

ILLINOIS INDEPENDENT
TAX TRIBUNAL

PANERA, LLC,)	
)	
Petitioner,)	
)	
v.)	No. 19 TT 167
)	
ILLINOIS DEPARTMENT OF)	
REVENUE,)	
)	Judge Brian Barov
)	
Respondent.)	

DEPARTMENT’S ANSWER TO PETITION

Respondent, the Illinois Department of Revenue (the “Department”), by and through its attorney, Michael Coveny, for its Answer to Petitioner’s Petition (“Petition”), hereby states as follows:

INTRODUCTION

1. Petitioner is a limited liability company formed under the laws of the State of Delaware.

ANSWER: The Department admits the allegations contained in paragraph 1.

2. Petitioner's primary place of business is 3630 S. Geyer Rd, Suite 100, St. Louis, MO 63127-1234. Its Illinois Department of Revenue number is 2565-5531.

ANSWER: The Department admits that Petitioner’s mailing address is 3630 S. Geyer Road, Suite 100, St. Louis, MO 63127-1234.

3. On October 13, 2016, the Department started an audit of Petitioner for Sales/Use Tax for periods April 1, 2014 through August 31, 2016.

ANSWER: The Department admits the allegations contained in paragraph 3.

4. On July 17, 2018, the Department extended and expanded the audit of Petitioner for Sales/Use Tax to include the periods April 1, 2014 through June 30, 2017 ("Audit Period"). Subsequent to the extension, the original auditor was re-assigned and a new auditor was assigned.

ANSWER: The Department admits the allegations contained in paragraph 4.

5. On September 28, 2019, the Department issued a Notice of Audit Results. No Notice of Proposed Liability was ever provided to Petitioner.

ANSWER: The Department admits that it issued a Notice of Proposed Audit Results on the above date and further, that a Notice of Proposed Liability (“NPL”) was not issued, but affirmatively states that an NPL was not issued because the statute of limitations on issuing a statutory Notice of Tax Liability was approaching and Petitioner refused to agree to any further extensions of the statute of limitations, necessitating closing the audit and issuance of its Notice of Tax Liability.

6. The Department issued the October 10, 2019 Notice of Tax Liability being disputed assessed net of payments/credits in the amount of \$8,199,691.00 in tax, \$1,639,938.00 in penalties and \$1,325,933.55 in interest for reporting periods April 1, 2014 through June 30, 2017 (Total Liability was \$12,805,414.55 without payments. A copy of the Notice is attached to this Petition.

ANSWER: The Department admits the existence, force and effect, at all relevant times of the document attached to the Petition as an Exhibit and referred to in paragraph 6 and state that such document speaks for itself.

JURISDICTION

7. The Tax Tribunal has jurisdiction pursuant to 35 ILCS 1010/1-45(a) because the alleged tax liability in question from the Illinois Retailers' Occupation Tax Act in the aggregate exceeds, \$15,000, exclusive of penalties and interest, and because Petitioner has remitted the \$500 filing fee and filed this Petition within 60 days of the Notice of Tax Liability.

ANSWER: The Department admits the allegations contained in paragraph 7.

BACKGROUND AND RELEVANT FACTS

8. Petitioner is a national fast casual restaurant brand that currently operates approximately 1,052 corporate owned retail establishments, of which 82 are currently located in the State of Illinois.

ANSWER: The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 8 and therefore neither admits nor denies the allegations.

9. Of the 82 retail establishments currently operated by Petitioner in the State of Illinois, four (4) are Regional Fulfillment Locations ("RFLs") that serve as retail kitchens without front counter point of sale and without customer seating.

ANSWER: The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 9 and therefore neither admits nor denies the allegations.

10. Petitioner also currently operates 19 Fresh Dough Facilities ("FDFs") that manufacture and distribute dough and other goods to Petitioner's retail establishments, one (1) of which is currently located in the State of Illinois.

ANSWER: The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 10 and therefore neither admits nor denies the allegations.

11. Petitioner's retail establishments and FDFs utilize unique identification numbers and maintain separate financial accounting records for the operations at each location.

ANSWER: The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 11 and therefore neither admits nor denies the allegations.

12. Each retail establishment of Petitioner, including locations in Illinois, uses a corporate-wide system to determine and maintain taxability and tax rates for each menu item.

ANSWER: The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 12 and therefore neither admits nor denies the allegations.

13. Each retail establishment collects and remits the state and local sales tax associated with its location.

ANSWER: The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 13 and therefore neither admits nor denies the allegations.

14. Petitioner remitted Illinois sales and use tax on all of its Illinois activities including all retail establishments and FDFs, and timely filed the required tax returns for all periods being audited.

ANSWER: The Department denies the allegations contained in paragraph 14.

