IN THE ILLINOIS INDEPENDENT
TAX TRIBUNAL

PANERA LLC,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 19TT167
	)	
ILLINOIS DEPARTMENT OF REVENUE,	)	
	)	
Respondent,	)	

PETITION

The Petitioner, PANERA LLC, (hereinafter "Petitioner"), a limited liability company, by its attorneys of record, David Kupiec and Natalie Martin of Kupiec & Martin, LLC, hereby petitions the Illinois Independent Tax Tribunal to review, and withdraw and/or modify the Notice of Tax Liability (hereinafter "Notice") issued by the Illinois Department of Revenue (hereinafter "Department") on October 10, 2019, for the reasons set forth below.

INTRODUCTION

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

2. Petitioner's primary place of business is 3630 S. Geyer Rd, Suite100, St. Louis, MO 63127-1234. Its Illinois Department of Revenue number is 2565-5531.

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.

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 reassigned and a new auditor was assigned.

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

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.

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.

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.

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.

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.

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

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.

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

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.

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.

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

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.

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.

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

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.

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

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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

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

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.

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.

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.

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.

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.

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

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

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:

United States Constitution – Due Process and Equal Protection Clause

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the Unites States; **nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.**
U.S. CONST., amend XIV, Section 1 (emphasis added)

Constitution of the State of Illinois – Due Process and Equal Protection Clauses

Article I, section 2 of the Constitution of the State of Illinois provides:
No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.
Ill. Const. 1970, art. I, Section 2.

Article IX, section 2, of the Constitution of the State of Illinois provides:
In any law classifying the subjects or objects of non-property taxes or fees, the classes shall be reasonable and the subjects and objects within each class shall be taxed uniformly. Exemptions, deductions, credits, refunds and other allowances shall be reasonable.
Ill. Const. 1970, art. IX, Section 2.

Retailers Occupation Tax 35 ILCS 120

35 ILCS 120/2-10

Sec. 2-10. Rate of tax. Unless otherwise provided in this Section, the tax imposed by this Act is at the rate of 6.25% of gross receipts from sales of tangible personal property made in the course of business....

With respect to food for human consumption that is to be consumed off the premises where it is sold (other than alcoholic beverages, soft drinks, and food that has been prepared for immediate consumption) and prescription and nonprescription medicines, drugs, medical appliances, products classified as Class III medical devices by the United States Food and Drug Administration that are used for cancer treatment pursuant to a prescription, as well as any accessories and components related to those devices, modifications to a motor vehicle for the purpose of rendering it usable by a person with a disability, and insulin, urine testing materials, syringes, and needles used by diabetics, for human use, the tax is imposed at the rate of 1%.

35 ILCS 120/7

Sec. 7. Every person engaged in the business of selling tangible personal property at retail in this State shall keep records and books of all sales of tangible personal property, together with invoices, bills of lading, sales records, copies of bills of sale, inventories prepared as of December 31 of each year or otherwise annually as has been the custom in the specific trade and other pertinent papers and documents. Every person who is engaged in the business of selling tangible personal property at retail in this State and who, in connection with such business, also engages in other activities (including, but not limited to, engaging in a service occupation) shall keep such additional records and books of all such activities as will accurately reflect the character and scope of such activities and the amount of receipts realized therefrom. The Department may adopt rules that establish requirements, including record forms and formats, for records required to be kept and maintained by taxpayers. For purposes of this Section, "records" means all data maintained by the taxpayer, including data on paper, microfilm, microfiche or any type of machine-sensible data compilation.

All books and records and other papers and documents which are required by this Act to be kept shall be kept in the English language and shall, at all times during business hours of the day, be subject to inspection by the Department or its duly authorized agents and employees.

To support deductions made on the tax return form, or authorized under this Act, on account of receipts from isolated or occasional sales of tangible personal property, on account of receipts from sales of tangible personal property for resale, on account of receipts from sales to governmental bodies or other exempted types of purchasers, on account of receipts from sales of tangible personal property in interstate commerce, and on account of receipts from any other kind of transaction that is not taxable under this Act, entries in any books, records or other pertinent papers or documents of the taxpayer in relation thereto shall be in detail sufficient to show the name and address of the taxpayer's customer in each such transaction, the character of every such transaction, the date of every such transaction, the amount of receipts realized from every such transaction and such other information as may be necessary to establish the non-taxable character of such transaction under this Act.

Except in the case of a sale to a purchaser who will always resell and deliver the property to his customers outside Illinois, anyone claiming that he has made a nontaxable sale for resale in some form as tangible personal property shall also keep a record of the purchaser's registration number or resale number with the Department.

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. In the course of any audit or investigation or hearing by the Department with reference to a given taxpayer, if the Department finds that the taxpayer lacks documentary evidence needed to support the taxpayer's claim to exemption from tax hereunder, the Department is authorized to notify the taxpayer in writing to produce such evidence, and the taxpayer shall have 60 days subject to the right in the Department to extend this period either on request for good cause shown or on its own motion from the date when such notice is sent to the taxpayer by certified or registered mail (or delivered to the taxpayer if the notice is served personally) in which to obtain and produce such evidence for the Department's inspection, failing which the matter shall be closed, and the transaction shall be conclusively presumed to be taxable hereunder.

Books and records and other papers reflecting gross receipts received during any period with respect to which the Department is authorized to issue notices of tax liability as provided by Sections 4 and 5 of this Act shall be preserved until the expiration of such period unless the Department, in writing, shall authorize their destruction or disposal prior to such expiration.

