

**ILLINOIS INDEPENDENT TAX TRIBUNAL
CHICAGO, ILLINOIS**

| | | |
|----------------------------------|---|---------------------------|
| DIAMORA INC., |) | |
| |) | |
| Petitioner, |) | |
| |) | |
| v. |) | Case No. 14-TT-246 |
| |) | |
| DEPARTMENT OF REVENUE |) | |
| OF THE STATE OF ILLINOIS, |) | |
| Respondent. |) | |

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:

1. This timely filed amended petition concerns the notices that involve a tax assessment, including penalty and interest, in excess of \$15,000 under a tax law identified in Section 1-45 of the Act, therefore, the Tax Tribunal has jurisdiction over this amended petition. Copies of the notices are attached hereto as Exhibit A.

ANSWER: Paragraph 1 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.

2. Petitioner, formerly an Illinois corporation, conducted business at 210 E. Galena Blvd, Aurora, Illinois 60505. Petitioner's Tax Account ID is 3316-5785. A copy of Petitioner's Notice granting Late Discretionary Hearing is attached hereto as Exhibit A.

ANSWER: The information contained in Paragraph 2 is required by Illinois Tax Tribunal Regulations Section 310(a)(1)(A) and (D)(86 Ill. Admin. Code §5000.310) and is not a material allegation of fact requiring an answer under Section 310(b)(2) of the Tax Tribunal

Regulations. The Department admits the factual allegations contained in Paragraph 2.

3. IDOR is an agency of the Executive Department of the State of Illinois that is authorized to administer and enforce provisions of the Illinois Retailers' Occupation Tax Act ("ROTA"), and the Illinois Use Tax Act. 20 ILCS 2505/2505-25 and 20 ILCS 2505/2505-90.

ANSWER: Paragraph 3 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.

4. Petitioner, formerly doing business as Club Gala, was engaged in the restaurant and tavern business, and was so engaged during the tax periods at issue in this amended petition.

ANSWER: The Department admits the allegations in Paragraph 4.

BACKGROUND

5. To generate a profit the Petitioner sold beverages and food at prices that were higher than its purchase cost.

ANSWER: The Department lacks sufficient information to either admit or deny the allegations in Paragraph 5 and therefore demands strict proof thereof.

6. Petitioner's cost for food and beverages varied and typically accounted for 30-50% of the sale price.

ANSWER: The Department lacks sufficient information to either admit or deny the allegations in Paragraph 6 and therefore demands strict proof thereof.

7. Petitioner occasionally purchased beer at retail prices, which reduced Petitioner's gross margin for such sales.

ANSWER: The Department lacks sufficient information to either admit or deny the allegations in Paragraph 7 and therefore demands strict proof thereof.

8. On information and belief, IDOR conducted an audit of the Petitioner's business in or around August 2012.

ANSWER: The Department admits it conducted an audit of the taxpayer during 2012 and 2013.

9. IDOR had access to the Petitioner's books and records. The audit included tax periods July 1, 2009 through December 31, 2011 ("Tax Periods".)

ANSWER: The Department denies Petitioner provided a full set of books and records or that the Department had access to all the Petitioner's books and records during the audit. The Department admits it conducted an audit of Petitioner July 1, 2009 to December 31, 2011 books and records.

10. On information and belief, IDOR's auditor corrected Petitioner's sales tax returns for the Tax Periods pursuant to Section 4 of the ROTA (35 ILCS 120/4). This section provides in pertinent part as follows:

...the Department shall examine such return and shall, if necessary, correct such return according to its best judgment and information.

ANSWER: Paragraph 10 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.

11. On or about March 4, 2013 Petitioner was assessed a tax liability of \$45,993.27 (the "Liability").

ANSWER: The Department states the Notice speaks for itself and therefore denies the characterization thereof and any and all other allegations in Paragraph 11. The Department admits it issued the Notice of Tax Liability dated March 4, 2013, attached to Petitioner's

Petition.

12. On information and belief, IDOR determined Petitioner's tax liability by incorrectly calculating Petitioner's cost of goods sold at only 20% of the corresponding sale price.

ANSWER: The Department denies the allegations in Paragraph 12.

13. On information and belief, IDOR assessed a fraud penalty on Petitioner based on its method of calculating gross receipts that far exceeded the actual gross receipts generated by the Petitioner, which resulted in an excessive tax liability.

ANSWER: The basis of the assessment, including any penalties, is as set forth in the audit file including the audit narrative, and the Department therefore denies Petitioner's characterization and all other allegations contained in Paragraph 13.