15. During the periods being audited, Petitioner employed individuals with state tax experience and had policies and procedures implemented to properly collect and remit Illinois sales tax.

ANSWER: The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 15 and therefore neither admits nor denies the allegations.

16. During the periods being audited, Petitioner, properly maintained the required books and records for each of its Illinois business locations.

ANSWER: The Department denies the allegations contained in paragraph 16.

17. Petitioner contends that at no time did Petitioner limit the Department's ability to conduct a representative audit sample or inform the Department that books and records did not exist to support the Illinois tax collected, remitted and reported for the periods at issue.

ANSWER: The Department emphatically denies that Petitioner did not “. . . limit the Department’s ability to conduct a representative audit sample . . .” and otherwise affirmatively states that Petitioner did indeed limit the Department’s ability to conduct a representative audit sample and otherwise refused to cooperate with or even respond to the auditor’s document requests.

18. To facilitate its determination as to whether the Petitioner appropriately and consistently applied and recorded the high tax rate and low tax rate on sales at its Illinois retail establishments during the Audit Period, the Department requested detailed sales transaction information for a single retail establishment for a single day during the Audit Period.

ANSWER: The Department denies the allegations contained in paragraph 18.

19. The sample methodology and agreement thereto were not at issue in the Petitioner's previous Illinois audit.

ANSWER: The Department admits that there was no dispute in the prior audit because the Petitioner agreed to a percentage of error from a previous audit.

20. In July 2019, the Department requested the August 18, 2016 point of sale transaction records from Petitioner's Cook #9 (Location #608003) retail establishment.

ANSWER: The Department admits that it requested the information mentioned in Paragraph 20, but only in response to, and only after Petitioner indicated it would limit its response to the Department's document request to providing information for one restaurant location and for one day. The Department further affirmatively states that Petitioner, not the Department, made the decision to limit its document production to one day's data from one restaurant location.

21. The Petitioner does not agree with this methodology, as Petitioner's Cook #9 (Location #608003) is an RFL and not a regular retail establishment (with front counter point of sale and customer seating) and is not representative of its retail operations in Illinois.

ANSWER: The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 21 and therefore neither admits nor denies the allegations.

22. The Petitioner's RFLs do not process dine-in sales as menu items are generally purchased for off-premises consumption.

ANSWER: The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 22 and therefore neither admits nor denies the allegations.

23. Reviewing only the sales activity at an RFL does not provide the Department with the ability to determine if the Petitioner properly assessed sales tax and properly accounted for high tax and low tax transactions.

ANSWER: The Department admits that RFL information would not provide a representative sample for reviewing sales activity, but affirmatively states that Petitioner, not the Department was solely responsible for the lack of representative data during the audit due to Petitioner's lack of cooperation including Petitioner's multiple refusals to provide information and documents requested by the Department's auditor.

24. Petitioner did not provide the Department with the August 18, 2016 point of sale transaction records from Petitioner's Cook #9 (Location #608003) retail establishment.

ANSWER: The Department admits the allegations contained in paragraph 24.

25. The Department assessed additional sales tax on Petitioner by treating all transactions at all of its Illinois locations at the high rate of taxation for all sales pursuant to information provided on the Petitioner's previously filed returns for this period.

ANSWER: The Department admits that it was forced to treat all of Petitioner's sales as high rate due to Petitioner's lack of cooperation with the Department during the audit including Petitioner's multiple refusals to provide the information and documents requested by the Department's auditor.

26. Petitioner's prior Illinois sales tax audits and sales tax audits in other states did not result in findings of sales tax non-compliance or note recordkeeping deficiencies.

ANSWER: As to sales/use tax audits in other states, the Department is without knowledge or information sufficient to form a belief as to such allegations, and therefore neither admits nor denies those allegations. As to prior Illinois sales tax audits, the Department denies the allegations. The Department further affirmatively states that in its most recent audit prior to the audit at issue in the NTL under protest, Petitioner was assessed sales/use tax in excess of \$ 196,000.

27. In its audit of the Petitioner's fixed asset purchases, the Department requested that the Petitioner agree to the July 1, 2019 proposed sample report for the review of fixed assets that were acquired during the Audit Period.

ANSWER: The Department admits the allegations contained in paragraph 27.

28. Petitioner requested that the Department provide a fixed asset sample report to Petitioner in order to verify that the fixed asset sample report was in alignment with the sample proposed by the Department.

ANSWER: The Department admits the allegations contained in paragraph 28.

29. Petitioner notified the Department that it was unable to agree to and execute the proposed asset sample plan until Petitioner was able to review the fixed asset sample report.

ANSWER: The Department denies the allegations contained in paragraph 29.

