



**ILLINOIS INDEPENDENT  
TAX TRIBUNAL**

VONCH, LLC	)	
	)	
Petitioner,	)	
v.	)	Docket No. _____
	)	
ILLINOIS DEPARTMENT	)	
OF REVENUE,	)	
	)	
Respondent.	)	

**PETITION AND MOTION FOR ENTRY TEMPORARY RESTRAINING ORDER**

NOW COMES the Petitioner, VONCH, LLC, by and through its attorneys, LAVELLE LAW, LTD., and petitions the Illinois Independent Tax Tribunal to review and reverse and or modify the Notices of Tax Liability (the “Notices”) issued by the Respondent, the ILLINOIS DEPARTMENT OF REVENUE, and moves for the entry of a Temporary Restraining Order against Respondent, for the reasons stated below:

**INTRODUCTION**

1. The Notices were issued by Respondent on February 19, 2015, assessing Retailers’ Occupation Taxes, penalties, and interest against Petitioner in the amounts of \$22,137.00, \$8,855.00, and \$7,261.94, respectively, for the tax periods of January 1, 2009 through June 30, 2009, and \$45,594, \$9,119.00, and \$4,722.46, respectively, for the tax periods of July 1, 2009, through December June 30, 2012. *See Notices of Tax Liability attached hereto as Exhibit A.*

2. Petitioner is a limited liability company with its principal place of business at 7337 West 100<sup>th</sup> Place, Bridgeview, Illinois 60455.

3. Petitioner’s Account ID is 3614-0317 and its telephone number is (708) 233-7758.

## BACKGROUND AND RELEVANT FACTS

4. Since its organization on May 5, 2004, Petitioner has owned and operated Polekatz Chicago Gentleman's Club.
5. As the operator of a gentleman's club, Petitioner's derives most of its income from the sale of food and beverages and the rental of private rooms or areas, generally for group gatherings, such as bachelor and bachelorette parties.
6. When a party rents private rooms, it charged a fee, payment of which entitles the party to occupy a private room or space and watch the entertainment (live dancers) in such room or space (a "**Cover Charge**").
7. Parties renting private rooms are permitted to consume food and beverages in those rooms, and they are charged for such consumption separately from their Cover Charge.
8. When their time in the private room has expired, parties pay two separate charges – one charge for food and beverage consumed in that room, on which sales taxes are collected and paid to Respondent, and the Cover Charge, on which sales taxes are not collected.
9. In 2013, Respondent initiated an examination of Petitioner's Sales and Use Tax Returns for the periods of January 1, 2009, through June 30, 2012 (the "**Returns**"), with Angel Owens conducting the examination on Respondent's behalf.
10. On February 19, 2015, Thomas Lapota, to whom the audit was later assigned, issued the Notices.
11. Of the \$67,731.00 in tax assessed pursuant to the Notices, \$48,306.99 was related to Cover Charges received by Petitioner, which Respondent incorrectly determined are taxable.
12. Of the \$67,731.00 in tax assessed pursuant to the Notices, approximately \$16,500.00 was related to use taxes Respondent improperly imposed Petitioner's purchases.

13. As detailed below, these Cover Charges were not subject to sales taxation under the Illinois Retailers' Occupation Tax Act.

14. On February 20, 2015, Petitioner received an email from the Illinois Gaming Board indicating that Petitioner's application to renew its Video Gaming License would be denied if the liabilities set forth in the Notices were not resolved by May 31, 2015.

15. Upon information and belief, Petitioner's liquor license also may be subject to revocation due to the liabilities set forth in the Notices.

### **APPLICABLE LAW**

#### **Sales Tax**

16. The Illinois Retailers' Occupation Tax Act, *35 ILCS § 120/1, et seq.* (the "ROTA"), imposes 'sales' tax on sales of tangible personal property made in the course of business for use or consumption.

17. Sales tax is imposed on the seller's "gross receipts" from sales of tangible personal property made in the course of business. *35 ILCS § 120/2-10.*

18. For purposes of the ROTA, "gross receipts" from the sales of tangible personal property at retail is defined as the total selling price or the amount of such sales.

