and assessment of personal liability against Petitioner in the amount of \$143,913.82, and release Petitioner from any further liability related thereto.

29. Further, in the event that the Act is found to be applicable to Nottus's purchase of any of Cardinal's assets, personal liability should not be assessed against Petitioner because he was not a responsible officer, partner, or individual of Cardinal under 35 ILCS 5/1002(d).

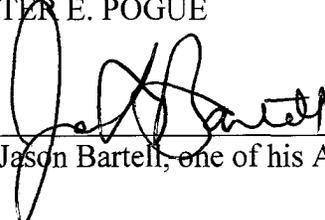
Therefore, Petitioner requests that the Illinois Department of Revenue rescind its collection action and assessment of personal liability against Petitioner in the amount of \$143,913.82, and release Petitioner from any further liability related thereto.

30. In the alternative, in the event that the Act is found to be applicable to Nottus's purchase of any of Cardinal's assets and Petitioner is found to be a responsible officer, partner, or individual of Cardinal, personal liability should be limited against Petitioner to no more than the reasonable value of the property acquired. Therefore, Petitioner requests that the Illinois Department of Revenue rescind its collection action and assessment of personal liability against Petitioner in the amount of \$143,913.82, issue a new collection action for an amount not to exceed the reasonable value of the assets acquired by Nottus from Cardinal, and upon taxpayer's payment of the same, release Petitioner from any further liability related thereto.

WHEREAS, Petitioner requests that the "Notice" be modified or canceled for the reasons contained herein.

WALTER E. POGUE

By:


Jason Bartell, one of his Attorneys

Representatives:

Jason Bartell
ARDC #: 6255602
Bartell Powell, LLP
10 E. Main St.
Champaign, IL 61820
PH: 217-352-5900
FAX: 217-352-0182

Notice

08/29/2014 14:58 6184396411

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PAGE 05

Collection Action

Assessment and Notice of Intent



August 21, 2014



Letter ID: L0929210336

WALTER E. POGUE
14011 N MCCAULEY LN
MOUNT VERNON IL 62864-7900

Taxpayer ID: XXX-XX-4771
1002D Penalty ID: 2640542



CARDINAL EMS LTD
PO BOX 111
MONTICELLO IL 61856-0111

We have determined you are personally liable for a penalty of \$143,913.82.

The penalty is equal to the amount of unpaid liability of CARDINAL EMS LTD, due to your status as a responsible officer, partner, or individual of CARDINAL EMS LTD.

Illinois law (35 ILCS 5/1002(d)) provides that any person who has control, supervision, or responsibility of filing returns or making payments for a taxpayer, and who willfully fails to do so, shall be personally liable for a penalty equal to the amount of tax due including penalty and interest.

Pay us **\$143,913.82**. Your payment must be guaranteed (i.e., cashier's check, money order) and made payable to the Illinois Department of Revenue. Send or bring it to us at the address below.

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

- If the amount of this liability is more than \$15,000, file a petition with the Illinois Independent Tax Tribunal within 60 days of this notice. Your petition must be in accordance with the rules of practice and procedure provided by the Tribunal (35 ILCS 1010/1-1, et seq.).
- In all other cases that do not fall within the jurisdiction of the Illinois Independent Tax Tribunal, file a protest with us, the Illinois Department of Revenue, and request an administrative hearing within 60 days of the date of this notice, which is October 20, 2014. Your request must be in writing, clearly indicate that you want to protest, and explain in detail why you do not agree with our actions. If you do not file a protest within the time allowed, you will waive your right to a hearing, and this liability will become final. An administrative hearing is a formal legal proceeding conducted pursuant to the rules adopted by the Department and is presided over by an administrative law judge. A protest of this notice does not preserve your rights under any other notice.
- Instead of filing a petition with the Illinois Independent Tax Tribunal or a protest with us, the Illinois Department of Revenue, you may instead, under Sections 2a and 2a.1 of the State Officers and Employees Money Disposition Act (30 ILCS 230/2a, 230/ 2a.1), pay the total liability under protest using Form RR-374, Notice of Payment Under Protest (available on our website at tax.illinois.gov), and file a complaint with the circuit court for a review of our determination.

If the debt remains unpaid and this penalty becomes final, we intend to take collection enforcement action against you personally to collect this debt. Collection action can include the seizure and sale of your assets, and levy of your wages and bank accounts.

BETH WINTER
100% PENALTY UNIT
ILLINOIS DEPARTMENT OF REVENUE
PO BOX 19035
SPRINGFIELD IL 62794-9035

For information about

- › how to pay
- › submitting proof
- › collection actions



217 782-9904 ext. 31606
217 785-2635 fax

08/29/2014 14:58 6184396411

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Collection Action

Assessment and Notice of Intent



August 21, 2014



Letter ID: L0929210336

WALTER E. POGUE
14011 N MCCAULEY LN
MOUNT VERNON IL 62864-7900

Taxpayer ID: XXX-XX-4771
1002D Penalty ID: 2640542



This statement lists our most recent information about your unpaid balance, available credits, or returns you have not filed. A payment voucher is included so you may pay the balance due.

IL Withholding Income Tax

Account ID: 20-4723820-000

Period	Tax	Penalty	Interest	Other	Payments/Credits	Balance
31-Dec-2010	85,088.91	8,628.69	8,945.77	-	-	100,641.37
30-Jun-2012	17,981.55	774.05	213.85	-	(11,221.09)	7,728.36
30-Sep-2012	18,859.00	2,589.08	450.86	-	-	21,698.94
31-Dec-2012	12,281.77	1,328.18	235.20	-	-	13,845.15

IDOR-5P-NPL (N-03/07)

Retain this portion for your records.