Any person who fails to keep books and records or fails to produce books and records for examination, as required by this Section and the rules adopted by the Department, is liable to pay to the Department, for deposit into the Tax Compliance and Administration Fund, a penalty of $1,000 for the first failure to keep books and records or produce books and records for examination and a penalty of $3,000 for each subsequent failure to keep books and records or produce books and records for examination as required by this Section and the rules adopted by

the Department. The penalties imposed under this Section shall not apply if the taxpayer shows that he or she acted with ordinary business care and prudence. The Department may adopt rules to administer the penalties under this Section.
(Source: P.A. 100-940, eff. 8-17-18.)

Illinois Use Tax 35 ILCS 105

35 ILCS 105/3

Sec. 3. Tax imposed. A tax is imposed upon the privilege of using in this State tangible personal property purchased at retail from a retailer, including computer software, and including photographs, negatives, and positives that are the product of photoprocessing, but not including products of photoprocessing produced for use in motion pictures for commercial exhibition.

Taxpayer's Bill of Rights 20 ILCS 2520

Sec. 2. Legislative Declaration. 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; 86-18)

86 Ill Adm Code Section 130.310 Food, Soft Drinks and Candy

a) Food. *With respect to food for human consumption that is to be consumed off the premises where it is sold (other than alcoholic beverages, soft drinks,* candy *and food that has been prepared for immediate consumption), the tax is imposed at the rate of 1%. Food for human consumption that is to be consumed off the premises where it is sold includes all food sold through a vending machine, except soft drinks,* candy, *and food products that are dispensed hot from a vending machine, regardless of the location of the vending machine.* (Section 2-10 of the Act) Public Acts 96-34, 96-37 and 96-38 included changes to the definition of soft drinks and provided that candy is not considered "food for human consumption that is to be consumed off the premises where it is sold". For further information

on the definition and taxation of soft drinks, see subsection (d)(6). For further information regarding the definition and taxation of candy, see subsection (d)(7).

b) The manner in which food is taxed depends upon 2 distinct factors that must both be considered in determining if food is taxed at the high rate as "food prepared for immediate consumption" or the low rate as "food prepared for consumption off the premises where sold".

1) The first factor is whether the retailer selling the food provides premises for consumption of food. If so, a rebuttable presumption is created that all sales of food by that retailer are considered to be prepared for immediate consumption and subject to tax at the high rate. As a result of this presumption, even bulk food could potentially be taxable at the high rate. However, this presumption is rebutted if a retailer demonstrates that

A) the area for on-premises consumption is physically separated or otherwise distinguishable from the area where food not for immediate consumption is sold; and

B) 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 the tax on high and low rate sales are recorded at the time of collection.

2) The second factor is the nature of the food item being sold. As provided in subsection (c), some foods, such as hot foods, are always considered to be "food prepared for immediate consumption", and thus subject to the high rate of tax.

3) Numerous examples applying these factors to different types of food and food retailers are provided in subsection (d)(4)(A)-(I).

c) Definitions

1) "Food". Food is any solid, liquid, powder or item intended by the seller primarily for human internal consumption, whether simple, compound or mixed, including foods such as condiments, spices, seasonings, vitamins, bottled water and ice.

2) "Food Prepared for Immediate Consumption". Food prepared for immediate consumption means food that is prepared or made ready by a

retailer to be eaten without substantial delay after the final stage of preparation by the retailer.

A) Food prepared for immediate consumption includes, but is not limited to, the following:

i) all hot foods, whether sold in a restaurant, delicatessen, grocery store, discount store, concession stand, bowling alley, vending machine or any other location. At a grocery store, hot foods subject to the high rate of tax include, but are not limited to, pizza, soup, rotisserie or fried chicken and coffee; other examples of food prepared for immediate consumption include popcorn or nachos sold at a movie concession stand; hot dogs sold by a street vendor; and hot precooked meals sold to customers, such as a Thanksgiving dinner. For purposes of this Section, "hot" means any temperature that is greater than room temperature;

ii) sandwiches, either hot or cold, prepared by a retailer to the individual order of a customer;

iii) salad, olive or sushi bars offered by a retailer at which individuals prepare their own salads (hot or cold);

iv) all coffee, tea, cappuccino and other drinks prepared by a retailer for individual consumption, whether hot or cold, are subject to the high rate of tax;

v) all food sold for consumption on the premises where sold.

B) "Food prepared for immediate consumption" does not include:

i) doughnuts, cookies, bagels or other bakery items prepared by a retailer and sold either individually or in another quantity selected by the customer, provided they are for consumption off the premises where sold;

ii) whole breads, pies and cakes prepared by a retailer, even when prepared to the individual order of a customer;

iii) sandwiches that are prepared by a retailer and placed in a deli case or other storage unit;

iv) cold salads, jellos, stuffed vegetables or fruits sold by weight or by quart, pint or other quantity by a retailer;

v) cheese, fruit, vegetable or meat trays prepared by a retailer, either to the individual order of a customer or premade and set out for sale;

vi) food items sold by a retailer that are not prepared or otherwise manufactured by that retailer, such as pre-packaged snacks or chips, unless these items will be consumed on the premises where sold (e.g., in a sandwich shop). For grocers, such items include, but are not limited to, fruits, vegetables, meats, milk, canned goods and yogurt. In addition, effective September 1, 2009, all sales of "candy", as defined in subsection (d)(7), are subject to the high rate of tax.