#### **Sales Tax on Cover Charges and Minimum Charges**

19. Cover charges are not included in the taxable receipts of persons operating ... places of business that come within the Act, when cover charges are made exclusively for the privilege of occupying space within the ... place, and when the payment of a cover charge by a patron does not entitle the patron to use or consume any food or beverage or other tangible personal property; In such an instance, the cover charge is a receipt on account of a service rendered, whether the service be entertainment or otherwise, and does not accrue on account of

the sale of tangible personal property at retail. *86 Ill. Admin. Code §130.2145(c)(1)*.

20. This provision regarding cover charges, however, does not apply to “minimum charges” that are made by ... retailers of food or beverages or both, and that entitle the persons paying the charge to use or consume some tangible personal property, such as food or beverages, without additional payment; The retailer's receipts from these charges are subject to sales tax. *86 Ill. Admin. Code §130.2145(c)(2)(A)*.

21. When a retailer charges customers a separate charge for entertainment, to be paid regardless of whether the customer orders refreshments, the receipts therefrom are excluded from gross receipts for purposes of the ROTA. *Miller v. Department of Revenue*, 15 Ill.2d 323 (1958).

#### *Use Taxes*

22. The Illinois Use Tax Act (the “UTA”) imposes ‘use’ taxes on the privilege of use within Illinois of tangible personal property purchased at retail from a retailer. *35 ILCS § 105/3*.

23. The UTA applies to out of state purchases of tangible property used in Illinois. *Brown’s Furniture, Inc. v. Wagner*, 171 Ill.2d 410 (1996).

#### *Assessment of Late Payment Penalties*

24. Section 4 of the Retailers’ Occupation Tax Act permits Respondent to assess penalties as part of a Notice of Tax Liability in accordance with Illinois’ Uniform Penalty and Interest Act (the “UPIA”). *35 ILCS § 120/3*.

25. Section 3-3(b) of the UPIA authorizes the assessment of a penalty for late payment of tax when due. *35 ILCS § 735/3-3(b)*.

26. Section 3-8 of the UPIA provides that the late payment penalty “shall not apply if the taxpayer shows that his failure...was due to reasonable cause.” *35 ILCS § 735/3-8*.

27. The determination of whether a taxpayer acted with reasonable cause shall be

made on a case by case basis taking into account all pertinent facts and circumstances. The most important factor to be considered in making a determination to abate a penalty will be the extent to which the taxpayer made a good faith effort to determine his proper tax liability and to file and pay his proper liability in a timely fashion.” *86 Ill. Admin. Code § 700.400(b)*.

28. Included in the specific examples of reasonable cause set forth in applicable regulations include the existence of “an Illinois appellate court decision... which supports the taxpayer's position.” *86 Ill. Admin. Code § 700.400(e)(8)*.

**COUNT I**  
**IMPROPER IMPOSITION OF SALES TAXES ON COVER CHARGES**

29. Petitioner realleges and incorporates by reference Paragraphs 1-28 as Paragraph 29 of Count I as though fully set forth herein.

30. As stated above, in determining Petitioner’s gross receipts for the audit periods at issue, Respondent improperly included Cover Charges received by Petitioner.

31. Upon information and belief, Respondent included Petitioner’s Cover Charges in its gross receipts based on Respondent’s mistaken belief that these Cover Charges were “minimum charges,” as such term is used in *86 Ill. Admin. Code §130.2145(c)(2)(A)*.

32. However, Petitioner’s Cover Charges are distinguishable from “minimum charges” in that, by paying Cover Charges, Petitioner’s customers are not entitled to consume any food or beverages without a separate charge.

33. Instead, Petitioner’s Cover Charges are those types of charges referred to in *86 Ill. Admin. Code §130.2145(c)(1)* in that customers paying Cover Charges receive only the privilege of occupying a private room or space within Petitioner’s establishment; payment of a Cover Charge does not entitle a customer to use or consume any food or beverage or other tangible personal property.

34. This is supported by the fact that, when a customer's privilege of occupying a private room or space has expired, such customer pays two separate charges – the Cover Charge and the charge for any food and beverages consumed.

