ILLINOIS INDEPENDENT TAX TRIBUNAL
CHICAGO, ILLLINOIS

WALTER E. POGUE,	)	
	)	
Petitioner,	)	
	)	**Case No. 14-TT-254**
v.	)	
	)	**Judge Brian F. Barov**
ILLINOIS DEPARTMENT OF REVENUE,	)	
	)	
Respondent.	)	

NOTICE OF FILING

TO: Mr. Jason Bartell
Bartell Powell, LLP
10 E. Main St.
Champaign, IL 61820
(217) 352-5900

PLEASE TAKE NOTICE, that on January 20, 2015, the Department filed by electronic mail the attached **ANSWER** with the Illinois Independent Tax Tribunal, located at 160 N. LaSalle Street Room N506, Chicago, Illinois 60601.

Respectfully submitted,

__/s/ Jonathan M. Pope_____
Jonathan M. Pope
Special Assistant Attorney General

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Date: January 20, 2015

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ANSWER

NOW COMES the Illinois Department of Revenue (the "Department"), through its attorney, Lisa Madigan, Illinois Attorney General, and for its Answer to the Walter E. Pogue ("Petitioner") Petition respectfully pleads as follows:

INTRODUCTION

1. The "Notice" was issued by the Department on October 28, 2014, assessing personal liability in the amount of $24,672.02 for the unpaid tax debt of Nottus, Inc. ("Nottus"). A copy of the "Notice" is attached to this Petition.

ANSWER: The term "tax debt" is vague; the Department therefore denies any allegations related thereto. The Department admits that on or about October 28, 2014, the Department issued a "Collection Action - Assessment and Notice of Intent" to Petitioner as a responsible officer of Nottus in the amount of $24,672.02 representing Nottus' unpaid withholding taxes, inclusive of penalties and interest.

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 [omitted].

ANSWER: The Department admits the statements in Paragraph 2.

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.

ANSWER: The Department admits that the Nottus Illinois Business Registration Application (Form Reg-1), dated January 10, 2013, indicates Petitioner as owning a 51% interest in Nottus. The Department denies any other allegations in Paragraph 3 related thereto. The Department also denies that Nottus is incorporated in Washington State.

4. *735 ILCS 735/3-7* permits a responsible officer to be held personally liable for willful failure to pay required taxes.

ANSWER: Paragraph 4 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b)(2).

5. Petitioner should not be held personally liable for the unpaid tax debt of Nottus because he is not a responsible officer and he did not act willfully.

ANSWER: Paragraph 5 contains legal conclusions, not material allegations of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). Notwithstanding the above, the Department denies the statements in Paragraph 5.

BACKGROUND AND RELEVANT FACTS

6. On October 28, 2014, the Department issued a "Collection Action - Assessment and Notice of Intent" to Petitioner for the unpaid tax debt of Nottus. The determination letter provides that Petitioner is personally liable in the amount of $24,672.02 for being a responsible officer of Nottus.

ANSWER: The term "tax debt" is vague; the Department therefore denies any allegations related thereto. The Department admits that on or about October 28, 2014, the Department issued a "Collection Action - Assessment and Notice of Intent" to Petitioner as a responsible officer of Nottus in the amount of $24,672.02 representing Nottus' unpaid withholding taxes, inclusive of penalties and interest.

7. Petitioner is not a responsible officer of Nottus, did not act willfully, and is therefore not personally responsible for this tax liability.

ANSWER: Paragraph 7 contains legal conclusions, not material allegations of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). Notwithstanding the above, the Department denies the statements in Paragraph 7.

APPLICABLE LAW

8. *35 ILCS 735/3-7* can hold a responsible officer of a corporation personally liable for tax liability due to willful non-payment.

ANSWER: Paragraph 8 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). The Department admits the

existence, force, and effect at all relevant times of 35 ILCS 735/3-7 and states that such law speaks for itself.

9. *35 ILCS 735/3-7* reads in pertinent part:

> "Any officer or employee of any taxpayer subject to the provisions of this Act administered by the Department who has the control, supervision or responsibility of filing returns and making payment of the amount of any trust tax imposed in accordance with that Act and who willfully fails to file the return or make the payment to the Department of willfully attempts in any other manner to evade or defeat the tax shall be personally liable for a penalty equal to the total amount of tax unpaid by the taxpayer including interest and penalties thereon. . ."
>
> *35 ILCS 735/3-7*.

ANSWER: Paragraph 9 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). The Department admits the existence, force, and effect at all relevant times of 35 ILCS 735/3-7 and states that such law speaks for itself.

10. In order to be considered a responsible officer under the act, a person should have significant authority and control of the business affairs of the company. *Cerone v. State, 974 N.E.2d 377, 383 (Ill. App. Ct. 1st Dist. 2012)*. In *Cerone*, the court found that a part owner of a restaurant was a responsible officer due to holding a 75% interest, regularly visiting the restaurant, speaking with the restaurant managers concerning business affairs, holding check signing authority, and participating in significant business decision. *Id.*

ANSWER: Paragraph 10 contains legal conclusions, not material allegations of fact, and therefore does not require an answer pursuant to Rule 310(b)(2).