C) The provisions of subsection (c)(2)(B) are subject to the rebuttable presumption described in subsection (d). That is, the items listed in subsection (c)(2)(B) are taxable at the low rate only if the retailer had a separate means of recording and accounting for high and low rate sales, and the retailer provides no on-premises facilities for consumption of the food or, if the retailer does provide such facilities, they are physically separated or otherwise distinguishable from the area where food not for immediate consumption is sold.

3) "Premises". Premises is that area over which the retailer exercises control, whether by lease, contract, license or otherwise, and, in addition, the area in which facilities for eating are provided, including areas designated for, or devoted to, use in conjunction with the business engaged in by the vendor. Vendor premises include eating areas provided by employers for employees and common or shared eating areas in shopping centers or public buildings if customers of food vendors adjacent to those areas are permitted to use them for consumption of food products.

d) Test to Determine Applicable Rate. The rate at which food is taxable is determined as follows:

1) If retailers provide seating or facilities for on-premises consumption of food, all food sales are presumed to be taxable at the high rate as "food prepared for immediate consumption". However, this presumption can be rebutted by evidence that:

A) the area for on-premises consumption is physically separated or otherwise distinguishable from the area where food not for immediate consumption is sold; and

B) the retailer utilizes a means of recording and accounting for collection of receipts from the sales of food prepared for immediate consumption (high rate) and the sales of food that are not prepared for immediate consumption (low rate).

2) If a retailer does not provide seating or facilities for on-premises consumption of food, then the low rate of tax will be applied to all food items except for "food prepared for immediate consumption by the retailer" as provided in subsection (b) and soft drinks, candy and alcoholic beverages. However, in order for the low rate of tax to apply, retailers that sell both food prepared for immediate consumption and food for consumption off the premises where sold must utilize means of recording and accounting for collection of receipts from the sales of food prepared for immediate consumption (high rate) and the sales of food that are not prepared for immediate consumption (low rate). If these receipts are not maintained, all sales will be presumed to be at the high rate of tax.

3) Illustration C is a decision tree to assist in making high rate/low rate determinations.

4) Examples:

A) Grocery Store – On-premises Facilities for Consumption of Food. Provided that the requirements of subsection (d)(1) are met, examples of high rate items include, but are not limited to, hot foods (soup, pizza, rotisserie or fried chicken, stuffed potatoes, hot dogs); all sandwiches, either hot or cold, that are prepared to the individual order of a customer; salads prepared by customers at a salad/olive/sushi bar; and all food sold for consumption on the premises. Also included are hot precooked meals sold to customers, such as a Thanksgiving dinner; however, if precooked meals are sold in an unheated state of preparation, they are considered to be low rate. Meal packages sold by a grocer (e.g., 2 or more pieces of fried chicken with choice of two sides and dinner rolls sold at one price) that include at least 1 hot food item are taxable at the high rate, even if some foods in the package, sold alone, would be taxable at the low rate. Low rate items would include, but are not limited to, doughnuts (regardless of quantity), bagels, rolls and whole breads or bakery items prepared by the retailer; sandwiches that are premade by the retailer and set out for sale to customers; cold pizzas prepared by the retailer and set out for sale to customers; stuffed olives or peppers prepared by the retailer and set out for sale in individual sized containers; and deli items sold by the retailer to customers by size or weight (prepared salads, e.g., potato, pasta, bean or fruit salads; jello; pudding; stuffed olives).

B) Grocery Store – No On-premises Facilities for Consumption of Food. Provided that the requirements of subsection (d)(2) are met, examples of high rate items would include, but are not limited to, hot foods (soup, pizza, rotisserie or fried chicken, hot dogs); all sandwiches, either hot or cold, that are prepared to the individual order of a customer; and salads that are made by customers at a salad/olive/sushi bar. In addition, effective September 1, 2009, all sales of "candy", as defined in subsection (d)(7), are subject to the high rate of tax. Also included are hot precooked meals sold to customers, such as a Thanksgiving dinner. If precooked meals are sold in an unheated state of preparation, however, they are considered to be low rate. Low rate items would include, but are not limited to, doughnuts (regardless of quantity), bagels, rolls and whole breads or bakery items prepared by the retailer; sandwiches that are premade by the retailer and set out for sale to customers; cold pizzas prepared by the retailer and set out for sale to customers; stuffed olives or peppers prepared by the retailer and set out for sale in individual sized containers; and deli items sold by the retailer to customers by size or weight.

C) Restaurants and Cafeterias. All foods sold by a restaurant or a cafeteria are considered food prepared for immediate consumption. Such food can either be prepared to the individual order of a customer or premade and set out for selection by the customer. However, if a restaurant or cafeteria also sells whole pies, cakes or individual pastries for sale, these items are taxable at the low rate, as long as the requirements of subsection (d)(1) are met.

D) Bakery. Provided that the requirements of either subsection (d)(1) or (d)(2) are met, the following items are taxable at the low rate: doughnuts, cookies or individual pastries, regardless of quantity, sold for consumption off the premises where sold, and whole cakes or pies, such as wedding or special occasion cakes. Food sold for consumption on the premises, such as doughnuts and coffee, are subject to the high rate of tax.

E) Delicatessen. Provided that the requirements of either subsection (d)(1) or (d)(2) are met, meat, cheese and prepared salads sold by weight or volume are taxable at the low rate. Individual sandwiches prepared to the individual order of a customer are high rate, as well as other food sold for consumption on the premises.