35. As the Court stated in *Miller v. Department of Revenue*, with such charges being separate, the portion of the charge related to the customer's occupation of the private room (the Cover Charge) is not includible in Petitioner's gross receipts for purposes of the ROTA, and therefore is not taxable.

**COUNT II**  
**IMPROPER ASSESSMENT OF LATE PAYMENT PENALTIES**  
**(Pled in the Alternative to Count I)**

36. Petitioner realleges and incorporates by reference Paragraphs 1-35 as Paragraph 36 of Count II as though fully set forth herein.

37. To the extent that it is determined that Petitioner's Cover Charges are taxable under the ROTA, the imposition of the late payment penalty on the underpaid taxes related to such Cover Charges is improper, as Petitioner had reasonable cause for excluded such charges from its gross receipts in determining its sales tax obligations.

38. As set forth above, a taxpayer's reliance on an Illinois appellate court decision that supports its position constitutes reasonable cause for purposes of assessment of the late payment penalty.

39. In determining that Petitioner's Cover Charges were not taxable, Petitioner relied on *Miller v. Department of Revenue*, an Illinois Supreme Court case, in which the Court held that, in the case of a retailer that charges for entertainment separately from charges for food and beverages, the charges for entertainment are excluded from receipts for purposes of the ROTA.

40. Petitioner has always charged its customers separately for entertainment/room

rentals and food and beverages; in reliance on *Miller v. Department of Revenue*, Petitioner reasonably believed that its charges for entertainment/room rentals were not taxable under the ROTA.

**COUNT III**  
**IMPROPER IMPOSITION OF USE TAXES**

41. Petitioner realleges and incorporates by reference Paragraphs 1-40 as Paragraph 41 of Count II as though fully set forth herein.

42. Respondent determined that use taxes were due, but not paid on, approximately \$330,000.00 of assets, supplies, and other goods purchased by Petitioner throughout the audit period.

43. For many of these purchases, no basis was provided for Respondent's determination that they were subject to use tax other than that an invoice was missing.

44. With respect to one item on which use tax has been assessed, "computer and internet expenses" paid to Ryan Bennett, Respondent indicated that no tax was reported on invoices received from Mr. Bennett.

45. However, per Mr. Bennett's affidavit, his business never sold tangible goods to Petitioner. *See Exhibit B.*

46. With the transactions between Mr. Bennett and Petitioner not involving tangible property, there is no basis for Respondent's assessment of use taxes in relation to such transactions.

47. Where a corrected return is challenged, the record must demonstrate that Respondent's method of preparing the corrected return meets such minimum standard of reasonableness. *Elkay Manufacturing Co. v. Sweet*, 202 Ill. App. 3d 466, 470 (1st Dist. 1990).

48. The reasonableness standard is based upon Section 4 of the ROTA (which is

incorporated into the UTA in accordance with 35 ILCS § 105/12), which requires Respondent to correct returns according to its best judgment and information. *Mel-Park Drugs, Inc.*, 218 Ill. App. 3d at 208 (1st Dist. 1991).

49. The fact that an invoice for a purchase has not been provided is not a reasonable basis for determining that a transaction is subject to use tax, especially taking into account that certain transactions on which use tax have been assessed were not relate to purchases of tangible property.

**COUNT IV**  
**REQUEST FOR TEMPORARY RESTRAINING ORDER**

50. Petitioner realleges and incorporates by reference Paragraphs 1-49 as Paragraph 50 of Count II as though fully set forth herein.

51. As set forth above, to the extent that the liabilities set forth in the Notices are not resolved by May 31, 2015, Petitioner's gaming board, liquor, and possibly other licenses will be in jeopardy of revocation or non-renewal, unless Respondent instructs the appropriate licensing agencies to not revoke or reject the renewal such licenses with respect to such liabilities.

52. While this matter is pending, Petitioner is unable to enter into a payment plan with Respondent to resolve these liabilities and Petitioner does not have the ability to pay such liabilities in lump sum payment on or before May 31, 2015.

