IN THE ILLINOIS INDEPENDENT TAX TRIBUNAL

ASC HOLDINGS, INC. Petitioner, v. ILLINOIS DEPARTMENT OF REVENUE Respondent.	)))))))))	No. RECEIVED AUG 3 1 2016 BY: 16 TT 178

PETITION

Petitioner, ASC Holdings, Inc., by and through its attorney, Horwood Marcus & Berk Chartered, complains of Respondent, the Illinois Department of Revenue, and alleges as follows:

THE PARTIES

1. Petitioner's headquarters and principal place of business are located at 5430 LBJ Freeway, Suite 1700, Dallas, Texas 75240.

2. Petitioner is represented by David A. Hughes of Horwood Marcus & Berk Chartered, located at 500 West Madison St., Suite 3700, Chicago, Illinois 60661, who can be reached at 312-606-3212 or dhughes@hmblaw.com.

3. Petitioner's FEIN is 87-0443648.

4. Respondent, the Illinois Department of Revenue ("Department"), is an agency of the Executive Department of the State Government. 20 ILCS 5/5-15.

JURISDICTION

5. Petitioner is protesting the Notice of Deficiency, dated July 19, 2016 (the "Notice"), asserting a deficiency of Illinois corporate income and replacement tax of $14,726,597.00, interest of $1,133,855.93 and penalties of $2,945,319.40, for a total

asserted deficiency of $18,805,772.33 for the tax year ended December 31, 2012 (the "Tax Year"). A copy of the Notice is attached as **Exhibit A**.

6. The tax involved herein is the Illinois corporate income and replacement tax imposed under the Illinois Income Tax Act, 35 ILCS 5/201 *et seq.* (the "Tax").

7. Pursuant to the Illinois Independent Tax Tribunal Act of 2012, this Tribunal has original jurisdiction over all determinations of the Department reflected on a Notice of Deficiency issued under the Illinois Income Tax Act where the amount at issue in the notice exceeds $15,000, exclusive of penalties and interest. 35 ILCS 1010/1-45(a).

BACKGROUND

8. The facts recited herein relate to the Tax Year unless otherwise stated.

9. Petitioner is a Utah company that is headquartered and maintains its commercial domicile in Dallas, Texas.

10. Petitioner is an indirect subsidiary of Contran Corporation ("Contran").

11. Contran is a Delaware holding company that is headquartered and maintains its commercial domicile in Dallas, Texas.

12. Contran has four operating segments and one equity investment.

13. Contran's operating segments are (i) Chemicals; (ii) Component Products; (iii) Waste Management; and (iv) Steel and Wire.

14. Contran's equity investment is in Titanium Metals Corporation ("TIMET").

15. The Chemicals segment consists of Kronos Worldwide, Inc. and subsidiaries (the "Kronos Group").

16. The Kronos Group collectively comprises one of the leading global producers and marketers of value-added titanium dioxide pigments, which are used in a diverse range of

customer applications and end-use markets, including coatings, plastics, paper, food, cosmetics, inks, textile fibers, rubber, pharmaceuticals, glass, ceramics and other industrial and consumer markets.

17. The Component Products segment consists of CompX International Inc. and subsidiaries (the "CompX Group").

18. The CompX Group collectively comprises one of the leading manufacturers of engineered components that are sold to a variety of industries including office furniture, recreational transportation (including boats), mailboxes, toolboxes, home applications, banking equipment, vending equipment and computer-related equipment.

19. One of the CompX Group subsidiaries, Livorsi Marine, Inc., is a leading manufacturer of stainless steel exhaust systems, gauges and throttle controls for the performance marine industry.

20. The Waste Management segment consists of Waste Control Specialists LLC ("WCS").

21. WCS operates a West Texas facility for the processing, treatment, storage and disposal of a broad range of low-level radioactive, hazardous, toxic and other wastes.

22. The Steel and Wire segment consists of Keystone Consolidated Industries, Inc. and subsidiaries (the "Keystone Group").

23. The Keystone Group collectively comprises one of the leading domestic manufacturers of fabricated wire products.

24. Valhi, Inc. ("Valhi") is a publicly-traded Delaware holding company that is headquartered and maintains its commercial domicile in Dallas, Texas.

25. Valhi is over 90% owned by Valhi Holding Company, which is an indirect wholly-owned subsidiary of Contran.

26. NL Industries, Inc. ("NL Industries") operates in the Component Products segment through its majority interest in the CompX Group.

