

IN THE ILLINOIS INDEPENDENT TAX TRIBUNAL

C-U MERRY ANN'S DINER, INC.,)
)
 Petitioner,)
)
 vi.)
)
 ILLINOIS DEPARTMENT OF)
 REVENUE,)
)
 Respondent.)
)

RECEIVED
APR 28 2014
Case No. _____
By: 147870

PETITION

Petitioner, C-UMerry Ann’s Diner, Inc., by and through its attorneys, Harrington & Tock LLC, complains of Respondent, Illinois Department of Revenue, as follows:

1. Illinois Department of Revenue (“Department”) sent to the Petitioner, C-U Merry Ann’s Diner, Inc., four Notices Of Tax Liability (“NTLs”) on or about February 26, 2014. Each Notice of Tax Liability was dated February 26, 2014.

2. Chronologically, the four NTLs apply to the following reporting periods:
 - a. August 15, 2010 through December 31, 2012 (hereinafter referred to as the “First NTL”, a copy of which is attached hereto as Exhibit “A”);
 - b. January 1, 2013, through January 31, 2013 (the “Second NTL”, a copy of which is attached hereto as Exhibit “B”);
 - c. February 1, 2013, through February 28, 2013 (the “Third NTL”, a copy of which is attached hereto as Exhibit “C”); and,

- d. March 1, 2013, through March 31, 2013 (the "Fourth NTL", a copy of which is attached hereto as Exhibit "D").
3. Each NTL arose out of a Retail Occupation Tax audit report conducted and prepared by the Department.
4. This Tribunal has jurisdiction of this matter pursuant to 35 ILCS 1010/1-45(a). The tax amount at issue in the First NTL exceeds \$15,000.00. The tax amount at issue in the Second NTL, Third NTL and Fourth NTL for the months of January, February and March of 2013, combined, exceeds \$15,000.00.
5. Petitioner opened a restaurant on the campus of the University of Illinois in August of 2010. The name of the restaurant is Merry Ann's Diner. The Diner seats seventy customers and is open twenty-four hours a day. The average amount paid per server ticket for food and soft drinks is less than \$8.00. No beer or wine is sold. Average sales in the Diner are approximately \$1,600.00 per day over a three year period.
6. Until recently, it was the business practice of the Petitioner to create through the Diner's cash register two consecutively numbered Z tape summaries ("Z Tape Summary") per day. Each Z Tape Summary would show the following information for that part of the day from which each Z Tape Summary was generated:
 - a. date;
 - b. Z Tape number;

- c. the sales receipts received since the date and time the previous Z Tape Summary was generated; and,
 - d. the number of sales tickets entered into the register since the previous Z Tape Summary was generated.
7. A Z Tape Summary summarizes the transactions that have taken place since the previous Z Tape Summary was generated. The detailed information collected from each entry into the cash register is printed on the Daily Register Tape.
8. For the period of time covered by the Department's audit (August 15 of 2010 through March of 2013) the manager of Petitioner would reconcile each day's Z Tape Summaries with the detailed Daily Register Tape.
9. When the Z Tape Summaries were reconciled by the manager with the Daily Register Tapes, all inaccurate entries on the Daily Register Tape, whether from over-rings or under-rings, would cause each Z Tape Summary to be corrected on its face by the manager. Once corrected, the Z Tape Summary for each day would accurately show the total actual receipts received from the date and time that Z Tape Summary started to the date and time the next Z Tape Summary started.
10. After the manager reconciled the Z Tape Summaries that pertained to the respective Daily Register Tape, that Daily Register Tape was discarded.

11. The Petitioner was audited by the Department in 2013 concerning the proper payment of sales tax by the Petitioner from the date the Diner opened in August of 2010 through March of 2013.
12. During the audit, Petitioner produced for the Department's review all Z Tape Summaries that had been generated by the Petitioner as corrected by the Petitioner, all records of cash deposits, all records of daily credit card sales and all records of food costs.
13. The Department examined the Z Tape Summaries. The Department relied upon part 1 of the Z Tape Summaries to determine total sales by the Petitioner from date to date without regard for the inclusion of over-rings within the total sales number in part 1 on each Z Tape Summary.
14. The Department requested that Petitioner produce the original Daily Register Tapes for each day of the audit period to verify the accuracy of Petitioner's changes to each Z Tape Summary due to over-rings that had been recorded on the Daily Register Tapes.
15. Petitioner told the Department the Daily Register Tapes had all been discarded by Petitioner.
16. The Department informed Petitioner that the handwritten over-ring amounts on the Z Tape Summaries were not acceptable to the Department as proof of those over-rings.
17. Petitioner states that the under reported sales determined by the Department in the amount of \$677,175.99 were not sales, but over-rings.

18. It was unreasonable for the Department to preclude any proof of the over-rings claimed by Petitioner.
19. The Department should have reviewed the Z Tape Summaries to determine if those daily sales were reasonable. If the Department had done so, the Department would have readily recognized that the dollar amounts of numerous sales were very unreasonable.
20. The Department's Audit covered approximately 950 days. According to Petitioner, the average daily actual receipts (cash and charge cards) averaged \$1,616.70 over the full audit period.
21. However, the average daily receipts for the 39 highest sales days, without subtracting over-rings, were \$17,600.00.
22. The two highest sales days were for cash sales of \$100,107.83 and \$98,010.69, followed by cash sales for \$69,190.63, \$67,328.05 and \$66,625.30.
23. 70% of the payments made by customers at the Diner are by charge card; 30% of payments are in cash.
24. If the daily sales figures utilized by the Department, were actual sales, there would have been either a substantial spike in credit card fees received by Petitioner (which there was not) or trunk loads of cash being wheeled into the diner to pay for the \$95,000.00 lunch special, which there were not.
25. If the Department had recognized that sale volumes that were 30 to 50 times greater than normal would cause a reasonable auditor to

investigate the cause of such variations, the Department could have performed a mark-up to estimate gross receipts based on the Petitioner's cost paid for food sold.