30. Petitioner contends that the Department did not follow the Department's Sampling Guidelines as the Petitioner and Department did not fully: a) review the method of sampling, population definitions, stratification and sample size; b) discuss projection methods and bases; c) agree that nonrecurring, extraordinary items should not be projected; or d) agree that credits or overpayments where the taxpayer has born the burden should be projected as well as liability items.

ANSWER: The Department admits that its sampling guidelines were not followed in this audit but further affirmatively states that any such failure to do so was solely on account of Petitioner's lack of cooperation with the Department during the audit including Petitioner's multiple refusals to provide information and documents requested by the Department's auditor.

31. To date, the Department has not provided the Petitioner with the fixed asset sample report and the Petitioner has not provided fixed asset invoices, bills of sale, or other related purchase documents.

ANSWER: The Department denies the allegations contained in paragraph 31.

32. The sales and use tax assessment on the October 10, 2019 Notice of Liability included a full assessment of use tax on all fixed asset purchases with credit provided for accrued use tax reported and remitted to the State of Illinois during the Audit Period.

ANSWER: The Department admits the allegations contained in paragraph 32.

33. In so doing, the Department assessed use tax on Petitioner's internal accounting entries.

ANSWER: The Department denies the allegations contained in paragraph 33 and further affirmatively states that to the extent its auditor was able to determine if the transaction was internal, then it was not taxed. The auditor only taxed transactions where he was unable to determine the nature of the transaction where Petitioner failed or refused to provide a description of the transaction.

34. In so doing, the Department assessed use tax on purchases where the Petitioner properly remitted Illinois sales tax to the vendors.

ANSWER: The Department denies the allegations contained in paragraph 34.

35. In so doing, the Department assessed use tax on purchases where Petitioner accrued and remitted the proper use tax amount to the State of Illinois.

ANSWER: The Department denies the allegations contained in paragraph 35.

36. The Department and the Petitioner agreed on a sample methodology to audit the correct taxability of noncapital expenditures incurred by the Petitioner during the Audit Period.

ANSWER: The Department admits the allegations contained in paragraph 36.

37. The sample methodology chosen by the Department to audit the Petitioner's noncapital expenditures used three (3) strata, of which two (2) were based on extrapolation and one (1) was based on 100% of the respective population of applicable transactions.

ANSWER: The Department admits the allegations contained in paragraph 37.

38. The Petitioner provided the Department with its general ledger accounts and trial balances which the Department used to select accounts of interest to include in the sample strata.

ANSWER: The Department admits the allegations contained in paragraph 38.

39. The Petitioner provided the Department with the noncapital expenditure records and purchase invoices selected by the Department. These records and invoices included electronic invoices.

ANSWER: The Department admits the allegations contained in paragraph 39.

40. The Department assessed use tax on Petitioner's noncapital expenditures where sales tax was properly remitted to the vendors.

ANSWER: The Department denies the allegations contained in paragraph 40.

41. The Department did not properly credit the Petitioner for sales tax remitted to vendors on electronic invoices.

ANSWER: Although paragraph 41 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 41.

APPLICABLE LAW AND CASES

42. The following United States and Illinois Constitutional provisions, Illinois Statutes and Illinois regulations and Illinois court cases are relied upon: [citations omitted]

ANSWER: The Department admits the existence, force and effect, at all relevant times of the United States and Illinois Constitutional provisions, Illinois

Statutes, regulations and Illinois court cases set forth or referred to in paragraph 42 and states that such statutory, regulatory and case law speak for itself.

ERROR I - ALL FOOD AND BEVERAGE SALES TRANSACTIONS SHOULD NOT BE ASSESSED AT THE HIGH TAX RATE AS A REPRESENTATIVE SAMPLE COULD NOT BE AGREED UPON AND BOOKS AND RECORDS EXIST TO DETERMINE LOW RATE TREATMENT OF CERTAIN ITEMS

43. Petitioner realleges and reincorporates paragraphs 1- 42 of the Petition herein

ANSWER: The Department repeats and incorporates its answers to paragraphs 1-42 as if fully set forth herein.

44. Petitioner timely filed its ST-1, Sales and Use Tax and E91 I Surcharge Returns for periods April 1, 2014 through June 30, 2017.

ANSWER: The Department admits the allegations contained in paragraph 44.

45. Petitioner has previously been audited by the Department for Sales and Use Tax and minimal amounts were assessed.

ANSWER: The Department admits that Petitioner was previously audited for Sales and Use Tax but denies that “minimal” amounts were assessed as the term “minimal” is ambiguous and subjective. The Department further affirmatively states that in its most recent audit prior to the audit at issue in the NTL under protest, Petitioner was assessed sales/use tax in excess of \$ 196,000.

46. The previous audit covered the similar issues and the proposed sample plan was not in issue in the Petitioner's previous Illinois sales and use tax audit.

ANSWER: The Department admits the allegations contained in paragraph 46.