F) Ice Cream Store. Ice cream items in individual sizes, either prepared to the individual order of a customer or premade and offered for sale by a retailer, constitute "food prepared for

immediate consumption" and are subject to the high rate of tax. These items include ice cream cones, cups of ice cream, sundaes, shakes and premade ice cream sandwiches, bars or cookies. However, provided that the requirements of either subsection (d)(1) or (d)(2) are met, ice cream cakes or rolls or ice cream packaged in premeasured containers, such as a pint, quart or gallon, are subject to tax at the low rate.

G) Food Sold at Food Courts. All hot food and food prepared to the individual order of a customer by a retailer at a food court is subject to the high rate of tax. In addition, all other food sold for consumption on the premises of a food court is subject to the high rate of tax.

H) Convenience Stores. Provided that the requirements of either subsection (d)(1) or (d)(2) are met, prepackaged food items not prepared by a convenience store retailer are subject to the low rate of tax. These items include, but are not limited to, chips, snacks, bread products and cookies. The sale of hot food items, such as hot dogs, nachos or pretzels, are subject to the high rate of tax, as well as other food sold for consumption on the premises. In addition, effective September 1, 2009, all sales of "candy", as defined in subsection (d)(7), are subject to the high rate of tax.

I) Coffee Shops. Provided that the requirements of either subsection (d)(1) or (d)(2) are met, coffee, latte, cappuccino and tea (prepared either hot or cold) and food sold for consumption on the premises (e.g., pastries, cookies, snacks) are subject to the high rate of tax. Bulk coffees (beans or grounds, for instance) and teas, or pastries that are not consumed on the premises, are subject to the low rate of tax.

5) Alcoholic Beverages. The reduced rate does not extend to alcoholic beverages. An alcoholic beverage is any beverage subject to the tax imposed under Article VIII of the Liquor Control Act of 1934 [235 ILCS 5/Art. VIII].

6) Soft Drinks. The reduced rate does not extend to soft drinks. Soft drinks are taxed at the State sales tax rate of 6.25%. Soft drinks are taxable at the high rate regardless of the type of establishment where they are sold, e.g., a grocery store, restaurant or vending machine.

A) Until September 1, 2009, the term "soft drinks" means any *complete, finished, ready-to-use, non-alcoholic drink, whether carbonated or not, including but not limited to soda water, cola, fruit juice, vegetable juice, carbonated water, and all other*

preparations commonly known as soft drinks of whatever kind or description that are contained in any closed or sealed bottle, can, carton, or container regardless of size. "Soft drinks" does not include coffee, tea, non-carbonated water, infant formula, milk or milk products as defined in Section 3(a)(2) and (4) of the Grade A Pasteurized Milk and Milk Products Act [410 ILCS 635], *or drinks containing 50% or more natural fruit or vegetable juice.* (Section 2-10 of the Act) Frozen concentrated fruit juice, dry powdered drink mixes and fruit juices that are reconstituted to natural strength are not soft drinks.

B) *On and after September 1, 2009, the term "soft drinks" means non-alcoholic beverages that contain natural or artificial sweeteners. "Soft drinks" do not include beverages that contain milk or milk products, soy, rice or similar milk substitutes, or greater than 50% of vegetable or fruit juice by volume.* (Section 2-10 of the Act)

C) Natural and artificial sweeteners include, but are not limited to, corn syrup, high fructose corn syrup, invert sugar, dextrose, sucrose, fructose, lactose, saccharose, fruit juice concentrates, molasses, evaporated cane juice, rice syrup, barley malt, honey, Rebaudioside A (Reb A), erythritol, xylitol, aspartame, saccharin, acesulfame K, sucralose and sorbitol. Beverages that list in the ingredient list natural and/or artificial sweeteners including, but not limited to, those listed in this subsection (d)(6)(C), meet the definition of "soft drinks". (Note, for purposes of this Section, natural and artificial sweeteners do not include natural or artificial flavors.)

D) Examples of soft drinks include, but are not limited to

i) soda pop;

ii) carbonated and noncarbonated water that contains natural or artificial sweeteners;

iii) root beer;

iv) sport or energy drinks;

v) sweetened tea or coffee (without milk or milk products; see subsection (d)(6)(E));

vi) non-alcoholic beer;

vii) fruit drinks containing 50% or less fruit juice; and

viii) "ready-to-use" non-alcoholic beverage mixers containing 50% or less vegetable or fruit juice by volume, e.g., ready-to-use margarita mixes.

E) Examples of products that are not considered soft drinks include, but are not limited to:

i) beverage powders or dry mixes;

ii) concentrates, e.g., frozen concentrate lemonade;

iii) ground or whole bean coffee and loose leaf tea or tea bags;

iv) carbonated and noncarbonated water that does not contain natural or artificial sweeteners;

v) carbonated and noncarbonated water that does not contain natural or artificial sweeteners but does contain natural or artificial flavor;

vi) vegetable or fruit juices containing greater than 50% vegetable or fruit juice, even if these beverages contain natural or artificial sweeteners;

vii) any drinks that contain milk or milk products, soy, rice or similar milk substitutes; and

viii) brewed unsweetened black coffee or tea. (Note, even though brewed unsweetened black coffee and tea are not considered soft drinks, hot coffee or hot tea, regardless of whether they contain natural or artificial sweeteners or milk or milk products, are subject to tax at the 6.25% rate because they are considered to be "food prepared for immediate consumption". (See subsection (c)(2)(A)(iv).))

7) Candy. On and after September 1, 2009, the reduced rate does not extend to "candy". Candy is taxed at the State sales tax rate of 6.25%.

