

IN THE
ILLINOIS INDEPENDENT TAX TRIBUNAL
COOK COUNTY, ILLINOIS

INNOPHOS HOLDINGS INC.)	
)	
Taxpayer Account ID: 20-1380758)	
Taxpayer Telephone No.: (609) 495-2495)	
Tax Type: ROT / UT)	
TPE: Tax Year Ending December 2009 &)	
Tax Year Ending December 2010)	No. 14-TT-214
)	
v.)	
)	
ILLINOIS DEPARTMENT OF REVENUE.)	

FIRST AMENDED PETITION OF THE TAXPAYER

Innophos Holdings, Inc. ("Innophos"), by its attorneys of record, Reed Smith LLP, pursuant to Section 1-50 of the Illinois Independent Tax Tribunal Act of 2012 [35 ILCS 1010/1-5 *et seq.*] (the "Tax Tribunal Act"), complains of the Illinois Department of Revenue (the "Department" or "IDOR"), as follows:

Jurisdiction and Venue

1. This timely petition involves two Notices of Deficiency ("NOD") that each assesses an amount in excess of \$15,000.00 in tax, penalty and interest under a tax law identified in Section 1-45 of the Tax Tribunal Act; therefore, the Tax Tribunal has jurisdiction over this petition.
2. Innophos accepts the Tax Tribunal's designation of its office in Cook County to conduct the hearing in this matter.

Facts Common to all Counts

The Parties

3. Innophos is a corporation maintaining its principal office at 259 Prospect Plains Road, Cranbury, New Jersey 08512-8000.
4. Innophos is a leading producer of specialty grade phosphate for the food, pharmaceutical and industrial market segments. Within these segments, Innophos' products cover a broad range of applications including water, paper and metal treatment, agriculture, electronics, textiles, tablets, meat preservation and detergents.
5. The Illinois Department of Revenue is an executive agency authorized, among other functions, to administer and enforce the provisions of the Illinois Income Tax Act. 35 ILCS 5/101 *et seq.*

Innophos Locations in North America

6. Innophos' corporate headquarters is located in New Jersey.
7. Innophos has manufacturing facilities located in Illinois, Louisiana, New Jersey, Tennessee, and Utah.
8. Innophos also has manufacturing sites in Canada and Mexico.

Innophos' Illinois Locations

9. Innophos has two manufacturing plants located in Illinois, one in Chicago Heights, Illinois and the other in Waterway, Illinois.
10. Innophos owns a distribution center in Chicago Heights, Illinois (the "Jacobson Center").

11. While owned by Innophos, a third-party under contract to Innophos is responsible for the Jacobson Center operations and employs its own personnel.

Innophos' Inventory Management

12. More than half of Innophos' products are routed through the Jacobson Center.
13. Products made in the United States, Mexico and Canada are routed through the Jacobson Center.
14. Purchase orders for Innophos' products are received and processed in New Jersey.
15. Innophos produces inventory to fill expected customer demand, in anticipation of purchase orders.
16. Innophos uses a business forecast model to predict its customers' order volume in the near future, usually 3 months to a year out.
17. The business forecast relies on the order history of Innophos' customers and is based on the customers' quantity, product and grade order history.
18. The business forecast model determines the amount of inventory that is stocked at any given time at the Jacobson Center, so that product is already on-site and ready to be shipped to customers as purchaser orders are received and processed in New Jersey.
19. Products are shipped and stored in the Jacobson Center even if ultimately they may not be sold or delivered to Illinois customers.

20. Most of the products produced in Illinois and shipped to the Jacobson Center, along with the products produced elsewhere that are shipped to the Jacobson Center, are sold to customers outside of Illinois.
21. The Jacobson Center uses a "pick ticket" authorization system to ship its inventory.
22. When an order is received and processed in New Jersey, a ticket instruction is then sent to the third-party manager of the Jacobson Center to fulfill the ticket. The third-party has no decision making ability; it only picks and ships the products (on a pallet basis) that it is told to ship.