11. *Branson v. Department of Revenue* is another relevant case that deals with the issue of willfulness. *Branson* states, "Willful failure to pay taxes has generally been defined as involving intentional, knowing and voluntary acts or, alternatively, reckless disregard for obvious or known risks." *168 Ill. 2d 247, 255 (Ill. 1995).* In other words, a responsible officer must intentionally withhold payment of taxes with full knowledge of its consequences, or recklessly fail to pay taxes in the face of obvious or known risks. *Id.*

ANSWER: Paragraph 11 contains legal conclusions, not material allegations of fact, and therefore does not require an answer pursuant to Rule 310(b)(2).

RESPONSIBLE OFFICER

12. Petitioner was erroneously held personally liable by the Department for the unpaid tax debt of Nottus. Petitioner should not be held liable because he is not a responsible officer as defined under the statute.

ANSWER: Paragraph 12 contains legal conclusions, not material allegations of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). To the extent paragraph 12 may contain any allegations of fact, the Department denies such allegations.

13. Petitioner, being only a 51% shareholder of Nottus, does not have significant authority or control over the business affairs of the company.

ANSWER: Paragraph 13 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). Notwithstanding the above, the Department admits that the Nottus Illinois Business Registration Application (Form Reg-1),

dated January 10, 2013, indicates Petitioner as owning a 51% interest in Nottus. To the extent paragraph 13 may contain any other allegations of fact, the Department denies such allegations.

14. Additionally, unlike the cited *Cerone* case, Petitioner did not participate in significant business decisions with the company.

ANSWER: Paragraph 14 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). To the extent paragraph 14 may contain any allegations of fact, the Department denies such allegations.

15. As such, due to Petitioner not having the responsibility to pay taxes for Nottus, and due to Petitioner not having significant control over the business affairs of Nottus, he should not be held liable for this tax liability.

ANSWER: Paragraph 15 contains legal conclusions, not material allegations of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). To the extent paragraph 15 may contain any allegations of fact, the Department denies such allegations.

WILLFULNESS

16. In addition to not being a responsible officer as defined under statute and case law, Petitioner did not act willfully in any non-payment of taxes on the part of Nottus.

ANSWER: Paragraph 16 contains legal conclusions, not material allegations of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). To the extent paragraph 16 may contain any allegations of fact, the Department denies such allegations.

17. Because Petitioner did not significantly participate in the operation of the business, he did not intentionally or knowingly withhold payment of taxes.

ANSWER: Paragraph 17 contains legal conclusions, not material allegations of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). To the extent paragraph 17 may contain any allegations of fact, the Department denies such allegations.

18. Additionally, due to the nature of Petitioner's limited involvement in Nottus, he did not exhibit any reckless disregard for any obvious or known risks.

ANSWER: Paragraph 18 contains legal conclusions, not material allegations of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). To the extent paragraph 18 may contain any allegations of fact, the Department denies such allegations.

CONCLUSION AND RELIEF REQUESTED

19. As indicated by both statutory and case law, the *735 ILCS 735/3-7* was intended to apply to responsible officers of a company who willfully fail to pay required taxes. In the present case, Petitioner is neither a responsible officer nor has he demonstrated willfulness in any failure to pay taxes. [Petitioner's prayer for relief in Paragraph 19 omitted].

ANSWER: Paragraph 19 contains legal conclusions, not material allegations of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). To the extent paragraph 19 may contain any allegations of fact, the Department denies such allegations.

WHEREFORE, the Department prays that the Tribunal enter an order to:

a. deny any prayer for relief in Petitioner's Petition;

b. find the Notice at issue correct as issued;

c. order judgment in favor of Department and against Petitioner; and

d. grant such further relief as this Tribunal deems appropriate under the circumstances.

Respectfully Submitted,

LISA MADIGAN
Illinois Attorney General

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Special Assistant Attorney General

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CERTIFICATE OF SERVICE BY ELECTRONIC MAIL

Jonathan M. Pope certifies that he is a Special Assistant Attorney General of the State of Illinois duly appointed by Lisa Madigan, Attorney General of the State of Illinois; that he is authorized to make this certificate; that on January 20, 2015, before the hour of 5:00 p.m. (C.S.T.) he served a true and exact copy of the foregoing instrument entitled **ANSWER** on the above Taxpayer/Petitioner by sending the same as an attachment to an electronic mail message addressed to Taxpayer/Petitioner at his designated email address:

Mr. Jason Bartell: jbartell@bartellpowell.com

__/s/ Jonathan M. Pope_____
Jonathan M. Pope
Special Assistant Attorney General

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