53. The revocation or non-renewal of any of Petitioner's various licenses would have a debilitating effect on Petitioner's operations and likely would leave Petitioner with no means by which any liability to Respondent could be paid at the conclusion of this hearing.

**CONCLUSION AND RELIEF REQUEST**

54. Based on the foregoing, it is apparent that Respondent's conclusion that Petitioner's Cover Charges were taxable pursuant to the ROTA was improper and that there was

no basis for Respondent's assessment of use taxes against Petitioner

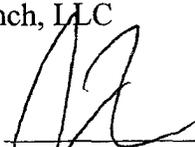
55. To the extent that it is determined that Petitioner's Cover Charges were subject to taxation under the ROTA, Petitioner had reasonable cause for its underreporting and underpayment of related sales taxes based on its reliance on the Illinois Supreme Court case of *Miller v. Department of Revenue*.

56. While this hearing is pending, it is imperative that the status quo with respect to Petitioner's various business licenses be maintained so that Petitioner may continue operating.

WHEREAS, for the reasons set forth herein, Petitioner requests that:

- a) Respondent be ordered to revise its audit report removing Petitioner's Cover Charges from its gross receipts for purposes of calculation of Petitioner's sales tax liabilities;
- b) Respondent be ordered to revise its audit report removing all late payment and other penalties assessed against Petitioner based on Petitioner's reasonable cause;
- c) Respondent be ordered to revise its audit report removing all use tax assessments;
- d) That the Notices be modified to take these revisions into account; and
- e) A temporary restraining order be entered against Respondent requiring Respondent to take any and all actions necessary to prevent any adverse actions against Petitioner's various business licenses until this hearing is resolved.

Respectfully Submitted,  
Vonch, LLC

By:   
One of their attorneys  
Dated: March 13, 2015

Joshua A. Nesser  
Lavelle Law, Ltd., #27743  
180 N. LaSalle #2503  
Chicago, IL 60601  
Dir 312-888-4113  
Fax 847.241-1526  
[jnesser@lavellelaw.com](mailto:jnesser@lavellelaw.com)

# **EXHIBIT**

**A**

**Notice of Tax Liability**  
for Form EDA-105-R, ROT Audit Report



February 19, 2015



Letter ID: CNXXXX66251X56X7

Account ID: 3614-0317

#BWNKMGV  
#CNXX XX66 251X 56X7#  
VONCH LLC  
ATTN: POA - CHARLES DIGIOVANNI  
19615 S LA GRANGE RD  
MOKENA IL 60448-9360

We have audited your account for the reporting periods January 01, 2009, through June 30, 2009. As a result we have assessed the amounts shown below.

	<u>Liability</u>	<u>Payments/Credit</u>	<u>Unpaid Balance</u>
Tax	22,137.00	0.00	22,137.00
Late Payment Penalty Increase	8,855.00	0.00	8,855.00
Interest	7,261.94	0.00	7,261.94
<b>Assessment Total</b>	<b>\$38,253.94</b>	<b>\$0.00</b>	<b>\$38,253.94</b>

If you agree, pay the assessment total as soon as possible to minimize additional penalty and interest. Mail a copy of this notice and your payment with the voucher on the enclosed Taxpayer Statement. By including a copy of this notice, your payment will be properly applied to the audit liability.

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

- If the amount of this tax liability, exclusive of penalty and interest, is more than \$15,000, or if no tax liability 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 that do not fall within the jurisdiction of the Illinois Independent Tax Tribunal, file a protest with us, the Illinois Department of Revenue, and request an administrative hearing within 60 days of the date of this notice, which is April 20, 2015. Submit your protest on Form AH-4, Protest and Request for Administrative Hearing with the Illinois Department of Revenue (available on our website at tax.illinois.gov). Mail form AH-4 along with a copy of this notice to the address on the form. If you do not file a protest within the time allowed, you will waive your right to a hearing, and this liability will become final. 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. A protest of this notice does not preserve your rights under any other notice.
- Instead of filing a petition with the Illinois Independent Tax Tribunal or a protest with us, the Illinois Department of Revenue, 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 to satisfy your liability.

If you have questions, write or call us weekdays between 8:00 a.m. and 4:00 p.m. Our contact information is listed below.