The Illinois Income Tax Act

23. The Illinois Income Tax Act (the "IITA") imposes a tax on the net income of every individual, corporation, trust and estate for the privilege of earning or receiving income in or as a resident of Illinois. 35 ILCS 5/101 *et seq.*
24. For a taxpayer that sells tangible personal property, like Innophos, the Illinois corporate income tax is imposed on the taxpayer's "base income," as defined in the IITA (federal taxable income after statutory addition and subtraction modifications) that is: (A) "non-business income" as defined in the IITA which is allocable to Illinois; and (B) "business income" as defined in the IITA (all income other than nonbusiness income) which is "apportionable" to Illinois according to the ratio of Illinois sales to total sales everywhere. That ratio is commonly referred to as the "sales factor" or the "apportionment formula."

The Department's Audit

25. The Department's audit staff and management requested and received access to Innophos' books and records supporting its Illinois state tax returns.
26. The Department's audit of Innophos included the taxable periods ending December 2009 and December 2010 (the "Years at Issue").
27. The Department's auditor (the "Auditor") determined a total deficiency for the tax period ending December 2009 of \$1,406,079.49 (the "2009 Deficiency").
28. The 2009 Deficiency resulted from (i) the Auditor's adjustment of Innophos' sales factor by adding to the numerator, as "Illinois sales", those sales shipments that originated in Illinois and were delivered to states in which the auditor determined Innophos was not subject to tax; and (ii) the Auditor's adjustment of Innophos' "Illinois sales to include all factorable receipts on federal 1120, Lines 1 through 10, over federal 1120, Line 1, as originally reported."
29. The Auditor proposed an additional late-payment penalty because Innophos "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."
30. Once an Illinois audit has commenced, an additional 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 an increase of the penalty to 20%. 35 ILCS 735/3-3(b-20)(2).

31. The Auditor determined a total deficiency for the tax period ending December 2010 of \$1,126,050.59 (the "2010 Deficiency").
32. The 2010 Deficiency resulted from (i) the Auditor's adjustment of Innophos' sales factor by adding to the numerator, as "Illinois sales", those sales shipments that originated in Illinois and were delivered to states in which the auditor determined Innophos was not subject to tax; and (ii) the Auditor's adjustment of Innophos' "Illinois sales to include all factorable receipts on federal 1120, Lines 1 through 10, over federal 1120, Line 1, as originally reported."
33. The Auditor imposed a late-filing or nonfiling penalty because Innophos did not file a processable return by the due date. This penalty is figured at the rate of 2 percent of the amount of tax required to be shown due on Innophos' return, after subtracting any payments made or credits allowed by the due date of the return. This penalty is imposed the day after the original due date of Innophos' return, including any extended due date. The penalty cannot exceed \$250. 35 ILCS 735/3-3(a-10).
34. The Auditor imposed the additional late-payment penalty because Innophos "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."

The Controversy

35. On September 11, 2014, the Department issued to Innophos two Notices of Deficiency for the tax periods ending December 2009 and December 2010 assessing total deficiencies in the amounts of \$1,406,079.49 and \$1,126,050.59, respectively. Copies of the 2009 and 2010 Notices of Deficiency are attached hereto as **Exhibit 1** and **Exhibit 2**, respectively.

COUNT I

P.A. 98-0478 Rendered the "Throwback" Rule in IITA Section 304(a)(3)(B) Inapplicable to Returns for Tax Years Ending on or After December 31, 2008

36. Innophos incorporates by this reference and realleges paragraphs 1 through 35 as though fully-set forth herein.
37. The Department's Auditor used the so-called "throwback rule" found in IITA Section 304(a)(3)(B) to increase the portion of Innophos' total business income apportioned to and taxed by Illinois.
38. IITA Section 304(a)(3)(B) provides that a taxpayer's sales of tangible personal property made to states in which the taxpayer is not subject to tax are to be treated instead as sales in Illinois (*i.e.*, added to the numerator of the Illinois apportionment sales factor).
39. On August 16, 2013, Public Act 98-0478 amended, effective January 1, 2014, the Illinois Income Tax Act with retroactive application to tax years

ending on or after December 31, 2008, concerning the apportionment of business income.