27. NL Industries is a publicly traded New Jersey holding company that is headquartered and maintains its commercial domicile in Dallas, Texas.

28. In 1986, a predecessor of Valhi purchased NL Industries, which held an investment interest in TIMET.

29. TIMET is one of the world's largest producers of titanium sponge, the basic form of titanium metal used in titanium melted and milled products for use in a variety of commercial aerospace, military, medical and other emerging markets.

30. For the Tax Year, Petitioner filed an Illinois combined Tax return with approximately 33 affiliates, including Contran, Valhi Holding Company, Valhi, NL Industries, the Kronos Group, the CompX Group, WCS and the Keystone Group (the "Combined Group").

31. TIMET was not included in the Combined Group for the Tax Year.

32. TIMET has never been included in an Illinois combined Tax return.

33. Petitioner was the designated agent for filing the Combined Group's Illinois Tax return for the Tax Year.

34. On November 9, 2012, TIMET entered into a definitive merger agreement (the "Merger Agreement") with an unrelated third party, Precision Castparts Corp. ("Precision").

35. Pursuant to the Merger Agreement, on November 20, 2012, Precision commenced an all-cash tender offer to acquire all of TIMET's outstanding common stock.

36. On December 20, 2012, Precision purchased all of TIMET's common stock that was held by members of the Combined Group (the "Sale") for $16.50 per share, aggregating to $853,417,307 (the "Gross Proceeds").

37. By December 20, 2012, Precision had purchased the majority of TIMET's common stock that was held by the general public.

38. On the date of the Sale, the members of the Combined Group collectively held 29.5% of TIMET's common stock through Valhi Holding Company, Kronos Worldwide, Inc., Contran, Valhi, NL Industries and NL's wholly-owned subsidiary, NL Environmental Management Services, Inc.

39. None of the members of the Combined Group that held an interest in TIMET maintained their commercial domicile in Illinois.

40. On January 7, 2013, Precision completed the merger with TIMET.

41. At the time of the Sale, TIMET was a publicly-held Delaware corporation that was headquartered and maintained its commercial domicile in Dallas, Texas.

42. As a result of the Sale, the members of the Combined Group realized an aggregate gain of $676,229,861 (the "Gain").

43. On Petitioner's Illinois combined Tax return for the Tax Year, the Gain was classified as nonapportionable nonbusiness income.

44. TIMET had sales in Illinois, but did not have any payroll or property in the State and did not file an Illinois Tax return for the Tax Year.

45. Petitioner has payroll and sales, holds inventory and equipment, and pays rent in Illinois.

46. CompX Security Products, Inc., a member of the Combined Group, has payroll and sales, holds inventory and equipment, and owns real property in Illinois.

47. Keystone Consolidated Industries, Inc., a member of the Combined Group, has payroll and sales, holds inventory and equipment, and owns real property in Illinois.

48. Keystone Calumet, Inc., a member of the Combined Group, has payroll and sales in Illinois, holds inventory and equipment, and owns real property in Illinois.

49. Kronos (US), Inc., a member of the Combined Group, has payroll and sales, holds consigned inventory, and pays rent in Illinois.

50. Livorsi Marine, Inc., a member of the Combined Group, has payroll and sales, holds inventory and equipment, and owns real property in Illinois.

51. TIMET's business is separate and distinct from the business activities of the members of the Combined Group.

52. TIMET employees manage and control its day-to-day business operations.

53. The majority of the directors on TIMET's Board of Directors were independent.

54. TIMET maintained its own research and development activities.

55. TIMET maintained its own production facilities throughout the world.

56. TIMET had its own distinct supply and distribution channels.

57. TIMET had its own customer base.

58. Any transactions between or among TIMET and any member of the Combined Group were conducted on an arm's length basis.

59. There were no intercompany transfers or sales of raw materials or products between or among TIMET and any member of the Combined Group.

60. TIMET did not make any joint purchases of raw materials, equipment or supplies with any member of the Combined Group.

COUNT I

Illinois is Prohibited from Taxing the Gain under the Due Process and Commerce Clauses <u>of the United States Constitution</u>

61. Petitioner realleges and incorporates by reference the allegations made in paragraphs 1 through 60, inclusive, hereinabove.