BUREAU OF AUDITS  
TECHNICAL REVIEW SECTION  
ILLINOIS DEPARTMENT OF REVENUE  
PO BOX 19012  
SPRINGFIELD IL 62794-9012

217 785-6579

# Notice of Tax Liability

for Form EDA-105-R, ROT Audit Report



#BWNKMGV  
#CNXX X153 2386 2727#  
VONCH LLC  
ATTN: POA - CHARLES DIGIOVANNI  
19615 S LA GRANGE RD  
MOKENA IL 60448-9360

February 19, 2015



Letter ID: CNXXX15323862727

Account ID: 3614-0317

We have audited your account for the reporting periods July 01, 2009, through June 30, 2012. As a result we have assessed the amounts shown below.

	<u>Liability</u>	<u>Payments/Credit</u>	<u>Unpaid Balance</u>
Tax	45,594.00	0.00	45,594.00
Late Payment Penalty Increase	9,119.00	0.00	9,119.00
Interest	4,722.46	0.00	4,722.46
<b>Assessment Total</b>	<b>\$59,435.46</b>	<b>\$0.00</b>	<b>\$59,435.46</b>

If you agree, pay the assessment total as soon as possible to minimize additional penalty and interest. Mail a copy of this notice and your payment with the voucher on the enclosed Taxpayer Statement. By including a copy of this notice, your payment will be properly applied to the audit liability.

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

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- In all other cases that do not fall within the jurisdiction of the Illinois Independent Tax Tribunal, file a protest with us, the Illinois Department of Revenue, and request an administrative hearing within 60 days of the date of this notice, which is April 20, 2015. Submit your protest on Form AH-4, Protest and Request for Administrative Hearing with the Illinois Department of Revenue (available on our website at [tax.illinois.gov](http://tax.illinois.gov)). Mail form AH-4 along with a copy of this notice to the address on the form. If you do not file a protest within the time allowed, you will waive your right to a hearing, and this liability will become final. 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. A protest of this notice does not preserve your rights under any other notice.
- Instead of filing a petition with the Illinois Independent Tax Tribunal or a protest with us, the Illinois Department of Revenue, 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](http://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 to satisfy your liability.

If you have questions, write or call us weekdays between 8:00 a.m. and 4:00 p.m. Our contact information is listed below.

BUREAU OF AUDITS  
TECHNICAL REVIEW SECTION  
ILLINOIS DEPARTMENT OF REVENUE  
PO BOX 19012  
SPRINGFIELD IL 62794-9012

217 785-6579

# **EXHIBIT**

**B**

AFFIDAVIT OF Ryan Bennett

I, Ryan Bennett, being first duly sworn under oath, do state that the following facts within my personal knowledge are true and accurate:

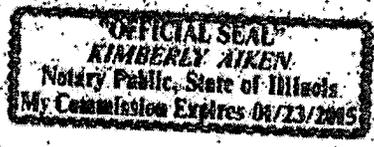
1. My name is Ryan Bennett, I am of legal age, and my [Social Security Number/Employer Identification Number] is 312-74-7462.
2. [I reside/My principal office is located] at 37436 Grande Blvd, Lake Villa, Illinois 60046, and my best contact phone number is 847-693-6170.
3. I am the owner and operator of N/A, which provides Computer services in the Chicago metropolitan area.
4. In the year of 2010, I provided the following services to Vonch, LLC, on approximately the following dates: to my best recollection, backup replacement on 8/16/2010; Projector install on 8/23/2010; Computer installed on 2/11/2010; Computer replaced on 10/10/2010.
5. In exchange for the services I provided to Vonch, LLC, in 2010, Vonch, LLC, paid to me approximately 1958.34.
6. My business has never sold any tangible goods to Vonch, LLC.
7. I have personal knowledge of and if called as a witness, I could testify competently to the facts stated herein.

FURTHER THE AFFIANT SAYETH NOT:

Ryan Bennett  
Ryan Bennett, AFFIANT

Subscribed to and before me  
this 4 day of June, 2014.

Kimberly Aiken  
Notary Public



My commission expires on: 1/23/2015