

**IN THE ILLINOIS INDEPENDENT TAX TRIBUNAL**

|                                 |   |               |
|---------------------------------|---|---------------|
| BROADWAY DISCOUNT STORE, INC.   | ) |               |
|                                 | ) |               |
| Petitioner,                     | ) |               |
|                                 | ) | No. 14-TT-208 |
|                                 | ) |               |
| v.                              | ) |               |
|                                 | ) |               |
|                                 | ) |               |
|                                 | ) |               |
| ILLINOIS DEPARTMENT OF REVENUE, | ) |               |
|                                 | ) |               |
| Defendant.                      | ) |               |

**ANSWER**

The Department of Revenue of the State of Illinois, by and through its attorney, Lisa Madigan, Attorney General of the State of Illinois, answers the Taxpayer’s Petition as follows:

**PARTIES**

1. Petitioner is an Illinois corporation located at 3848 Broadway, Rockford, Illinois 60118, and can be reached at 815-229-1146.

**ANSWER:** The information contained in Paragraph 1 is required by Illinois Tax Tribunal Regulations Section 310(a)(1)(A) (86 Ill. Admin. Code §5000.310) and is not a material allegation of fact that requires an answer under Section 310(b)(2) of the Tax Tribunal Regulations. Department denies that the Petitioner’s zip code is “60118.” The audit report indicates that the Petitioner’s zip code is 61108. The Department also denies that the phone number for Petitioner is “815-229-1146.” This appears to be the phone number for a pre-existing affiliated store named Variety Discount, Inc. The audit report indicates Petitioner’s phone number as 815-516-9487. The Department otherwise admits the factual allegations contained in Paragraph 1.

2. Petitioner is represented by attorneys Lane M. Gensburg and Michael W. Gutting of Dale & Gensburg, P.C., located at 200 West Adams Street, Suite 2425, Chicago, Illinois 60606. Lane M. Gensburg can be reached at 312-263-2200 or [lgensburg@dandgpc.com](mailto:lgensburg@dandgpc.com). Michael W. Gutting can be reached at 312-263-2200 or [mgutting@dandgpc.com](mailto:mgutting@dandgpc.com).

**ANSWER:** The information contained in Paragraph 2 is required by Illinois Tax Tribunal Regulations Section 310(a)(1)(B) (86 Ill. Admin. Code §5000.310) and is not a material allegation of fact that requires an answer under Section 310(b)(2) of the Tax Tribunal Regulations. The Department admits the factual allegations contained in Paragraph 2.

3. Petitioner's Illinois Business Tax number is 4054-7736

**ANSWER:** The information contained in Paragraph 3 is required by Illinois Tax Tribunal Regulations Section 310(a)(1)(C) (86 Ill. Admin. Code §5000.310) and is not a material allegation of fact that requires an answer under Section 310(b)(2) of the Tax Tribunal Regulations. The Department admits the factual allegations contained in Paragraph 3.

4. The Department is an agency of the Executive Department of the State Government and is tasked with the enforcement and administration of Illinois tax laws. See 20 ILCS 5/5-15.

**ANSWER:** Paragraph 4 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations.

## NOTICES

### Retailers Occupation/Use Tax

5. On September 3, 2014, the Department issued five (5) Notices of Tax Liability (the "NTLs") to Petitioner assessing a total Retailers Occupation Tax/Use Tax ("ROT") liability of \$74,511.80 (including interest and penalties), covering the period October 1, 2011 through October 31, 2013 (the "period at issue"). The total liability consists of \$52,635 in tax due, \$10,434 in late payment penalties, \$10,434 in negligence penalties, and \$1,467.80 in interest. There were also payments/credits totaling \$459. A copy of the NTLs are attached hereto as **Exhibit A.**

**ANSWER:** The Department admits the factual allegations in Paragraph 5.

## JURISDICTION

6. Petitioner brings this action pursuant to the Illinois Independent Tax Tribunal Act (the "Tribunal Act"), 35 ILCS 1010/1-1 *et seq.*

**ANSWER:** Paragraph 6 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations.

7. The Tribunal has jurisdiction over this matter pursuant to Sections 1-45 and 1-50 of the Tribunal Act because Petitioner timely filed this petition within 60 days of the issuance of the NTL.

**ANSWER:** Paragraph 7 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations.

## **BACKGROUND**

8. Petitioner is a retail discount store selling cigarettes and various general merchandise. The Department audited Petitioner's books and records for the period at issue.

**ANSWER:** The Department objects to the term “various general merchandise” as vague and ambiguous. The Department otherwise admits the factual allegations contained in Paragraph 8.

9. The ROT audit liability contained in the NTLs are based on projections whereby the Department multiplied Petitioner's purchases by markup percentages determined from various sources.

**ANSWER:** The basis of the assessment is as set forth in the audit file including the audit narrative, and the Department therefore denies Petitioner's characterization of the basis of the audit findings. The Department denies the remainder of the allegations in Paragraph 9.

## **COUNT I**

### **Defendants' Audit Methodology Overstates Petitioner's ROT Liability**

10. Petitioner realleges and incorporates by reference the allegations made in paragraphs 1 through 9 above as and for this paragraph 10.