47. For the Audit Period, the Department requested transaction information for a single day, August 18, 2016, for a single retail establishment, #608003.

ANSWER: The Department admits that it requested the information mentioned in Paragraph 47, but only in response to, and only after Petitioner indicated it would limit its response to the Department's document request to providing information for one restaurant location and for one day. The Department further affirmatively states that Petitioner, not the Department, made the decision to limit its document production to one day's data from one restaurant location.

48. The Petitioner explained to the Department that this was not a representative sample for certain reasons. First, a single day is not a representative sample, a number of days is required. Second, cafe unit #608003 is a Panera RFL.

ANSWER: The Department denies that Petitioner objected to or attempted to explain why the sample was not representative and further is without knowledge or information sufficient to form a belief as to the remaining allegations contained in paragraph 48 and therefore neither admits nor denies those allegations.

49. A RFLs operations and low rate/high rate activities are much different than an ordinary retail establishment. An RFL is not open to the public, instead it generally provides retail kitchen services to support fulfillment of large delivery orders. As such, it has different sales activity and tax determinations.

ANSWER: The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 49 and therefore neither admits nor denies the allegations.

50. The Petitioner explained this and offered additional information to determine a representative sample. The Department would not accept this and indicated that they knew what cafe they wanted to review.

ANSWER: The Department denies the allegations contained in paragraph 50.

51. No sample was agreed upon and the Department assessed tax at the high rate for all items reported on the ST-1 's for the audit period.

ANSWER: The Department admits that it was forced to treat all of Petitioner's sales as high rate due to Petitioner's lack of cooperation with the Department during the audit including Petitioner's multiple refusals to provide the information and documents requested by the Department's auditor.

52. The Petitioner provided various records in response to the 10 IDR's issued during this audit. The Petitioner did not provide the requested sales information because no audit sample was agreed upon.

ANSWER: The Department admits that Petitioner did provide some of the information requested by the auditor and that no audit sample was agreed upon, but affirmatively state that the lack of agreement on an audit sample was due to Petitioner's lack of cooperation with the Department during the audit including Petitioner's multiple refusals to provide the information and documents requested by the Department's auditor, ultimately culminating in Petitioner's termination of all communication with the Department's auditor.

53. The Petitioner has voluminous records to support that "the retailer has a separate means of recording and accounting for collection of receipts from sales of both high and low rate foods. For purposes of this subsection (b)(1)(B), the phrase 'separate means of recording and accounting for collection of receipts' includes cash registers that separately identify high rate and low rate sales, separate cash registers, and any other methods by which tax on high and low rate sales are recorded at the time of collection." 86 Ill. Adm Code 130.3 10(b)(1)(B).

ANSWER: The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 53 and therefore neither admits nor denies the allegations.

54. The Petitioner did not provide the single day information because it was not a representative sample. Petitioner contends that this is not an audit where the Department is driven to establish or determine an audit sample due to the taxpayer's failure to maintain adequate records. *Chak Fai Hau v. Department of Revenue*, 2019 Ill. App. ¶ 172588 (February 27, 2019), citing *Vitale v. Illinois Department of Revenue*, 118 Ill. App. 3d 210 (1983). The Petitioner wanted to provide more information to ensure the sample was representative of all of their activity and taxability.

ANSWER: To the extent Paragraph 54 contains allegations of fact, the Department denies such allegations and to the extent an answer is required, also denies any remaining legal conclusions.

55. The Department has provided guidance on sampling. Pursuant to Illinois Department of Revenue Publication 107:

Sampling Guidelines

Since it is not possible or practical to examine all transaction, sampling is often used in a tax audit. Both parties should:

- Review the method of sampling, population definitions, stratification and sample size;
- Discussion projection methods and bases;
- Agree that nonrecurring, extraordinary items should not be projected;
- Agree that credits or overpayments where the taxpayer has born the burden should be projected as well as liability items. This does not include transactions where tax was paid to an Illinois registered vendor in error. Credits include, but are not limited to,
 - o Credit memo transactions,
 - o Tax accrued in error,

- o Tax paid to reciprocal taxing authority, and
- o Adjustment transactions.

ANSWER: The Department admits the existence, force and effect, at all relevant times of the Publication set forth or referred to in paragraph 55 and states such Publication speaks for itself.

56. Per these guidelines, the parties reviewed the sample size and discussed the methods. The Petitioner explained that the Department's sample was not representative and was unable agree.

ANSWER: The Department denies the allegations contained in paragraph 56.

57. Based on the Petitioner's facts and the Illinois cases, statutes and regulations cited above, the Notice of Tax Liability should be withdrawn and tax reviewed and audited accordingly.

ANSWER: Although paragraph 57 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 57.