COUNT I

DOR's Calculation of Petitioner's Purported Tax Liability was Incorrect and not According to its Best Judgment and Information

14. Petitioner restates and incorporates by reference paragraphs 1 through 13 of this Petition.

ANSWER: The Department incorporates and repeats its answers to Paragraphs 1 through 13 as though fully set forth herein.

15. As previously noted, Section 4 of the ROTA requires that IDOR "...shall examine such returns and shall, if necessary, correct such return according to its best judgment and information." 35 ILCS 120/4.

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. The auditor determined Petitioner's mark-up alcohol receipts by applying a multiplier of 5.2 to its alcohol purchases. The auditor did not make a distinction between various types of

alcohol, such as beer and liquor.

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 and all other allegations contained in Paragraph 16.

17. Petitioner's actual marked-up alcohol receipts were based on a multiplier of 3.4, which generated actual receipts that were substantially lower than the amounts attributed to it by the auditor.

ANSWER: The Department lacks sufficient information to either admit or deny the allegations in Paragraph 17 and therefore demands strict proof thereof.

18. A reasonable review of Petitioner's vendor invoices relative to the corresponding sale price, which was reflected on its menu and confirmed by its point-of-sale receipts, should have sufficiently informed the auditor that the proper multiplier was 3.4 rather than 5.2 that she applied.

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 and all other allegations contained in Paragraph 18.

19. IDOR's corrected returns, which were based on an incorrect method of calculating Petitioner's purported tax liability, were not produced with a minimum standard of reasonableness because the auditor did not use her best judgment based on the information provided by Petitioner.

ANSWER: Paragraph 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 in Paragraph 19.

WHEREFORE, the Department respectfully requests this Tribunal:

- a. Deny each prayer for relief in the Petition;
- b. Find that the Department's Notice correctly reflects 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

Petitioner's Failure to Pay the Purported Additional Tax was due to Reasonable Cause

20. Petitioner restates and incorporates by reference paragraphs 1 through 19 of this Petition.

ANSWER: The Department incorporates and repeats its answers to Paragraphs 1 through 19 as though fully set forth herein.

21. Illinois law provides that penalties "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.

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.

22. Petitioner made a good faith effort to determine its obligation as reported on its sales tax reports.

ANSWER: Paragraph 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 in Paragraph 22.

23. Petitioner acted in good faith, and with reasonable cause; therefore, no penalty should be assessed against the Petitioner.

ANSWER: Paragraph 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 in Paragraph 23.

WHEREFORE, the Department respectfully requests this Tribunal:

- a. Deny each prayer for relief in the Petition;
- b. Find that the Department's Notice correctly reflects 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

Petitioner had no Intent to Defraud the Department

24. Petitioner restates and incorporates by reference paragraphs 1 through 23 of this Petition.

ANSWER: The Department incorporates and repeats its answers to Paragraphs 1 through 23 as though fully set forth herein.

25. The Illinois Uniform Penalty and Interest Act (the "UIPA") provides that:

if any return or amended return is filed with the intent to defraud, in addition to any penalty imposed under Section 3-3 of this Act, a penalty shall be imposed in an amount equal to 50% of any resulting deficiency.
35 ILCS 735/3-6(a).

ANSWER: Paragraph 25 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.

26. On information and belief, IDOR's auditor assessed a fraud penalty against the Petitioner based on the fact that IDOR's auditor applied a method of calculating gross receipts that resulted in a purported tax liability that far exceeded the actual gross receipts generated by

Petitioner.

ANSWER: The basis of the assessment, including any penalties, is as set forth in the audit file, including the audit narrative, and the Department therefore denies Petitioner's characterization and all other allegations contained in Paragraph 26.

27. At no time, and in no way, did Petitioner intend to defraud the State of Illinois.

ANSWER: Paragraph 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 in Paragraph 27.

WHEREFORE, the Department respectfully requests this Tribunal:

- a. Deny each prayer for relief in the Petition;
- b. Find that the Department's Notice correctly reflects 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: March 5, 2015

Respectfully submitted,
Illinois Department of Revenue

By: /s/ Ashley Hayes Forte
Ashley Hayes Forte
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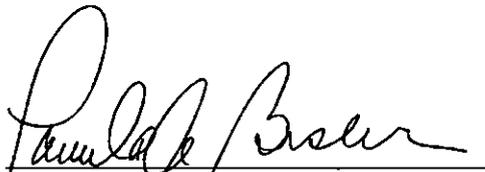
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**AFFIDAVIT OF PAMELA A. BESLER
PURSUANT TO TRIBUNAL RULE 5000.310(b)(3)**

1. I am currently employed by the Illinois Department of Revenue in the Audit Bureau.
2. My current title is Revenue Auditor III.
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, and 17.

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.



Pamela A. Besler
Revenue Auditor III
Illinois Department of Revenue

DATED: 3/5/15