A) *"Candy" means a preparation of sugar, honey, or other natural or artificial sweeteners in combination with chocolate, fruits, nuts or other ingredients or flavorings in the form of bars, drops, or pieces. "Candy" does not include any preparation that contains flour or requires refrigeration.* (Section 2-10 of the Act) To meet

the definition of candy, the item must be analyzed by using four factors, as explained in subsections (d)(7)(B) through (E).

B) Flour: Products whose ingredient list contain the word "flour", regardless of the type of flour (e.g., wheat, rice) are not candy. A product does not contain flour unless the product label specifically lists flour as an ingredient. Ingredients such as soy or whey that may be used in place of, or as a substitute for, flour are not considered to be flour for purposes of determining if the item qualifies as candy unless they are specifically labeled as flour in the ingredient list.

i) Items that are not considered candy because they list flour as one of the ingredients on the label include, but are not limited to, certain licorice, certain candy bars, cookies and chocolate covered pretzels.

ii) Snack mixes that contain both candy and non-candy items, such as trail mix that contains products with flour or bags of individually wrapped candy bars in which some candy bars contain flour and others do not, are not candy if the ingredient list on the bag lists flour as an ingredient of any of the items.

C) Refrigeration: Items that require refrigeration are not considered to be candy. For example, popsicles and ice cream bars are not candy. Items that otherwise qualify as candy and do not require refrigeration are candy even if they are sold refrigerated or frozen, e.g., a candy bar that has been frozen. Merely suggesting that the product be refrigerated (e.g., to ensure product quality, please keep this package stored in a cool place, at or below 65°F) is insufficient to meet the refrigeration requirement.

D) Sweeteners: Candy is limited to products that contain sugar, honey or other natural or artificial sweeteners. Examples of natural or artificial sweeteners include, but are not limited to, corn syrup, high fructose corn syrup, invert sugar, dextrose, sucrose, fructose, lactose, saccharose, fruit juice concentrates, molasses, evaporated cane juice, rice syrup, barley malt, honey, Rebaudioside A (Reb A), erythritol, xylitol, aspartame, saccharin, acesulfame K, sucralose, sorbitol.

E) Bars, drops or pieces: Items must be in the form of bars, drops or pieces to be considered candy.

i) Examples of items that are not in the form of bars, drops or pieces and are not candy include, but are not limited to, jars of honey, syrups, peanut butter, preserves or jams, cans of fruit in syrup, cans or tubes of cake frosting and cereals.

ii) Examples of items that are in the form of bars, drops or pieces and are candy include, but are not limited to, sweetened cooking or baking bars or chips, sweetened coconut flakes, honey glazed peanuts, baking sprinkles, caramel-coated popcorn (does not include un-popped popcorn), artificially flavored candy mints, caramel or candied apples and almond bark.

F) Examples of items that are considered candy (provided that they meet all the requirements of subsections (d)(7)(B) through (D)) include, but are not limited to:

i) chocolate bars, including sweet or semi-sweet bars or bits;

ii) chocolate molded items (e.g., bunny, snowman);

iii) chocolate covered or dipped strawberries, chocolate or carob covered raisins or nuts;

iv) chocolate covered potato chips;

v) chocolate covered bacon;

vi) caramel-coated popcorn (does not include un-popped popcorn), caramel apples, caramel corn or rice cakes;

vii) almond bark, peanut brittle;

viii) marshmallows;

ix) breath mints;

x) chewing gum;

xi) fruit roll-ups;

xii) glazed dried apricots;

xiii) trail mixes that contain candy ingredients, e.g., sweetened nuts;

xiv) granola bars;

xv) any type of nut that is sweetened with any natural or artificial sweetener, e.g., if the ingredient list contains any natural or artificial sweetener.

G) Examples of items that are not considered candy because they do not meet the requirements of subsections (d)(7)(B) through (D) include, but are not limited to (note, if some of the items listed below, such as popcorn, are covered or dipped in chocolate, caramel or other candy coating, they may be considered candy):

i) cakes, pies, cookies, pastry;

ii) ice cream, ice cream bars, frozen yogurt, popsicles, hot fudge ice cream topping;

iii) pretzels;

iv) corn chips, potato chips, popcorn and beef jerky;

v) chocolate milk, strawberry milk, fruit juice, soft drinks;

vi) powdered hot chocolate cocoa mix and other drink mixes;

vii) food coloring;

viii) unsweetened chocolate;

ix) cereals; and

x) licorice and candy bars that contain flour as an ingredient.

e) Reporting

1) The retailer must keep an actual record of all sales and must report tax at the applicable rates, based on sales as reflected in the retailer's records. Books and records must be maintained in sufficient detail so that all receipts reported with respect to food can be supported.

2) A retailer who finds it difficult to maintain detailed records of receipts from sales of food at the reduced rate, as well as detailed records of receipts from all other sales of tangible personal property at the full rate, may request the use of a formula. The request must be made to the Department in writing, must state the reasons that a formula method is necessary, and must outline the proposed formula in detail. Included in

the request must be a description of how the method can be audited by the Department. Upon a finding that the formula can be audited and will produce results that will reasonably approximate the actual taxable receipts in each category, the Department may issue its approval for use of the formula. If approval is granted, the Department reserves the right to withdraw approval or require a change in procedure at any time.