ERROR II - THE DEPARTMENT IS PRECLUDED FROM ASSESSING TAX ON ALL FOOD AND BEVERAGE SALES TRANSACTIONS AT THE HIGH RATE PURSUANT TO SECTION 7 OF THE RETAILERS' OCCUPATION TAX ACT AND REGULATION SECTION 130.801(b) AS PETITIONER'S BOOKS AND RECORDS SUPPORT THE LOW TAX RATE TREATMENT

58. Petitioner realleges and reincorporates paragraphs 1- 42 of the Petition herein.

ANSWER: The Department repeats and incorporates its answers to paragraphs 1-42 as if fully set forth herein.

59. Petitioner timely filed its ST-1, Sales and Use Tax and E911 Surcharge Returns for periods April 1, 2014 through June 30, 2017.

ANSWER: The Department admits the allegations contained in paragraph 59.

60. Petitioner has previously been audited by the Department for Sales and Use Tax and minimal amounts were assessed.

ANSWER: The Department admits that Petitioner was previously audited for Sales and Use Tax but denies that “minimal” amounts were assessed as the term “minimal” is ambiguous and subjective. The Department further affirmatively states that in its most recent audit prior to the audit at issue in the NTL under protest, Petitioner was assessed sales/use tax in excess of \$ 196,000.

61. Section 7 of the Retailers' Occupation Act, 35 ILCS 120/7, expressly states that:

It shall be presumed that all sales of tangible personal property are subject to tax under this Act until the contrary is established, and the burden of proving that a transaction is not taxable hereunder shall be upon the person who would be required to remit the tax to the Department if such transaction is taxable.

ANSWER: The Department admits the existence, force and effect, at all relevant times of the statutory provisions set forth or referred to in paragraph 61 and states such provision speaks for itself.

62. Moreover, Regulation Section of 130.801(b) expressly provides that:

Retailers must maintain complete books and records covering receipts from all sales and distinguishing taxable from nontaxable receipts.

ANSWER: The Department admits the existence, force and effect, at all relevant times of the regulation set forth or referred to in paragraph 62 and states such regulation speaks for itself.

63. Petitioner maintains the books and records expressly required by Section 7 of the ROT to support the low tax rate charged to certain food and beverage items not sold for on-premise consumption.

ANSWER: Although paragraph 63 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 63.

64. The Illinois Supreme Court has explained that in order for a taxpayer to overcome the Department's prima facie case of taxability there should be some evidence submitted which is identified with books or records as kept by the taxpayer and supported by proof of fact entitling it to be admitted as evidence or facts gathered from some other sources which imports equal verity. *DuPage Liquor Store, Inc. v. McKibbin*, 383 Ill. 276 (1943); *Copilevitz v. Department of Revenue*, 41 Ill. 2d 154 (1968).

ANSWER: The Department admits the existence, force and effect, at all relevant times of the case law set forth or referred to in paragraph 64 and state such case law speaks for itself.

65. Illinois courts have also found that Taxing statutes are construed "most strongly against the government and in favor of the taxpayer." *Martin Equipment of Illinois, Inc. v. Illinois Department of Revenue*, 18 TT 86, Illinois Independent Tax Tribunal (August 23, 2019), citing *Chet's Vending Serv., Inc. v. Dep't of Revenue*, 71 Ill. 2d 38, 42 (1978).

ANSWER: The Department admits the existence, force and effect, at all relevant times of the case law set forth or referred to in paragraph 65 and state such case law speaks for itself.

66. Based on the Petitioner's books and records supporting the low tax rate as applied and the Illinois case law and statutory and regulatory provisions cited above, the

Department is precluded from assessing all food and beverage at the high tax rate and the Notice of Tax Liability should be withdrawn and tax reviewed and audited accordingly.

ANSWER: Although paragraph 66 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 66.

**ERROR III - INTERNAL ASSETS ALLOCATION TRANSACTIONS ARE NOT
TAXABLE TRANSACTIONS AND SECTION 2-10 OF THE RETAILERS'
OCCUPATION TAX ACT PRECLUDES THE DEPARTMENT FROM ASSESSING
TAX ON SUCH TRANSACTIONS**

67. Petitioner realleges and reincorporates paragraphs 1- 42 of the Petition herein.

ANSWER: The Department repeats and incorporates its answers to paragraphs 1-42 as if fully set forth herein.

68. Petitioner timely filed its ST-1, Sales and Use Tax and E911 Surcharge Returns for periods April 1, 2014 through June 30, 2017.

ANSWER: The Department admits the allegations contained in paragraph 68.

69. Petitioner has previously been audited by the Department for Sales and Use Tax and minimal amounts were assessed.

ANSWER: The Department admits that Petitioner was previously audited for Sales and Use Tax but denies that “minimal” amounts were assessed as the term “minimal” is ambiguous and subjective. The Department further affirmatively states that in its most recent audit prior to the audit at issue in the NTL under protest, Petitioner was assessed sales/use tax in excess of \$ 196,000.