Fold and detach on perforation. Return bottom portion with your payment.

Collection Action

(R-12/08) (136)



Letter ID: L0929210336
WALTER E. POGUE

Total amount due: \$143,913.82

Write the amount you are paying below.

Mail this voucher and your payment to:
ILLINOIS DEPARTMENT OF REVENUE
PO BOX 19035
SPRINGFIELD IL 62794-9035

\$ _____
Write your Account ID on your check.

000 006 003730589601 731 129199 2 0000014391382

08/28/2014 14:00 6184396411

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Taxpayer Statement



August 22, 2014



Letter ID: L2018431120

 WALTER PROGUE
 14011 N MCCAULEY LN
 MOUNT VERNON IL 62864-7900

Taxpayer ID: 27-3533018
 Total amount due: \$26,006.20



This statement lists our most recent information about your unpaid balance, available credits, or returns you have not filed. A payment voucher is included so you may pay the balance due.

IL Withholding Income Tax

Account ID: 27-3533018-000

Period	Tax	Penalty	Interest	Other	Payments/Credits	Balance
31-Dec-2013	-	-	-	-	-	Not Included*
* File and pay this return.						
31-Mar-2014	11,595.04	1,391.40	105.78	-	-	13,092.22
30-Jun-2014	12,398.87	495.94	19.37	-	-	12,913.98

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Retain this portion for your records.

P-000899

Fold and detach on perforation. Return bottom portion with your payment.

Taxpayer Statement (R-12/08) (136)



Letter ID: L2018431120
 WALTER PROGUE

Total amount due: \$26,006.20
 Write the amount you are paying below.

Mail this voucher and your payment to:
 ILLINOIS DEPARTMENT OF REVENUE
 PO BOX 19035
 SPRINGFIELD IL 62794-9035

\$ _____
 Write your Taxpayer ID on your check.

000 006 010543647526 731 123199 2 0000002600620

08/28/2014 14:00 6184396411

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Collection Action
Notice of Intent



August 22, 2014



Letter ID: L0295690258

WALTER PROGUE
14011 N MCCAULEY LN
MOUNT VERNON IL 62864-7900

Taxpayer ID: 27-3533018



NOTTUS, INC
2149 SHADY REST RD
MONTICELLO IL 61856-8099

You have been identified as a responsible officer, partner, or individual of NOTTUS, INC.

Illinois law provides that we may hold you personally liable for a penalty equal to the total tax, penalty, and interest due from NOTTUS, INC.

The following pages detail the current amount of debt we are pursuing against NOTTUS, INC. This debt must be paid immediately. Your payment must be guaranteed (i.e., cashier's check, money order) and made payable to the Illinois Department of Revenue. Send or bring it to us at the address below.

If this debt is not paid, we intend to issue a penalty against you for the full amount of the debt. Once the penalty becomes final, we can take further collection action against you personally which may include the seizure and sale of your assets and levy of your wages and bank accounts.

If you believe you are not personally responsible for this debt, send us written proof within 10 days. If the information you submit is insufficient, we may continue to issue the penalty.

If you have any questions, please write or call our office weekdays from 8:30 a.m. to 4:30 p.m.

BETH WINTER
ILLINOIS DEPARTMENT OF REVENUE
PO BOX 19035
SPRINGFIELD IL 62794-9035

217 782-9904 ext. 31808
217 785-2635 fax

- For information about
- › how to pay
- › submitting proof
- › what you owe
- › collection actions



Taxpayer Statement



August 22, 2014



Letter ID: L1906588688

CARDINAL EMS LTD
PO BOX 111
MONTICELLO IL 61856-0111

Taxpayer ID: 20-4723820
Total amount due: \$217,287.59



This statement lists our most recent information about your unpaid balance, available credits, or returns you have not filed. A payment voucher is included so you may pay the balance due.

IL Withholding Income Tax

Account ID: 20-4723820-000

Period	Tax	Penalty	Interest	Other	Payments/Credits	Balance
30-Jun-2009	17,052.43	4,010.48	347.90	-	(19,198.54)	2,212.27
30-Sep-2009	24,884.78	2,838.48	3,087.13	-	(1,501.01)	29,308.38
31-Dec-2009	25,007.08	1,959.24	1,863.71	-	(9,574.65)	19,255.38
30-Jun-2010	23,804.02	322.99	126.34	-	(22,374.09)	1,879.26
30-Sep-2010	20,832.15	1,872.27	1,587.42	-	(3,384.44)	20,907.40
31-Dec-2010	85,068.91	8,628.69	6,952.78	-	-	100,648.36
30-Jun-2012	17,981.55	774.05	214.40	-	(11,221.09)	7,728.91
30-Sep-2012	18,859.00	2,589.08	452.39	-	-	21,700.47
31-Dec-2012	12,281.77	1,328.18	236.21	-	-	13,848.16

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Retain this portion for your records.

Fold and detach on perforation. Return bottom portion with your payment.

Taxpayer Statement (R-12/08) (136)



Letter ID: L1906588688
CARDINAL EMS LTD

Total amount due: \$217,287.59

Write the amount you are paying below.

Mail this voucher and your payment to:
ILLINOIS DEPARTMENT OF REVENUE
PO BOX 19036
SPRINGFIELD IL 62704 0036

\$ _____
Write your Taxpayer ID on your check.

000 006 006663279526 736 123199 1 0000021728759