62. The Due Process Clause of the Fourteenth Amendment and the Commerce Clause of the United States Constitution mandate that a state may not, when imposing an income or franchise tax, "tax value earned outside its borders." *ASARCO Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 315 (1982).

63. That principle rests on the fundamental requirement that there must be a "minimal connection between the interstate activities and the taxing state [] and there must be a rational relation between the income attributed to the taxing state and the intrastate value of the corporate business." *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768, 772 (1992).

64. In *Allied-Signal*, the U.S. Supreme Court indicated that, in the case of income from capital transactions, the two fundamental constitutional requirements are satisfied by showing either that the taxpayer and the corporation that was the source of the income have a unitary business relationship or that the capital transaction serves an operational rather than an investment function (the "operational function test"). *Allied-Signal*, 504 U.S. at 787.

65. In *MeadWestvaco Corp. v. Illinois Department of Revenue*, 553 U.S. 16 (2008), the Supreme Court clarified its reference to the "operational function test" in *Allied-Signal* and explained that the operational function test was not intended to modify the unitary

business principle by adding a new ground for apportionment, but rather the operational function test "simply recognizes that an asset can be a part of a taxpayer's unitary business even if what we may term a 'unitary relationship' does not exist between the 'payor and payee.'" *Id.* at 29.

66. The Court in *MeadWestvaco* went on to hold that where the asset in question is another business, the "hallmarks" of a unitary business are functional integration, centralized management and economies of scale. *Id.*; *see also Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 166 (1983).

67. The Combined Group held a minority interest in TIMET.

68. TIMET's business is separate and distinct from the business activities of the members of the Combined Group.

69. TIMET employees manage and control its day-to-day business operations and the majority of the directors on TIMET's Board of Directors were independent.

70. TIMET maintained its own research and development activities and its own production facilities.

71. Any transactions between or among TIMET and any member of the Combined Group were conducted on an arm's length basis.

72. TIMET had its own distinct supply and distribution channels.

73. There were no intercompany transfers or sales of raw materials or products between or among TIMET and any member of the Combined Group.

74. TIMET did not make any joint purchases of raw materials, equipment or supplies with any member of the Combined Group.

75. There was no functional integration, centralized management and economies of scale between or among TIMET and the members of the Combined Group.

76. The Department's taxation of the Gain is improper because TIMET was not engaged in a unitary business with the members of the Combined Group.

77. TIMET's business activities were completely unrelated to the activities conducted by the Combined Group in Illinois and neither contributed to nor were dependent upon the activities of the members of the Combined Group.

78. The acquisition and holding of TIMET's stock served an investment function.

79. The Department's taxation of the Gain violates the Due Process Clause and Commerce Clause of the United States Constitution because it results in the inclusion of income that bore no relationship to activities conducted within Illinois by the Combined Group.

WHEREFORE, Petitioner prays that the Tribunal finds and enters an order that:

(a) the Due Process and Commerce Clauses of the United States Constitution bar the Department from taxing Petitioner on the Gain;

(b) there was no unitary relationship between or among TIMET and any members of the Combined Group;

(c) the acquisition and holding of TIMET's stock served an investment function;

(d) there is no Tax deficiency for the Tax Year;

(e) the Notice be withdrawn; and

(f) grants such further relief as the Tribunal deems appropriate under the circumstances.

COUNT II

<u>The Gain Constitutes Nonbusiness Income Under the Act</u>

80. Petitioner realleges and incorporates by reference the allegations made in paragraphs 1 through 79, inclusive, hereinabove.

81. Under the Illinois Income Tax Act ("Act"), a corporation's income is classified as either "business income" or "nonbusiness income." 35 ILCS 5/1501(a)(1), (13).

82. During the Tax Year, the term "business income" was defined as "all income that may be treated as apportionable business income under the Constitution of the United States." 35 ILCS 5/1501(a)(1).

83. The term "nonbusiness income" means "all income other than business income or compensation." 35 ILCS 5/1501(a)(13).

84. A non-resident multistate taxpayer is required to apportion all business income to Illinois using a single sales factor apportionment formula. 35 ILCS 5/304(h)(3).

85. Nonbusiness income from a sale of intangible personal property is allocated to a taxpayer's commercial domicile. 35 ILCS 5/303(b)(3).