70. Petitioner's fixed assets accounts were audited as part of the underlying audit at issue to determine if Illinois Retailers' Occupation Tax ("ROT"), 35 ILCS 120, had been paid on each transaction.

ANSWER: The Department admits the allegations contained in paragraph 70.

71. Petitioner informed the Department during the audit that the accounts being reviewed also contained items that we internal allocations transactions not taxable transactions pursuant to Section 2-10 of the Illinois ROT, 35 ILCS 120/2-10. Petitioner explained that these internal allocation transactions were not the purchase of tangible personal property but rather an internal allocation for which no consideration or purchase price was exchanged.

ANSWER: The Department denies the allegations contained in paragraph 71.

72. The Department disregarded Petitioner's explanation of such items and refused to review further support provided by the Petitioner until the Petitioner agreed to Department's sample plan. Since Petitioner was unable to agree to the proposed sample plan, due to the unreasonableness of the sample for the fixed assets (as noted in Error I above), the Department assessed tax on all the internal allocations.

ANSWER: The Department admits that it was forced to treat all of Petitioner' allegedly internal transactions as taxable due to Petitioner's lack of cooperation with the Department during the audit including Petitioner's multiple refusals to provide the information and documents requested by the Department's auditor.

73. Based on the Petitioner's facts and the Illinois statutory provision cited above, the internal allocation items are clearly not taxable transactions and the Notice of Tax Liability should be withdrawn and tax reviewed and audited accordingly.

ANSWER: Although paragraph 73 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 73.

**ERROR IV - THE DEPARTMENT IS PRECLUDED FROM ASSESSING ILLINOIS
USE TAX ON TRANSACTIONS WHICH PETITIONER PREVIOUSLY PAID TAX**

74. Petitioner realleges and reincorporates paragraphs 1- 42 of the Petition herein.

ANSWER: The Department repeats and incorporates its answers to paragraphs 1-42 as if fully set forth herein.

75. Petitioner timely filed its ST-1, Sales and Use Tax and E911 Surcharge Returns for periods April 1, 2014 through June 30, 2017.

ANSWER: The Department admits the allegations contained in paragraph 75.

76. Petitioner has previously been audited by the Department for Sales and Use Tax and minimal amounts were assessed.

ANSWER: The Department admits that Petitioner was previously audited for Sales and Use Tax but denies that “minimal” amounts were assessed as the term “minimal” is ambiguous and subjective. The Department further affirmatively states that in its most recent audit prior to the audit at issue in the NTL under protest, Petitioner was assessed sales/use tax in excess of \$ 196,000.

77. Petitioner's expensed items and fixed assets were audited as part of the underlying audit at issue to determine if Petitioner paid or remitted the appropriate tax on each transaction.

ANSWER: The Department admits the allegations contained in paragraph 77.

78. Petitioner informed the Department during the audit that the applicable tax had been paid on the transactions being audited and provided the Department with invoices reflecting the payment of such tax.

ANSWER: The Department denies the allegations contained in paragraph 78.

79. The Department did not allow credit for invoices on which tax was paid and assessed Illinois Use Tax on such transactions.

ANSWER: The Department denies the allegations contained in paragraph 79.

80. Based on the Petitioner's facts and the Illinois statutory provisions cited above, the fixed assets or expensed items for which Petitioner provided the Department with electronic invoices reflecting Illinois tax paid are clearly not subject to Illinois Use Tax and the Notice of Tax Liability should be withdrawn and tax reviewed and audited accordingly.

ANSWER: Although paragraph 80 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 80.

ERROR V - AS A COMPLETELY INDEPENDENT BASIS FOR OBJECTING TO THE NOTICE OF TAX LIABILITY, PETITIONER SUBMITS THAT THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE U.S. CONSTITUTION AND ILLINOIS CONSTITUTION PROIDBIT THE DEPARTMENT'S ASSESSMENT OF THE TAX AT ISSUE WITHOUT REVIEWING THE PETITIONER'S SUPPORTING BOOKS AND RECORDS

81. Petitioner realleges and reincorporates paragraphs 1- 42 of the Petition herein.

ANSWER: The Department repeats and incorporates its answers to paragraphs 1-42 as if fully set forth herein.

82. Petitioner contends that the tax assessed in the Notice of Tax liability at issue is unconstitutional pursuant to the United States and Illinois due process and equal protection clause provisions.

ANSWER: Although paragraph 82 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 82.

83. As noted in the facts above, Petition maintained the required supporting books and records to support the Illinois ROT and Use tax remitted and reported on its originally filed tax returns at issue.

ANSWER: The Department denies the allegations contained in paragraph 83.