40. As amended by Public Act 98-0478, Section 304(f) of the IITA provides that for taxable years ending on or after December 31, 2008, if the apportionment provisions of the IITA do not "fairly represent the market for the person's goods, services or other sources of business income," a person may petition for, or the Director may, without a petition, permit or require (i) separate accounting; (ii) exclusion of any one or more factors; (iii) the inclusion of one or more additional factors; or (iv) the employment of any other method to effectuate an equitable allocation and apportionment of the person's business income. 35 ILCS 5/304(f), as amended.
41. To throwback and add a sale to the Illinois numerator of the sales factor pursuant to IITA Section 304(a)(3)(B) a taxpayer must first determine that the sale was not made to the Illinois market, *i.e.* that the item sold had a final delivery destination in a market other than Illinois.
42. The application of Section 304(a)(3)(B) to a tax year ending on or after December 31, 2008, which results in a sale to another state being added to the Illinois numerator, is directly at odds with IITA Section 304(f) as amended by P.A. 98-0478, because the knowing addition of a non-Illinois sale to the Illinois numerator of the sales factor knowingly does not "fairly

represent the [Illinois] market for the person's goods, services or other sources of business income."

43. After January 1, 2014, the effective date of P.A. 98-0478, IITA Section 304(a)(3)(B) of the IITA can only be reconciled with IITA Section 304(f) when: (A) it is applied to a tax year ending before December 31, 2008, or (B) the Department, using its authority under IITA Section 304(f) and thus bearing the burden of proof thereunder, determines the application of the throwback rule to a tax year ending on or after December 31, 2008, is necessary to "fairly represent the market for the person's goods, services or other sources of business income."

WHEREFORE, Innophos prays that the Tax Tribunal find and determine that P.A. 97-0478 has rendered IITA Section 304(a)(3)(B) not applicable to tax years ending on or after December 31, 2008, and therefore, that the Department's adjustment to include non-Illinois sales of Innophos in the Innophos Illinois sales factor numerators for 2009 and 2010 is not authorized by the IITA.

COUNT II

For Tax Years Ending on or after December 31, 2008, a Throwback Adjustment must be Proposed Pursuant to Section 304(f) of the IITA, and the Proponent must Bear the Burdens of Proof and of going Forward with Evidence

44. Innophos incorporates by this reference and realleges paragraphs 1 through 43 as though fully-set forth herein.

45. The Department's regulation implementing IITA Section 304(f) provides that:

Section 100.3390 Petitions for Alternative Allocation or Apportionment (Section 304(f) of the IITA)

* * *

(c) . . . The party (the Director or the taxpayer) seeking to utilize an alternative apportionment method has the burden of going forward with the evidence and proving by clear and cogent evidence that the statutory formula results in taxation of extraterritorial values and operates unreasonably and arbitrarily in attributing to Illinois a percentage of income out of all proportion to the business transacted in this State. In addition, the party seeking to use an alternative apportionment formula must go forward with the evidence and prove that the proposed alternative apportionment method fairly and accurately apportions income to Illinois based upon the business activity in this State. . .

86 Ill. Admin. Code § 100.3390(c) (emphasis added).

46. Because P.A. 98-0478 renders IITA Section 304(a)(3)(B) applicable to tax years ending before December 31, 2008, the Department's adjustment to add non-Illinois sales to the Illinois sales factor numerators of Innophos for 2009 and 2010 is permissible only if, pursuant to IITA Section 304(f) and Section 100.3390 of the Department's regulations, the Department meets the burden of going forward with evidence that proves by clear and cogent evidence that:

a. not throwing back to the Illinois numerator the Innophos sales to states in which it is not subject to income taxation "results in the taxation of extraterritorial values and operates unreasonably and

arbitrarily by attributing to Illinois a percentage of income which is out of all proportion to" the market in this State; and,

b. that using the throwback method to increase the Innophos Illinois numerator by throwing back to the numerator the sales of states in which Innophos is not subject to tax does "fairly and accurately apportion income to Illinois based upon" the market in this State.

47. Generally, under Section 904 of the IITA the Department's Notices of Deficiency are *prima facie* correct and shall be prima facie evidence of the correctness of the amount of tax and penalties due.

48. The Department's Notices of Deficiency are, without more, insufficient to establish a *prima facie* case of alternative apportionment under Section 304(f) of the IITA where the Department is the proponent of the alternative method and therefore, has the burden to prove by clear and cogent evidence that the statutory formula applied by the taxpayer does not fairly and accurately apportion income to Illinois.