86. The Due Process Clause of the Fourteenth Amendment and the Commerce Clause of the United States Constitution require a showing that the taxpayer and the corporation that was the source of the income have a unitary business relationship and, where the asset in question is another business, the "hallmarks" of a unitary business are functional integration, centralized management and economies of scale. *See MeadWestvaco Corp. v. Illinois Department of Revenue*, 553 U.S. 16 (2008); *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768 (1992); *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159 (1983); *ASARCO Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307 (1982).

87. The Combined Group held a minority interest in TIMET.

88. TIMET's business is separate and distinct from the business activities of the members of the Combined Group.

89. TIMET employees manage and control its day-to-day business operations and the majority of the directors on TIMET's Board of Directors were independent.

90. TIMET maintained its own research and development activities and its own production facilities.

91. Any transactions between or among TIMET and any member of the Combined Group were conducted on an arm's length basis.

92. TIMET had its own distinct supply and distribution channels.

93. There were no intercompany transfers or sales of raw materials or products between or among TIMET and any member of the Combined Group.

94. TIMET did not make any joint purchases of raw materials, equipment or supplies with any member of the Combined Group.

95. The members of the Combined Group that held TIMET stock were commercially domiciled in Texas.

96. There was no functional integration, centralized management and economies of scale between or among TIMET and the members of the Combined Group.

97. The acquisition and holding of TIMET's stock served an investment function.

98. The Department's taxation of the Gain is improper because TIMET was not engaged in a unitary business with the members of the Combined Group.

99. The Department's classification of the Gain as apportionable business income is erroneous.

100. The Gain is properly classified as nonapportionable nonbusiness income.

101. The Gain is not allocable to Illinois because none of the members of the Combined Group that held an interest in TIMET maintained their commercial domicile in Illinois.

WHEREFORE, Petitioner prays that the Tribunal finds and enters an order that:

(a) the Gain is nonapportionable nonbusiness income;

(b) the Gain is not allocable to Illinois;

(c) there is no Tax deficiency for the Tax Year;

(d) the Notice be withdrawn; and

(e) grants such further relief as the Tribunal deems appropriate under the circumstances.

COUNT III

In the Alternative, if it is Determined that the Gain Constitutes Apportionable Business Income, the Gross Proceeds Must be Included in the Denominator of Petitioner's Sales Factor

102. Petitioner realleges and incorporates by reference the allegations made in paragraphs 1 through 101, inclusive, hereinabove.

103. A non-resident multistate taxpayer is required to apportion all business income to Illinois using a single sales factor apportionment formula. 35 ILCS 5/304(h)(3).

104. The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in Illinois during the tax year and the denominator of which is the total sales of the taxpayer everywhere during the tax year. 35 ILCS 5/304(a)(3)(A).

105. The term "sales" is defined as all gross receipts not allocated under the provisions of the Illinois Income Tax Act. 35 ILCS 5/1501(a)(21).

106. A Department regulation provides that the term "sales" means all gross receipts derived by the taxpayer from transactions and activity in the regular course of such trade or business. 86 Ill. Admin. Code § 100.3370(a)(1).

107. In the case of income from intangible personal property, the sale is in Illinois if the income-producing activity is performed in the State or, if the income-producing activity of the taxpayer is performed both within and without the State, if a greater proportion of the income-producing activity of the taxpayer is performed within the State than in any other state, based on performance costs, based on costs of performance. *See* 35 ILCS 5/304(a)(3)(C-5)(iii)(b).

108. The term "cost of performance" is defined as the direct costs determined in a manner consistent with generally accepted accounting principles. 86 Ill. Admin. Code § 100.3370(c)(3)(B).

109. If the standard allocation and apportionment provisions do not fairly represent the market for the taxpayer's goods, services, or other sources of business income the taxpayer may petition for, or the Department may require, an alternative method of apportionment. 35 ILCS 5/304(f).

110. The party (the Department 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 the taxation of extraterritorial values and operates unreasonably and arbitrarily in attributing to Illinois a percentage of income which is out of all proportion to the business transacted in the State. 86 Ill. Admin. Code § 100.3390(c); *see also AT&T Teleholdings, Inc. v. Dep't of Revenue*, 978 N.E.2d 371 (Ill. App. Ct. 1st Dist. 2012).

111. 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 business activity in the State. 86 Ill. Admin. Code § 100.3390(c).