84. Moreover, Petitioner contends that the Department assessed the tax at issue without completing a review of Petitioner's underlying books and records which support that the tax at issue was correctly remitted and reported on the originally filed tax returns applicable to the Audit Period.

ANSWER: The Department acknowledges that it was forced to rely on best available evidence rather than a complete and full review of Petitioner's books and records to calculate the correct amount of tax due, but affirmatively states that any such failure to do so was solely on account of Petitioner's lack of cooperation with the Department during the audit including Petitioner's multiple refusals to provide information and documents requested by the Department's auditor, ultimately culminating in Petitioner's termination of all communication with the Department's auditor.

85. Petitioner argues that the provisions of both the U.S. and Illinois Due Process Clause and Equal Protection Clause expressly precludes the Department from depriving Petitioner of its property without due process of law as Petitioner meets the due process requirements through its daily business operations. The United States Supreme Court recently referenced due process in Wayfair Opinion, South Dakota v. Wayfair, Inc., 585 U.S. ___ (2018) by stating that:

the due process requirement that there be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax," Miller Brothers Co. v. Maryland, 347 U.S. 340, 344-345 (1954).

ANSWER: Although paragraph 85 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 85. The Department otherwise admits the existence, force and effect, at all relevant times, of the case law set forth or referred to in paragraph 85 and state such case law speaks for itself.

86. Accordingly, Petitioner contends that the Department's issuance of the Notice of Tax Liability at issue based on the Department's use of a non-representative audit sample and the fact that the Department did not review all of the Petitioner's books and records is unconstitutional.

ANSWER: Although paragraph 86 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 86.

**ERROR VI - THE NOTICE OF LIABILITY ISSUED BY THE DEPARTMENT
SHOULD BE WITHDRAWN BASED ON TAXPAYER GUARANTEES PROVIDED
WITHIN THE ILLINOIS TAXPAYERS' BILL OF RIGHTS ACT**

87. Petitioner realleges and reincorporates paragraphs 1-42 of the Petition herein.

ANSWER: The Department repeats and incorporates its answers to paragraphs 1-42 as if fully set forth herein.

88. Petitioner contends that it properly collected, remitted and reported the ROT and Use tax at issue and that the Department would have come to the same determination had the Department performed a complete review of Petitioner's books and records for the tax periods at issue.

ANSWER: Although paragraph 88 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 88.

89. Petitioner argues that even if the Department requires its auditor to use a sample period for testing, the Department's policy would also require that such a sample be representative of the taxable activities at issue and that auditor's review the Petitioner's books and records supporting the correct collection and payment of ROT and Use tax as required by the Illinois Taxpayers' Bill of Rights Act, 20 ILCS 2520.

ANSWER: The Department acknowledges that it was forced to rely on best available evidence rather than a complete and full review of Petitioner's books and records to calculate the correct amount of tax due, but affirmatively states that any such failure to do so was solely on account of Petitioner's lack of cooperation with the Department during the audit including Petitioner's multiple refusals to provide information and documents requested by the Department's auditor, ultimately culminating in Petitioner's termination of all communication with the Department's auditor.

90. Section 2 of the Taxpayers' Bill of Rights Act expressly states:

The General Assembly finds and declares that taxes are the most sensitive point of contact between citizens and their government, and that there is a delicate

balance between revenue collection and freedom from government oppression. *It is the intent of the General Assembly to place guarantees in Illinois law to ensure that the rights, privacy, and property of Illinois taxpayers are adequately protected during the process of the assessment and collection of taxes.*

The General Assembly further finds that the Illinois tax system is based largely on self-assessment, and the development of understandable tax laws and taxpayers informed of those laws will both improve self-assessment and the relationship between taxpayers and government. *It is the further intent of the General Assembly to promote improved taxpayer self-assessment by improving the clarity of tax laws and efforts to inform the public of the proper application of those laws.* (Source: P.A. 86-176; 86-189.)

ANSWER: The Department admits the existence, force and effect, at all relevant times of the statutory provisions set forth or referred to in paragraph 90 and states such provision speaks for itself.

91. Petitioner argues that the Department's use of a one day sample from a single Illinois business location, the treatment of internal accounting entries as taxable sales and the refusal to review electronic invoices to support sales tax payments each is a violation of the Petitioner's Taxpayers' Bill of Rights.

ANSWER: The Department acknowledges that it was forced to rely on best available evidence rather than a complete and full review of Petitioner's books and records to calculate the correct amount of tax due but affirmatively states that any such failure to do so was solely on account of Petitioner's lack of cooperation with the Department during the audit including Petitioner's multiple refusals to provide information and documents requested by the Department's auditor, ultimately culminating in Petitioner's termination of all communication with the Department's auditor.