WHEREFORE, Innophos prays that the Tax Tribunal find and determine:

A. that, for adjustments made after January 1, 2014, the Department bears the burden of going forward with evidence that proves by clear and cogent evidence that, for tax years ending on or after December 31, 2008, the statutory apportionment formula's exclusion of non-Illinois sales from the Illinois sales factor numerator does not "fairly represent the market for [Innophos'] goods," and also has the burden to prove that the adjustment proposed by the

Department, to include non-Illinois sales in the Illinois sales factor numerator, indeed does "fairly represent the market for [Innophos'] goods" and,

B. that the Department's Notices of Deficiency for 2009 and 2010 are, without more, insufficient to meet the Department's burden under Section 304(f) of the IITA and Section 100.3390 of the Department's regulations.

Count III

In the alternative, Throwback Violates the Supremacy Clause of the United States Constitution because it causes the Illinois Income Tax Burden to Rise in Direct Relation to the Protection Afforded by U.S. Public Law 86-272

49. Innophos incorporates by this reference and realleges paragraphs 1 through 43 as though fully-set forth herein.

50. U.S. Public Law 86-272 provides in pertinent part:

No State, or political subdivision thereof, shall have power to impose, . . . a net income tax on the income derived within such State by any person from intrastate commerce if the only business activities within such State by or on behalf of such a person during the taxable year are either, or both, of the following . . .

1. The solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside of the State; . . . and

2. The solicitation of orders by such a person, or his representative, in such State in the name of or for the benefit of a prospective customer of such a person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in

15 U.S. Code § 381.

51. In summary, Congress intended for P.L. 86-272 to provide clear guidance to multistate business enterprises, and to thereby relieve them of undue state income tax compliance and economic burdens, by providing immunity from state income taxation to businesses that limited their activities in a state to those specified in the federal law.

52. Article VI, Cl. 2 of the United States Constitution provides, in pertinent part, that:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; . . .

53. The Department's decision to increase the Illinois tax by the inclusion in the Illinois sales factor numerator of Innophos sales to states in which P.L. 86-272 relieves Innophos of an income tax burden, frustrates the design and intent of Congress by increasing the burdens on interstate commerce in direct relation to the protection conferred by Congress.

WHEREFORE, Innophos prays that the Tax Tribunal determine and find that the Department's adjustment to increase Innophos' Illinois sales factor numerator by adding thereto the sales made to states where Innophos enjoys the protection of Federal Public Law 86-272 violates the Supremacy Clause of the United States Constitution because it frustrates the intent and design of the federal law by increasing the Illinois tax

burden in direct relation to the burden relieved by the application of the federal law.

Count IV

In the alternative, if Section 304(a)(3)(B) Required an Increase to the Numerators for 2009 and 2010, it was Impossible for Innophos to Petition for Relief upon the now Available Basis that the Increase did not Fairly and Accurately Represent the Market for Innophos' Goods, and Innophos Would be Deprived of Due Process if such Relief is not now Granted

54. Innophos incorporates by this reference and realleges paragraphs 1 through 43 as though fully-set forth herein.
55. Because of the retroactive application of Public Act 98-0478, Innophos could not have, prior to January 1, 2014, petitioned under Section 304(f) of the IITA to avoid throwback on the basis that Section 304(a)(3)(B) of the IITA did not fairly and accurately reflect the market for Innophos' goods.
56. In 2009 and 2010 Innophos believed, as it does now, that the returns including only its Illinois destination sales in its Illinois sales factor numerator reflected its Illinois market.
57. However, at the time of filing its original 2009 and 2010 Illinois income tax returns, Innophos' belief regarding whether the Illinois apportionment formula fairly and accurately reflected the market for its goods was irrelevant, because from 1969 through January 1, 2014 – during which years Illinois had a three-factor property payroll and sales apportionment formula, then a four factor (double-weighted sales) formula, and finally a single sales factor formula – Section 304(f) of the IITA provided relief if the

statutory apportionment formula did not "fairly represent the extent of a person's business activity in this State" and did not concern itself with a fair representation of the market for a person's goods.

58. At the time of filing its 2009 and 2010 Illinois returns Section 304(f) of the IITA would not have informed Innophos that relief from the throwback rule of Section 304(a)(3)(B) of the IITA was available upon the basis that it did not fairly reflect the market for Innophos' goods.
59. The application of throwback in 2014 to the 2009 and 2010 Innophos returns without the retroactive opportunity to obtain relief under the current version of Section 304(f) of the IITA deprives Innophos of due process.