112. A Department regulation describes instances in which the standard statutory apportionment provisions are presumed to not fairly represent the extent of a taxpayer's business activity in the State and sets forth alternative apportionment methodologies to apply in those instances. 86 Ill. Admin. Code § 100.3380 (the "Alternative Apportionment Regulation").

113. The Alternative Apportionment Regulation provides that "[w]hen gross receipts arise from an incidental or occasional sale of assets used in the regular course of the person's trade or business, such gross receipts shall be excluded from the sales factor." 86 Ill. Admin. Code § 100.3380(c)(2) (the "Asset Provision").

114. Petitioner is required to apportion all business income to Illinois using a single sales factor apportionment formula.

115. If it is determined that the Gain constitutes apportionable business income, the Gross Proceeds constitute a "sale" under the plain language of the statute and therefore must be included in the denominator of Petitioner's sales factor under the standard statutory apportionment formula.

116. If it is determined that the Gain constitutes apportionable business income, none of the Gross Proceeds may be included in the numerator of Petitioner's sales factor under the standard statutory apportionment formula because none of the income-producing activity related to the Sale was performed in Illinois.

117. The Alternative Apportionment Regulation is invalid because it presumes distortion in certain instances in clear violation of the statute, which requires a showing that the standard apportionment provisions do not fairly represent the market for a taxpayer's goods, services, or other sources of business income.

118. The Asset Provision is invalid and may not be applied to exclude the Gross Proceeds from Petitioner's sales factor because the Department has not provided any evidence that the standard allocation and apportionment provisions do not fairly represent the market for Petitioner's goods, services, or other sources of business income.

WHEREFORE, if the Tribunal finds and enters an order that the Gain constitutes apportionable business income, Petitioner prays that the Tribunal finds and enters an order that:

(a) the Gross Proceeds be included in the denominator of Petitioner's sales factor;

(b) none of the income-producing activity related to the Sale was performed in Illinois;

(c) none of the Gross Proceeds be included in the numerator of Petitioner's sales factor; and

(d) grants such further relief as the Tribunal deems appropriate under the circumstances.

COUNT IV

In the Alternative, if it is Determined that the Gain Constitutes Apportionable Business Income and the Alternative Apportionment Regulation is Valid, <u>the Gain Must be Included in the Denominator of Petitioner's Sales Factor</u>

119. Petitioner realleges and incorporates by reference the allegations made in paragraphs 1 through 118, inclusive, hereinabove.

120. A non-resident multistate taxpayer is required to apportion all business income to Illinois using a single sales factor apportionment formula. 35 ILCS 5/304(h)(3).

121. The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in Illinois during the tax year and the denominator of which is the total sales of the taxpayer everywhere during the tax year. 35 ILCS 5/304(a)(3)(A).

122. The term "sales" is defined as all gross receipts not allocated under the provisions of the Illinois Income Tax Act. 35 ILCS 5/1501(a)(21).

123. The Alternative Apportionment Regulation contains a provision stating that "[i]n the case of sales of business intangibles (including, by means of example, without limitation, patents, copyrights, bonds, stocks and other securities), gross receipts shall be disregarded and only the net gain (loss) therefrom should be included in the sales factor." 86 Ill. Admin. Code § 100.3380(c)(5) (the "Business Intangibles Provision").

124. Petitioner is required to apportion all business income to Illinois using a single sales factor apportionment formula.

125. If it is determined that the Gain constitutes apportionable business income, the Gain clearly constitutes a "sale" under the plain language of the statute.

126. If it is determined that the Gain constitutes apportionable business income and the Alternative Apportionment Regulation is valid, the Gain must be included in the denominator of Petitioner's sales factor pursuant to the Business Intangibles Provision.

127. If it is determined that the Gain constitutes apportionable business income and the Alternative Apportionment Regulation is valid, none of the Gain may be included in the numerator of Petitioner's sales factor because none of the income-producing activity related to the Sale was performed in Illinois.

WHEREFORE, if the Tribunal finds and enters an order that the Gain constitutes apportionable business income and the Alternative Apportionment Regulation is valid, Petitioner prays that the Tribunal finds and enters an order that:

(e) the Gain be included in the denominator of Petitioner's sales factor;

(f) none of the income-producing activity related to the Sale was performed in Illinois;

(g) none of the Gain be included in the numerator of Petitioner's sales factor; and

(h) grants such further relief as the Tribunal deems appropriate under the circumstances.