**ANSWER:** The Department incorporates and repeats its answers to Paragraphs 1 through 9 as though fully set forth herein.

11. The Department erred in determining Petitioner's ROT liability by failing to adjust the Petitioner's purchases for an increase in ending inventory, and for spoilage and theft losses. The Department further erred by failing to take into account sales promotions of Petitioner where products were sold at a lower markup.

**ANSWER:** The basis of the assessment is as set forth in the audit file including the audit narrative, and the Department therefore denies Petitioner's characterization of the basis of the audit findings. The Department denies the remainder of the allegations in Paragraph 11.

**WHEREFORE,** the Department respectfully requests this Tribunal:

- a. Deny each prayer for relief in the Petition;
- b. Find that the Department's Notices correctly reflect the Petitioner's liability including interest and penalties.
- c. Enter judgment in favor of the Department and against the Petitioner; and
- d. Grant any further relief this Tribunal deems just and appropriate.

## **COUNT II**

### **All Failure to Pay Penalties should be Abated for Reasonable Cause**

12. Petitioner realleges and incorporates by reference the allegations made in paragraphs 1 through 11 as and for this paragraph 12.

**ANSWER:** The Department incorporates and repeats its answers to Paragraphs 1 through 11 as though fully set forth herein.

13. In its NTLs, the Department assessed failure to pay penalties totaling \$10,434.

**ANSWER:** Admitted that the Department assessed Late Payment Penalties totaling \$10,434.00 between the five (5) NTLs.

14. Illinois law provides that failure to file and pay penalties do not apply if a taxpayer shows that his failure to file or pay tax at the required time was due to reasonable cause. See 35 ILCS 735/3-8.

**ANSWER:** Paragraph 14 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal

Regulations. The Department admits the existence, force and effect of Section 3-8 of the Uniform Penalty and Interest Act (35 ILCS 735 *et seq.*), and states that the statute speaks for itself.

15. The most important factor to be considered in making a determination to abate a late filing or payment penalty is the extent to which the taxpayer makes a good faith effort to determine its proper tax liability and to file and pay its proper tax liability in a timely fashion. See 86 Ill. Admin. Code 700.400(b).

**ANSWER:** Paragraph 15 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations.

16. A taxpayer will be considered to have made a good faith effort to determine, file and pay its proper tax liability if it exercised ordinary business care and prudence in doing so. See 86 Ill. Admin. Code 700.400(c).

**ANSWER:** Paragraph 16 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations.

17. Petitioner's failure to timely pay its ROT liabilities (to the extent of any liabilities sustained by the Tribunal) during the period at issue was due to reasonable cause warranting abatement of the late payment penalties.

**ANSWER:** Paragraph 17 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations. The Department denies the legal conclusions/allegations contained in Paragraph 17.

**WHEREFORE**, the Department respectfully requests this Tribunal:

- a. Deny each prayer for relief in the Petition;
- b. Find that the Department's Notices correctly reflect the Petitioner's liability including interest and penalties;
- c. Enter judgment in favor of the Department and against the Petitioner; and
- d. Grant any further relief this Tribunal deems just and appropriate.

### **COUNT III**

#### **All Negligence Penalties should be Abated**

18. Petitioner realleges and incorporates by reference the allegations made in paragraphs 1 through 17 as and for this paragraph 18.

**ANSWER:** The Department incorporates and repeats its answers to Paragraphs 1 through 17 as though fully set forth herein.

19. In its NTLs, the Department assessed negligence penalties in an amount totaling \$10,434.

**ANSWER:** Admitted that the Department assessed Negligence Penalties totaling \$10,434.00 between the five (5) NTLs.

20. Illinois provides that a negligence penalty is applicable only where a return is prepared negligently, and defines negligence to constitute any failure to make a reasonable attempt to comply with the provisions of any tax Act and includes careless, reckless, or intentional disregard of the law or regulations. 35 ILCS 735/3-5. Illinois law further provides that no negligence penalty shall be imposed if it is shown that the failure to comply with the Tax Act is due to reasonable cause; and that a taxpayer is not negligent if the taxpayer shows substantial authority to support the return as filed. *Id.*

**ANSWER:** Paragraph 20 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations. The Department admits the existence, force and effect of Section 3-5 of the Uniform Penalty and Interest Act (35 ILCS 735 *et seq.*), and states that the statute speaks for itself.

21. Any understatement of ROT tax determined to be owed by Petition was not attributable to negligence as Petition did not act negligently in the preparation and filing of its ROT returns for the period in question, and any liability determined to exist was attributable to reasonable cause.

**ANSWER:** Paragraph 21 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations. Otherwise, denied.

22. The Department's determination that Petitioner owed negligence penalties is not supported by fact or law.

**ANSWER:** Paragraph 22 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations. Otherwise, denied.

**WHEREFORE,** the Department respectfully requests this Tribunal:

- a. Deny each prayer for relief in the Petition;
- b. Find that the Department's Notices correctly reflect the Petitioner's liability including interest and penalties;
- c. Enter judgment in favor of the Department and against the Petitioner; and
- d. Grant any further relief this Tribunal deems just and appropriate.

Dated: November 17, 2014

Respectfully submitted,  
Illinois Department of Revenue

By: /s/ Seth Jacob Schriftman  
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