WHEREFORE, Innophos prays that the Tax Tribunal find and determine that Innophos would have been eligible for IITA Section 304(f) relief had it been available when Innophos filed its 2009 and 2010 Illinois income tax returns, that Innophos would be deprived of Due Process if it is now denied the opportunity to obtain relief under Section 304(f) of the IITA from the adjustment to its Illinois sales factor numerator which does not fairly and accurately reflect the Illinois market for its goods.

COUNT V

Innophos' Failure to Pay the Alleged Additional Tax was due to Reasonable Cause

60. Innophos incorporates by this reference and realleges paragraphs 1 through 43 as though fully-set forth herein.

61. For both the tax period ending December 2009 and December 2010, the Department imposed a late-payment penalty pursuant to Section 3-3(b-20)(2) of the UPIA.

62. Section 3-8 of the UPIA provides that penalties, other than a fraud penalty, "shall not apply if the taxpayer shows that his failure to . . . pay tax at the required time was due to reasonable cause." 35 ILCS 735/3-8.

63. Innophos made a good faith effort to determine the correct reporting of its sales and use tax liability through the exercise of ordinary business care and prudence.

64. Innophos acted with reasonable cause and therefore, under section 3-8 of the UPIA, no penalties should apply to the audit deficiencies that the Department assessed against Innophos.

WHEREFORE, Innophos prays that the Tax Tribunal find and determine that the penalties assessed against Innophos violate section 3-8 of the UPIA and must therefore be cancelled or withdrawn.

COUNT VI

Innophos' Failure to File a Processable Return by the due date was due to Reasonable Cause

65. Innophos incorporates by this reference and realleges paragraphs 1 through 43 as though fully-set forth herein.

66. For the tax period ending December 2010, the Department imposed a late-filing or nonfiling penalty pursuant to Section 3-3(a-10) of the UPIA. 35 ILCS 735/3-3(a-10).

67. Section 3-8 of the UPIA provides that penalties, other than a fraud penalty, "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. . ." 35 ILCS 735/3-8.

68. Innophos made a good faith effort to file its processable return by the due date through the exercise of ordinary business care and prudence.

69. Innophos acted with reasonable cause and therefore, under section 3-8 of the UPIA, no penalties should apply to the audit deficiencies that the Department assessed against Innophos.

WHEREFORE, Innophos prays that the Tax Tribunal find and determine that the penalties assessed against Innophos violate section 3-8 of the UPIA and must therefore be cancelled or withdrawn.

Count VII

IITA Section 304(a)(3)(B)(ii) Violates the Uniformity Clause of the Illinois Constitution

70. Innophos incorporates by this reference and realleges paragraphs 1 through 43 as though fully-set forth herein.
71. The Tax Tribunal's order of November 17, 2015 establishes the law of the case that sales shipments of tangible personal property that originated in Illinois and were delivered to a purchaser in another state are "in this State" for purposes of computing the Illinois numerator of the sales factor if the taxpayer is not subject to a tax on or measured by income in the state of the purchaser, notwithstanding the retroactive effect of the amendment to Section 304(f) by P.A. 98-0478 (the "Law of this Case").
72. Article IX, Section 2 (the "Uniformity Clause") of the Illinois Constitution of 1970 states:
- In any law classifying the subjects or objects of non-property taxes or fees, the classes shall be reasonable and the subjects and objects within each class shall be taxed uniformly. Exemptions, deductions, credits, refunds and other allowances shall be reasonable.
73. To survive a uniformity challenge, "a non-property tax classification must (1) be based on a real and substantial difference between the people taxed and those not taxed, and (2) bear some reasonable relationship to the object of the legislation or to public policy." *Arangold Corp. v. Zehnder*, 204 Ill. 2d 142, 153 (2003) (internal citations omitted).