COUNT V

In the Alternative, if it is Determined that the Gain Constitutes Apportionable Business Income, the Notice Violates the Due Process and Commerce Clauses of the United States Constitution

128. Petitioner realleges and incorporates by reference the allegations made in paragraphs 1 through 127, inclusive, hereinabove.

129. Pursuant to the Due Process Clause and the Commerce Clause of the United States Constitution, a state income tax is invalid unless it is fairly apportioned. *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159 (1983).

130. For a tax to be "fairly apportioned," the measure of the tax must be reasonably related to the extent of the contact with the taxing state, since it is the activities of the taxpayer in the state that may be made to bear a just share of the state's tax burden. *Id.*

131. The Notice violates both the Due Process and Commerce Clauses of the United States Constitution because, if no receipts from the Sale are included in the denominator of Petitioner's sales factor, the Tax is out of all appropriate proportion to, and does not fairly represent, the business conducted by Petitioner in Illinois. *Allied-Signal, Inc. v. Director, Division of Taxation*, 504 U.S. 768 (1992); *Container Corp. of America v. Franchise Tax*

Bd., 463 U.S. 159 (1983); *ASARCO Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 330 (1982); *F.W. Woolworth Co. v. Taxation and Rev. Dep't*, 458 U.S. 354, 364 (1982); *Hans Rees' Sons, Inc. v. North Carolina*, 283 U.S. 123 (1931).

WHEREFORE, if the Tribunal finds and enters an order that the Gain constitutes apportionable business income, Petitioner prays that the Tribunal finds and enters an order that:

(a) inclusion of receipts from the Sale in the denominator of the sales factor is necessary to produce a fair apportionment method that is consistent with the Due Process Clause and the Commerce Clause of the United States Constitution; and

(b) grants such further relief as the Tribunal deems appropriate under the circumstances.

COUNT VI

In the Alternative, if it is Determined that the Gain Constitutes Apportionable Business Income, Exclusion of Receipts from the Sale from the Denominator of the Sales Factor Does Not Fairly Reflect the Business Activities of Petitioner in Illinois and Leads to a Grossly Distorted Result

132. Petitioner realleges and incorporates by reference the allegations made in paragraphs 1 through 131, inclusive, hereinabove.

133. If the standard allocation and apportionment provisions do not fairly represent the market for the taxpayer's goods, services, or other sources of business income the taxpayer may petition for, or the Department may require, an alternative method of apportionment. 35 ILCS 5/304(f).

134. Courts have deviated from the application of otherwise valid statutory apportionment formulas when application of the formula results in the attribution of income to a state that in no way reflects the business activities conducted by the taxpayer in the state. *See,*

e.g., *Hans Rees' Sons v. North Carolina ex rel. Maxwell*, 283 U.S. 123 (1931); *Miami Corp. v. Department of Revenue*, 571 N.E. 2d 800 (Ill. Ct. App. 1991).

135. If receipts from the Sale are excluded from the denominator of Petitioner's sales factor, the apportionment formula does not fairly represent the market for Petitioner's goods, services, or other sources of business income or the extent of Petitioner's business activity in Illinois.

WHEREFORE, if the Tribunal finds and enters an order that the Gain constitutes apportionable business income, Petitioner prays that the Tribunal finds and enters an order that:

(a) inclusion of receipts from the Sale in the denominator of Petitioner's sales factor is necessary to fairly represent the market for Petitioner's goods, services and other sources of business income and the extent of Petitioner's business activity in Illinois; and

(b) grants such further relief as the Tribunal deems appropriate under the circumstances.

COUNT VII

The Asserted Penalty Should be Abated

136. Petitioner realleges and incorporates by reference the allegations made in paragraphs 1 through 135, inclusive, hereinabove.

137. The Department imposed a late payment penalty of 20% of the asserted tax deficiency pursuant to the Uniform Penalty and Interest Act ("UPIA") Section 3-3. 35 ILCS 735/3-3.

138. Pursuant to UPIA Section 3-8, certain penalties, including the late payment penalty imposed under UPIA Section 3-3, shall not apply if the taxpayer shows that the failure to file a return or pay tax at the required time was due to reasonable cause. 35 ILCS 735/3-8; 86 Ill. Admin. Code § 700.400(a).

139. "Reasonable cause" is determined in each situation in accordance with the rules and regulations promulgated by the Department. 35 ILCS 735/3-8.