(Source: Amended at 34 Ill. Reg. 12935, effective August 19, 2010)

Section 130.801 Books and Records – General Requirements

a) *Every person engaged in the business of selling tangible personal property at retail in this State shall keep records and books of all sales and purchases of tangible personal property*, including all sales and purchase invoices, purchase orders, merchandise records and requisitions, inventory records *prepared as of December 31 of each year or otherwise annually, as has been the custom in the specific trade* [35 ILCS 120/7], credit memos, debit memos, bills of lading, shipping records, and all other records pertaining to any and all purchases and sales of goods whether or not the retailer believes them to be taxable under the Act; and the retailer shall also keep summaries, recapitulations, totals, journal entries, ledger accounts, accounts receivable records, accounts payable records, statements, tax returns with all schedules or pertinent working papers used in connection with the preparation of such returns, and other documents listing, summarizing or pertaining to such sales, purchases, inventory changes, shipments or other transactions. For a description of what records constitute the minimum required, including the use of machine-sensible records and electronic data interchange, see Section 130.805 of this Part.

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

c) The books and records must clearly indicate and explain all the information (deductions as well as gross receipts) required for tax returns.

d) If a taxpayer retains records required to be retained under this Section in both machine-sensible and hard-copy formats, the taxpayer shall, upon request, make the records available to the Department in machine-sensible format in accordance with Section 130.805(b)(5).

e) The *books and records must be kept in the English language and shall, at all times during business hours of the day, be subject to inspection by the Department or its duly authorized agents and employees.* [35 ILCS 120/7]

f) The books and records must be kept within Illinois except in instances where a business has several branches, with the head office being located outside Illinois, and where all books and records have been regularly kept outside the State at such

head office. Under such circumstances, upon written permission from the Department, books and records may be kept outside Illinois, but the taxpayer must, within a reasonable time after notification by the Department, make all pertinent books, records, papers and documents available at some point within Illinois for the purpose of the inspection and audit as the Department may deem necessary.

g) Request for Books and Records and Documentation During an Audit

1) At the initiation of an audit, the Department will notify the taxpayer of the books and records that the taxpayer will be required to produce for the Department to enable the Department to conduct the audit. During the course of the audit, the Department will provide the taxpayer with information document requests ("Information Document Request") for books and records the Department is requesting the taxpayer to produce for review. The taxpayer will be provided 30 days, or the number of days agreed to by the taxpayer and the Department, to respond to an Information Document Request. If the taxpayer and the Department cannot agree on a date to respond to a request, the taxpayer shall have 30 days to respond. If the taxpayer does not provide the Department with the books and records requested in the Information Document Request, the Department will issue a second Information Document Request for the books and records. If the taxpayer again fails to provide the Department with the books and records requested, the Department is authorized to issue a written document request for the records pursuant to subsection (i)(3).

2) *It shall be presumed that all sales of tangible personal property are subject to tax under the Act until the contrary is established. The burden of proving that a transaction is not taxable shall be upon the person who would be required to remit the tax to the Department if the transaction is taxable. In the course of any audit or investigation or hearing by the Department with reference to a given taxpayer, if the Department finds that the taxpayer lacks documentary evidence needed to support the taxpayer's claim to exemption from tax, the Department is authorized to notify the taxpayer in writing to produce such evidence ("Notice of Demand for Documentary Evidence"), and the taxpayer shall have 60 days subject to the right in the Department to extend this period either on request for good cause shown or on its own motion from the date when such notice is sent to the taxpayer by certified or registered mail (or delivered to the taxpayer if the notice is served personally) in which to obtain and produce such evidence for the Department's inspection and audit, failing which the matter shall be closed, and the transaction shall be conclusively presumed to be taxable.* [35 ILCS 120/7]. In the course of any audit or investigation by the Department with reference to a given taxpayer, if the taxpayer fails to produce the documentary evidence

needed to support the taxpayer's claim to exemption from tax within the 60 days or the time allotted, the taxpayer is subject to the penalty in subsection (i).

EXAMPLE: The auditor requests all the resale certificates and exemption certificates for all tax-exempt sales. The auditor has issued an Information Document Request pursuant to subsection (g)(1). The retailer has failed to provide the documentary evidence required to support the exemptions. The Department issued a written request ("Notice of Demand for Documentary Evidence") pursuant to subsection (g)(2) and provided the taxpayer 60 days to produce the documentation. If the retailer has not provided all of the certificates after the 60 days has elapsed, the matter will be closed, the transactions will be conclusively presumed to be taxable, and the retailer is subject to the penalty in subsection (i).

h) All books and records kept by a medical cannabis dispensing organization under the Compassionate Use of Medical Cannabis Pilot Program Act pursuant to rules adopted by the Illinois Department of Financial and Professional Regulation to implement the Compassionate Use of Medical Cannabis Pilot Program Act shall, at all times during business hours of the day, be subject to inspection by the Department or its duly authorized agents and employees.

i) *Any person who fails to keep books and records or fails to produce books and records for examination, as required by Section 7 of the Act and this Part, is liable to pay to the Department, for deposit into the Tax Compliance and Administration Fund, a penalty of $1,000 for the first failure to keep books and records or produce books and records for examination and a penalty of $3,000 for each subsequent failure to keep books and records or produce books and records for examination as required by Section 7 of the Act and this Part. The penalties imposed under Section 7 of the Act and this subsection (i) shall not apply if the taxpayer shows that he or she acted with ordinary business care and prudence.* [35 ILCS 120/7]

1) The Act imposes two requirements on retailers: retailers must maintain books and records (see subsection (a)) and they must produce the books and records for inspection and examination by the Department upon request (see subsection (e)). A retailer may be subject to the penalty in this subsection (i) if it maintains books and records but fails or refuses to produce the records upon request of the Department. A retailer also may be subject to the penalty in this subsection (i) if it does not maintain books and records and therefore cannot produce the books and records to the Department upon request. In the latter case, the retailer may be subject to either a penalty for the failure to maintain books and records or the failure to produce books and records; the Department cannot impose two penalties in this case.