74. The uniformity clause “was intended to be a broader limitation on legislative power to classify for non-property tax purposes than the limitation of the equal protection clause” and “[w]hen faced with a good-faith uniformity challenge, the taxing body bears the initial burden of producing a justification for the classification.” *Id.*
75. Thus, “a party bringing a uniformity clause challenge need not negate every conceivable basis that might justify the classification.” *Searle Pharmaceuticals, Inc. v. Department of Revenue*, 117 Ill. 2d 454, 468 (1987). Therefore, “a good-faith challenge to a tax classification requires the taxing body to justify the classification.” *Primeco Personal Communications L.P. v. Illinois Commerce Commission*, 196 Ill. 2d 70, 85 (2001).
76. Under the Law of this Case, taxpayers who sell tangible personal property and are required to apportion their income to Illinois under IITA § 304(a) are, unlike taxpayers required to apportion income under IITA § 304(b), (c), & (d), singled out to have their Illinois apportionment numerator increased based solely on whether they are subject to tax in the state where they delivered their products.
77. Taxpayers that sell insurance, financial services or transportation services do not have additional income subject to Illinois' income tax based solely on whether such activities or services were subject to tax in the states in

which the taxpayers' customers received such services. See IITA § 304(b), (c) and (d), respectively.

78. There is no real and substantial difference between taxpayers that sell tangible personal property and taxpayers that sell insurance, transportation services, or financial services.
79. There is no real and substantial difference between a taxpayer that sells tangible personal property and taxpayers that sell insurance, transportation services or financial services, that would justify the differential treatment being proposed by the Law of this Case. The State's policy of "full apportionment" (that a taxpayer be taxed on no more and no less than 100% of its income) discriminates against a taxpayer that sells tangible personal property as compared to those taxpayers that sell insurance, transportation services, or financial services because of the failure to throw back sales of taxpayers in the insurance, transportation services, or financial services industry can result in less than 100% of those taxpayers' incomes being subject to taxation.
80. The Law of this Case is that IITA § 304(f) alternative apportionment, whether petitioned by a taxpayer or required by a Director, requires clear and cogent evidence of "gross distortion," therefore insurance, transportation services, and financial organization taxpayers who are not subject to tax in another state or states will not be required by the Director to use alternative apportionment to assure no more and no less than 100%

of such taxpayer's income is subject to state taxation, while taxpayers that sell tangible personal property are required by IITA § 304(a)(3)(B)(ii) to throwback to Illinois their sales to such other non-tax state.

81. Therefore, the Department has the burden of producing a justification for the differential treatment afforded tangible personal property sellers in comparison to sellers of insurance, transportation services, and financial services.

WHEREFORE, Innophos prays that the Tax Tribunal find and determine that the throwback rule found in IITA §304(a)(3)(B)(ii) is unconstitutional because it violates the Uniformity Clause of the Illinois Constitution of 1970.

Count VIII

IITA Section 304(a)(3)(B)(ii) Violates the Due Process Clause of the Illinois Constitution and the Due Process Clause of the United States Constitution

82. Innophos incorporates by this reference and realleges paragraphs 1 through 43 as though fully-set forth herein.
83. At all times relevant hereto, the IITA provided that "Sales of tangible personal property are in this state if: (i) the property is delivered or shipped to a purchaser other than the United States government, within this State regardless of the f.o.b. point or other conditions of sale." 35 ILCS 5/304(a)(3)(B)(i).

- 84: At all times relevant hereto, the IITA provided, in pertinent part, that "Sales of tangible personal property are in this state if: (ii) The property is shipped from an office, store, warehouse, factory or other place of storage in this State and . . . the person is not taxable in the state of the purchaser." 35 ILCS 5/304(a)(3)(B)(ii).
85. As amended by Public Act 98-0478, Section 304(f) of the IITA provides that for taxable years ending on or after December 31, 2008, if the apportionment provisions of the IITA do not "fairly represent the market for the person's goods, services or other sources of business income," a person may petition for, or the Director may, without a petition, permit or require (i) separate accounting; (ii) exclusion of any one or more factors; (iii) the inclusion of one or more additional factors; or (iv) the employment of any other method to effectuate an equitable allocation and apportionment of the person's business income. 35 ILCS 5/304(f), as amended.
86. P. A. 98-0478 did not affect the application of IITA Section 304(a)(3)(B)(i).
87. Due Process requires that P.A. 98-0478 limit the application of IITA Section 304(a)(3)(B)(ii) to tax years ending before December 31, 2008.
88. The Tax Tribunal's order of November 17, 2015 establishes the Law of this Case that sales shipments of tangible personal property that originated in

Illinois and were delivered to a purchaser in another state are "in this State" if the seller was not taxable in the state of the purchaser, within the meaning of ILTA Section 304(a)(3)(B)(ii), notwithstanding the retroactive effect of the amendment to Section 304(f) by P.A. 98-0478.