140. The late payment penalty asserted in the Notice should be abated because Petitioner acted reasonably in filing the Illinois combined Tax return for the Tax Year and any deficiency ultimately determined to be due is due to reasonable cause.

WHEREFORE, Petitioner prays that the Tribunal finds and enters an order that:

(a) the late payment penalty be abated for reasonable cause;

(b) the Notice is withdrawn or vacated as to the penalty; and

(c) grants such further relief as the Tribunal deems appropriate under the circumstances.

COUNT VIII

Petitioner is Entitled to Reasonable Expenses and Attorney's Fees

141. Petitioner realleges and reincorporates by reference the allegations made in paragraphs 1 through 140, inclusive, hereinabove.

142. The Illinois Administrative Procedure Act provides that, "[i]n any case in which a party has any administrative rule invalided by a court for any reason . . . the court shall award the party bringing the action the reasonable expenses of the litigation, including reasonable attorney's fees." 5 ILCS 100/10-55(c).

143. To the extent the Alternative Apportionment Regulation is declared invalid under Count III, Petitioner is entitled to the reasonable expenses of litigation, including reasonable attorney's fees.

WHEREFORE, to the extent the Alternative Apportionment Regulation is declared invalid under Count III, Petitioner prays that the Tribunal finds and enters an order that:

(a) declares that Petitioner is entitled to the reasonable expenses of litigation, including reasonable attorney's fees; and

(b) grants such further relief as the Tribunal deems appropriate under the circumstances.

Respectfully submitted,

ASC Holdings, Inc.
Petitioner

By: David A. Hughes
Petitioner's Attorney

David A. Hughes (dhughes@hmblaw.com)
Horwood Marcus & Berk Chartered
500 West Madison Street, Suite 3700
Chicago, IL 60661
(312) 606-3200

Notice of Deficiency

for Form IL-1120, Corporation Income and Replacement Tax Return

STATE OF Illinois
DEPARTMENT OF REVENUE
tax.illinois.gov

July 19, 2016

Letter ID: CNXXX14526833445

#BWNKMGV
#CNXX X145 2683 3445#
ASC HOLDINGS INC
ATTN: CONTRAN CORP
5430 LBJ FWY STE 1700
DALLAS TX 75240-6259

Taxpayer ID:	87-0443648
Audit ID:	A1909430272
Reporting period:	December 2012
Total Deficiency:	$18,805,772.33
Balance due:	$18,805,772.33

We have audited your account for the reporting period listed above. The attached statement explains the computation of your deficiency and the balance due. **Illinois law requires that we notify you of this deficiency and your rights.**

If you agree to this deficiency, pay the total balance due as soon as possible to minimize penalty and interest assessed. Make your check payable to the "Illinois Department of Revenue", write your taxpayer ID on your check, and mail a copy of this notice along with your payment.

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

- **If the amount of this tax deficiency, exclusive of penalty and interest is more than $15,000, *or* if no tax deficiency is assessed, but the total penalties and interest 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,** file a protest with us, the Illinois Department of Revenue, within **60 days** of the date of this notice. If you file a protest on time, we must reconsider the proposed deficiency, and if requested, grant you or your authorized representative and administrative hearing. 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. Submit your protest on Form EAR-14, Format for Filing a Protest for Income Tax, (available on our website at **tax.illinois.gov**). If we do not receive your protest within **60 days**, this deficiency will become final. A protest of this notice does not preserve your rights under any other notice.
- **In any case,** 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 you do not protest this notice or pay the assessment total in full, we may take collection action against you for the balance due which, may include levy of your wages and bank accounts, filing of a tax lien, *or* other action.

If you have questions, call us at the telephone number shown below.

Sincerely,

Constance Beard

Constance Beard
Director

ILLINOIS DEPARTMENT OF REVENUE
AUDIT BUREAU
PO BOX 19012
SPRINGFIELD IL 62794-9012

(217) 524-4279

CERTIFICATE OF SERVICE

Undersigned counsel of record hereby certifies that he caused a copy of the foregoing **Petition** to be served upon other counsel of record herein by causing the same to be delivered by messenger before the hour of 5:00 p.m. on the 31st day of August, 2016.

Illinois Department of Revenue
Office of Legal Services
100 W. Randolph St., 7-900
Chicago, IL 60601

Daniel A. Hughes

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