2) If a person fails to produce books and records for examination or inspection by the Department upon request, a prima facie presumption shall arise that the person has failed to keep the books and records so required. A person who is unable to rebut this presumption is subject to the penalty provided in this subsection (i).

3) Except as otherwise provided by subsection (i)(8)(A), if a request has been made and not honored, prior to issuing a notice of penalty for a failure to maintain books and records or a failure to produce books and records, the Department must provide the taxpayer with a document request in writing ("Notice of Demand for Books and Records").

A) The Notice of Demand for Books and Records shall contain:

i) the name of the person receiving the request;

ii) the name of the business;

iii) the date of the request or requests;

iv) the books and records requested;

v) the books and records that the person failed to produce;

vi) the number of days the person has to produce the books and records; and

vii) the name of the Department agent or employee.

B) The Department agent or employee shall sign and date the form and provide a copy of the form to the person either in person or by mail. The person shall have 30 days from the date of the Notice of Demand for Books and Records to produce the books and records the person has failed to produce. The Department is authorized to extend the period either on written request for good cause shown or on its own motion. If the person fails to produce the books and records within the time allotted, the Department shall issue a notice of penalty pursuant to this subsection (i).

4) Any person receiving a notice of penalty may, within 20 days after the date on the notice of penalty, protest and request a hearing in writing. Upon receiving a request for a hearing, the Department shall give notice to the person requesting the hearing of the time and place fixed for the hearing and shall hold a hearing in conformity with the provisions of the Act, and then issue its final administrative decision in the matter to that person. The Department shall postpone the hearing until completion of

the inspection or audit. In the absence of a protest and request for a hearing within 20 days, the Department's decision shall become final without any further determination being made or notice given.

5) The Department cannot impose more than one penalty for failure to produce books and records for a calendar month.

EXAMPLE 1: An authorized agent of the Department inspects a retailer and requests the records for the first week in April. The retailer does not produce the records. The agent subsequently requests the records for the remaining 3 weeks in April. The retailer does not produce the records. The agent can assess only one penalty for the month of April.

EXAMPLE 2: In April, an authorized agent of the Department inspects a retailer and requests all purchase invoices for tangible personal property purchased in March. The purchase invoices are not provided by the retailer and the Department issues a notice of penalty in the amount of $1,000. The agent returns in May and requests to see all the cigarette sales receipts for March. The retailer fails to produce the sales receipts. The Department cannot issue a penalty for failure of the retailer to provide sales receipts for March because the agent has previously issued a notice of penalty for failure to produce the purchase invoices for March.

6) A records request can cover multiple periods. The Department is authorized to issue a separate penalty for each period.

EXAMPLE: An auditor makes multiple requests for books and records for the months of January through July. The retailer cannot produce the books and records for any of the months. The auditor fills out a Notice of Demand for Books and Records, provides a copy to the person, and provides 30 days for the person to produce the books and records. After the 30-day period expires, the retailer does not produce the books and records. The Department issues a notice of penalty in the amount of $1,000 for the month of January and $3,000 for each of the months February through July, for a total penalty of $19,000.

7) *The penalties imposed* under this subsection (i) *shall not apply if the taxpayer shows that he or she acted with ordinary business care and prudence.* [35 ILCS 120/7] When determining whether a taxpayer has acted with ordinary business care and prudence, the Department will consider the size of the business, the amount of gross receipts, the volume of sales, the nature of the business, the type and number of items sold by the business, the types of books and records requested, and whether the books and records constitute the minimum records required by Section 130.805. (In other words, would a taxpayer that exercised ordinary business care and prudence be able to produce the books and records

requested by the Department?) "Ordinary care has been defined to be that degree of care which is exercised by ordinarily prudent persons under same or similar circumstances." Swenson v. City of Rockford, 9 Ill.2d 122, 127 (1956).

8) Requests for Books and Records at the Beginning and During Scheduled Audits

A) When the Department determines it will audit a taxpayer's books and records, it shall notify the taxpayer of the audit and schedule a time to commence the audit that is satisfactory to the Department and the taxpayer. In no event can this time be later than 6 months after the date of the notice, unless the Department agrees to extend the 6-month period. If the taxpayer refuses to schedule the commencement of the audit within 6 months after the date of the notice, the taxpayer is subject to a penalty for refusal to produce books and records for every month subject to the audit. After the 6-month period has expired, the Department may issue a notice of penalty to the taxpayer pursuant to this subsection (i). The Department is not required to provide the taxpayer with a document request or allow additional time to schedule an audit of the person's books and records.

B) During the course of an audit, the auditor may issue multiple requests for specific books and records. Prior to issuing the first notice of penalty during an audit, the auditor shall complete a Notice of Demand for Books and Records in accordance with subsection (i) that identifies all books and records that have not been provided pursuant to all earlier requests for the production of documents.

(Source: Amended at 43 Ill. Reg. 8865, effective July 30, 2019)

COURT CASES CITED -

Miller Brothers Co. v. Maryland, 347 U.S. 340 (1954)

South Dakota v. *Wayfair*, Inc., et al., No. 17-494 (June 21, 2018) 585 US

DuPage Liquor Store, Inc. v. McKibbin, 383 Ill. 276 (1943)

Copilevitz v. Department of Revenue, 41 Ill. 2d 154 (1968)

Chet's Vending Serv., v. Dept. of Revenue, 71 Ill. 2d 38 (1978)

Vitale v. Illinois Department of Revenue, 118 Ill. App. 3d 210 (1983)

Chak Fai Hau v. Department of Revenue, 2019 Ill. App. 1st 172588 (February 27, 2019)

Martin Equipment of Illinois, Inc., 18 TT 86, Illinois Independent Tax Tribunal (August 23, 2019)

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 TREATEMENT OF CERTAIN ITEMS

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

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

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

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.