89. For tax years ending before December 31, 2008, Section 304(f) of the ILTA did not provide for a taxpayer or for the Director of Revenue to deviate from the statutory apportionment formula within Section 304 unless the statutory formula applicable to a given taxpayer did not "fairly represent the extent of a person's business activity in this State."
90. An Illinois taxpayer's fulfillment of a sales order to an out-of-state purchaser by the shipment of tangible personal property from a location in Illinois to the purchaser's destination outside of Illinois is business activity within Illinois which, for tax years ending before December 31, 2008: (a) was not considered to render the sale of the shipped item to be "in this State" if the Illinois taxpayer was not subject to a tax on or measured by net income in the purchaser's state; and (b) was not considered to be a sale "in this State" if the Illinois taxpayer was subject to a tax on or measured by net income in the purchaser's state and actually filed a return and paid the tax due on such return; but (c) it was considered a sale "in this State" if the Illinois taxpayer was subject to a tax on or measured by net income but did not file a return in that state.

91. For tax years ending on or after December 31, 2008, Section 304(f) of the IITA did not provide for a taxpayer or for the Director of Revenue to deviate from the statutory apportionment formula within Section 304 unless the statutory formula does not “fairly represent the *market* for the person's goods, services or other sources of business income.” 35 ILCS 5/304(f), as amended by P.A. 98-0478 (emphasis added).
92. An Illinois taxpayer's fulfillment of a sales order to an out-of-state purchaser by the shipment of tangible personal property from a location in Illinois to the purchaser's destination outside of Illinois, becomes part of the market for the person's goods and services in the state of the purchaser rather than the market for the person's goods and services in this State.
93. The Illinois Constitution of 1970 provides as follows: “No person shall be deprived of life, liberty or property without due process of law” Ill. Const. art. I, § 2.
94. The United States Constitution provides as follows: “No state . . . shall any state deprive any person of life, liberty, or property, without due process of law” U.S. Const. amend. XIV, § 1.
95. The Law of this Case, under which IITA Section 304(a)(3)(B)(ii) includes as a sale “in this State,” a sale that is delivered to a purchaser outside this State, violates the Due Process clauses of the Illinois and the United States

constitutions, respectively, for tax years ending on or after December 31, 2008.

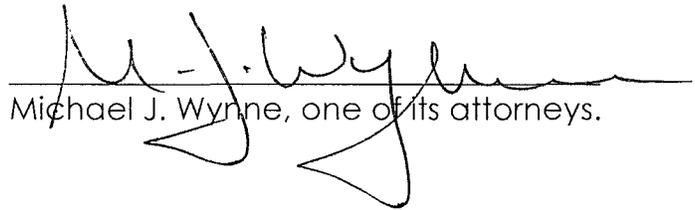
96. Under the Law of this Case, for tax years ending on or after December 31, 2008, a sale shipped from Illinois to a purchaser in either Germany or Iowa is an Illinois "market" sale if the taxpayer is subject to tax in Germany or Iowa but does not file a tax return in that jurisdiction.
97. For tax years ending before December 31, 2008, both the sale to Germany and to Iowa represented Illinois *business activity*, the fair representation of which was policed under Section 304(f), but for tax years ending on or after December 31, 2008, Section 304(f) polices the fair representation of the *market* and neither the sale to Germany nor the sale to Iowa represent the Illinois *market*.
98. Due Process protects against capricious legislation, which is either arbitrary or unreasonable as a matter of substance rather than procedure.
99. To arbitrarily declare that sales from Illinois to, say Germany or Iowa, are Illinois "market" sales based solely on (i) whether the sale is one of tangible personal property rather than of services or of intangibles, and (ii) on whether the sale is reported in a tax return in the jurisdiction of delivery of the item, is both capricious and unreasonable and contrary to the Due Process protections in the State and Federal constitutions.

100. There is no rational basis to support the discriminatory categorization of only sales of tangible personal property as being made "in this State" when they are known to be made outside Illinois based on whether the selling taxpayer has filed an income tax return in the purchaser's state, and when sales of services or intangibles similarly made to purchasers in jurisdictions where the selling taxpayer does not file an income tax return are not deemed to be made "in this State."

Respectfully submitted,

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