92. Based on the facts stated above as well as the provisions of the Taxpayers' Bill of Rights that expressly state that it is the "intent of the General Assembly to place guarantees in Illinois law to ensure that the rights, privacy, and property of Illinois

taxpayers are adequately protected during the process of the assessment and collection of taxes," 20 ILCS 2520, Petitioner contends that it should be determined that Petitioner's ROT and Use tax were correctly remitted and reported.

ANSWER: Although paragraph 92 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 92.

93. Based on the facts presented above, Petitioner contends that the Notice at issue should be withdrawn and or modified.

ANSWER: Although paragraph 93 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 93.

ERROR VII - ABATEMENT OF PENALTIES AND INTEREST PURSUANT TO REASONABLE CAUSE PROVISIONS OF REGULATION SECTION 700.400

94. Petitioner realleges and reincorporates paragraphs 1- 42 of the Petition herein.

ANSWER: The Department repeats and incorporates its answers to paragraphs 1-42 as if fully set forth herein.

95. For the tax periods at issue, Petitioner requests the abatement under the reasonable cause provisions of Regulation 700.400 of \$1,655,989 of late payment penalties and \$1,338,518.55 in interest.

ANSWER: The Department admits that Petitioner requests abatement of penalties under the regulation cited in paragraph 95 but denies that it is eligible for penalty abatement under that regulation.

96. Petitioner contends that in collecting, remitting and reporting the Illinois ROT and Use tax at issue, it made a good faith effort to comply with the law and exercised ordinary business care and prudence as it followed Illinois statutory and regulatory provisions.

ANSWER: The Department denies the allegations contained in paragraph 96.

97. With respect to the other tax assessments reported in the Notice that Petitioner may agree to pay, Petitioner avers that the penalties originating from those items should also be abated as the Petitioner made a good faith effort to comply with the law and exercised ordinary business care in determining, remitting and reporting those Illinois ROT and Use tax.

ANSWER: The Department denies the allegations contained in paragraph 97.

98. Finally, the Department's regulations on Reasonable Cause look to whether the Petitioner "made a good faith effort" and exercised "ordinary business care in prudence". 86 Illinois Admin. Code Section 700.400. (35 ILCS 735-3/8.) As indicated above, Petitioner made every effort to comply with the Illinois ROT and Use tax statutes and regulations and maintained the required books and records to support such activities. The information provided above supports the abatement of all penalties and interest assessed on the Notice under the reasonable cause provisions.

ANSWER: The Department admits the existence, force and effect, at all relevant times of the regulation set forth or referred to in paragraph 98 and states

such provision speaks for itself. The Department denies the remaining allegations of paragraph 98 as legal conclusions rather than allegations of fact.

WHEREFORE, the Department prays:

- A) That Judgment be entered against the Petitioner and in favor of the Department on all Counts or Errors in this matter;
- B) That the Department's Notice of Tax Liability be determined to be correct;
- C) That this Tribunal grant such other additional relief it deems just and proper.

Illinois Department of Revenue
100 West Randolph Street, 7-900
Chicago, IL. 60601
(312) 814-6697; FAX (312) 814-4344

Respectfully submitted,



Michael Coveny
Department of Revenue Counsel

STATE OF ILLINOIS)
) SS
COUNTY OF SANGAMON)

AFFIDAVIT AS TO LACK OF SUFFICIENT KNOWLEDGE

I, KEN MESLE, being first duly sworn, deposes and says that I am an employee of the Illinois Department of Revenue, that I have read the foregoing Department's Answer to Petitioner's Petition to the Illinois Independent Tax Tribunal, that I am well acquainted with its contents, and under penalties as provided by law pursuant to 735 ILCS 5/1-109 of the Illinois Code of Civil Procedure, I certify that I lack the required personal knowledge to either admit or deny paragraphs 8, 9-13, 15, 21-22, 26, 48-49, and 53, in whole or in part, pursuant to 735 ILCS 5/2-610(b) and Tribunal Rule 5000.310(b)(3). I hereby certify that the statements set forth in this affidavit are true and correct to the best of my knowledge, information and belief.



KEN MESLE
Revenue Auditor III
Illinois Department of Revenue

Date: 4/8/2020

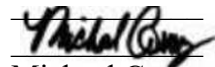
CERTIFICATE OF SERVICE

I, Michael Coveny, an attorney for the Illinois Department of Revenue, state that I served a copy of the attached Department's Verified Answer to Petitioner's Verified Petition upon:

David J. Kupiec / Natalie M. Martin
Kupiec & Martin, LLC
600 W. Van Buren Street
Suite 202
Chicago, IL 60607

By email to dkupiec@kupiecandmartin.com and nmartin@kupiecandmartin.com on April 8, 2020.

—



Michael Coveny,
Department of Revenue Counsel