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

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, café unit #608003 is a Panera RFL.

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.

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 café they wanted to review.

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.

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.

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 130.310(b)(1)(B).

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. 1st 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.

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 ,
    - Credit memo transactions,
    - Tax accrued in error,
    - Tax paid to reciprocal taxing authority, and
    - Adjustment transactions.

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.

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.

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 TREATEMENT

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

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

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.

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.

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.

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).

65. Illinois courts have also found that Taxing statutes are construed "most strongly against the government and in favor or 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).

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.

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.

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

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

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.

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.

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.

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.

ERROR IV – THE DEPARTMENT IS PRECLUDED FROM ASSESSING ILLLINOIS USE TAX ON TRANSACTIONS WHICH PETITIONER PREVIOUSLY PAID TAX

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

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

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.

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.

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

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.

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 PROHIBIT 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.

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.

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.

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.

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).

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.

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.

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.

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.

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.)

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.

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.

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

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.

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.

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.

97. With respect to the other tax assessments reported in the Notice that Petition may agree to pay, Petitioner avers that the penalties originating from those items should also be

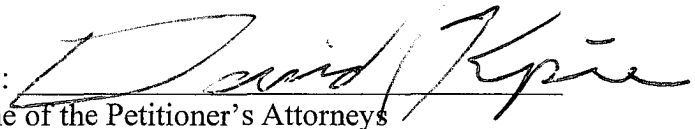
abated as the Petitioner made a good faith effort to comply with the law and exercised ordinary business care in determining, remitting and reporting those Illinois ROT and Use tax .

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.

CONCLUSION AND RELIEF REQUESTED

WHEREAS, Petitioner requests that the Department withdraw and/or modify the Notice at issue. We respectfully request that the Tax Tribunal Rule in favor of Petitioner.

Respectfully Submitted,
PANERA LLC

By: 
One of the Petitioner's Attorneys

David J. Kupiec
Kupiec & Martin, LLC
600 W. Van Buren #202
Chicago, IL 60607
(312) 632-1022
dkupiec@kupiecandmartin.com
Attorney No. 58817

Notice of Tax Liability

STATE OF Illinois
DEPARTMENT OF REVENUE
tax.illinois.gov

#BWNKMGV
#CNXX XX79 2597 6163#
PANERA LLC
ST LOUIS BREAD CO
ATTN: ATTN TAX DEPT
3630 S GEYER RD STE 400
SAINT LOUIS MO 63127-1234

October 10, 2019

Letter ID: CNXXXX7925976163
Account ID: 2565-5531
Reporting period: June 30, 2017

We have audited your Sales/Use Tax & E911 Surcharge account for the reporting periods April 01, 2014, through June 30, 2017, and the liability has been processed on Form EDA-105-R, ROT and E911 Surcharge Audit Report. As a result, we have assessed the amounts shown below.

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 protest this notice within specific time periods. See the "Protest Rights" section on the following page of this notice for additional information and instructions.

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.

Note: If you are under bankruptcy protection, see the "Bankruptcy Information" section on the following pages of this notice for additional information and instructions.

	Liability	Payments/Credit	Unpaid Balance
Tax	9,810,907.00	(1,611,216.00)	8,199,691.00
Late Payment Penalty Increase	1,655,989.00	(16,051.00)	1,639,938.00
Interest	1,338,518.55	(12,585.00)	1,325,933.55
Assessment Total	$12,805,414.55	($1,639,852.00)	**$11,165,562.55**

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.

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

217 785-6579

IN THE ILLINOIS INDEPENDENT
TAX TRIBUNAL

PANERA LLC,	)	
Petitioner,	)	
v.	)	No.
ILLINOIS DEPARTMENT OF REVENUE,	)	
Respondent,	)	

NOTICE OF FILING

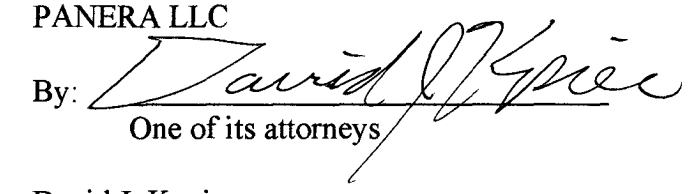
TO:

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

Please take note that on December 9, 2019, the undersigned representative for PANERA LLC, filed with the Illinois Independent Tax Tribunal, 160 N. LaSalle St. Room 506, Chicago, IL 60601 a Petition, a copy of which is attached and served on you.

Date: December 9, 2019

Respectfully Submitted,
PANERA LLC

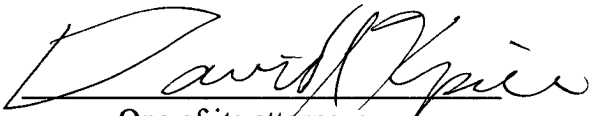
By: 
One of its attorneys

David J. Kupiec
Kupiec & Martin, LLC
600 West Van Buren Street, Ste 202
Chicago, Illinois 60607

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 in person before the hour of 5:00p.m. on the 9th day of December, 2019.

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

By: 
One of its attorneys

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