26. The US Income Tax Returns filed by Petitioner for 2010, 2011 and 2012 may be used to derive Petitioner's annual food costs as a percent of gross receipts (not including over-rings) for the sale of that food (not including sales tax).

27. Food costs as a percent of such receipts were:

2010	27.5%
2011	24.5%
2012	27.8%.

26. According to the National Restaurant Association, the national average for cost of food as a percent of sales is 26.4%.

28. If the over-rings had not been excluded from those 2010, 2011 and 2012 figures, the cost of food sold would have remained at \$326,447.00, but the sales would have increased from \$1,235,126.00 to \$1,656,738.00. The cost of food as a percentage of sales would have dropped from an average of 26.3% to 20%.

29. The Department failed to conduct a reasonable audit of Petitioner's business.

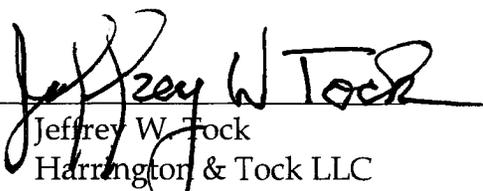
30. The Department refused to consider any alternative means of determining Petitioner's sales tax liability once the Department learned that Petitioner had not retained its Daily Register Tapes that would have shown actual daily over-rings.

31. The Department refused to conduct a mark-up audit that would have exonerated Petitioner from paying sales tax on over-rings where no tax was due.

WHEREFORE, Petitioner prays that this Honorable Tribunal will schedule an evidentiary hearing at which time Petitioner shall present evidence that the under reported sales claimed by the Department to have been made by Petitioner were, in fact, not sales at all and that Petitioner owes neither any tax, penalty or interest as claimed by the Department.

Upon such determination by this Honorable Tribunal, Petitioner prays that all claims and demands by the Department against Petitioner be discharged and released with prejudice and held for naught.

C-U Merry Ann's Diner, Inc.,
Petitioner

By: 
Jeffrey W. Tock
Harrington & Tock LLC
Attorney for Petitioner

Prepared by:

Jeffrey W. Tock
HARRINGTON & TOCK LLC
201 W. Springfield Ave., Suite 601
P.O. Box 1550
Champaign, Illinois 61824-1550
Telephone: (217) 352-4167

EXHIBIT "A"

Notice of Tax Liability

for Form EDA-105-R, ROT Audit Report



#BWNKMGV
#CNXX X1X5 1519 7126#
C U MERRY-ANN'S DINER, INC
MERRY-ANN'S DINER
3307 LAKESHORE DR
CHAMPAIGN IL 61822-5205

February 26, 2014



Letter ID: CNXXX1X515197126

Account ID: 4002-5918



We have audited your account for the reporting periods August 15, 2010, through December 31, 2012. As a result we have assessed the amounts shown below.

	<u>Liability</u>	<u>Payments/Credit</u>	<u>Unpaid Balance</u>
Tax	43,552.00	0.00	43,552.00
Late Payment Penalty Increase	8,710.00	0.00	8,710.00
Interest	1,943.23	0.00	1,943.23
Assessment Total	\$54,205.23	\$0.00	\$54,205.23

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

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

- If the amount of this tax liability, exclusive of penalty and interest, is more than \$15,000, or if no tax liability is assessed but the total penalties and interest is more than \$15,000, file a petition with the Illinois Independent Tax Tribunal within 60 days of this notice. Your petition must be in accordance with the rules of practice and procedure provided by the Tribunal (35 ILCS 1010/1-1, et seq.).
- In all other cases that do not fall within the jurisdiction of the Illinois Independent Tax Tribunal, file a protest with us, the Illinois Department of Revenue, and request an administrative hearing within 60 days of the date of this notice, which is April 28, 2014. Submit your protest on Form AH-4, Protest and Request for Administrative Hearing with the Illinois Department of Revenue (available on our website at tax.illinois.gov). Mail form AH-4 along with a copy of this notice to the address on the form. If you do not file a protest within the time allowed, you will waive your right to a hearing, and this liability will become final. An administrative hearing is a formal legal proceeding conducted pursuant to the rules adopted by the Department and is presided over by an administrative law judge. A protest of this notice does not preserve your rights under any other notice.
- Instead of filing a petition with the Illinois Independent Tax Tribunal or a protest with us, the Illinois Department of Revenue, you may instead, under Sections 2a and 2a.1 of the State Officers and Employees Money Disposition Act (30 ILCS 230/2a, 230/2a.1), pay the total liability under protest using Form RR-374, Notice of Payment Under Protest (available on our website at tax.illinois.gov), and file a complaint with the circuit court for a review of our determination.

If you do not protest this notice or pay the assessment total in full, we may take collection action against you for the balance due, which may include levy of your wages and bank accounts, filing of a tax lien, or other action to satisfy your liability.

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

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

217 785-6579

EXHIBIT "B"

Notice of Tax Liability

for Form EDA-105-R, ROT Audit Report



#BWNKMGV
#CNXX XX97 9578 X8X4#
C U MERRY-ANN'S DINER, INC
MERRY-ANN'S DINER
3307 LAKESHORE DR
CHAMPAIGN IL 61822-5205

February 26, 2014



Letter ID: CNXXXX979578X8X4

Account ID: 4002-5918



We have audited your account for the reporting periods January 01, 2013, through January 31, 2013. As a result we have assessed the amounts shown below.

	<u>Liability</u>	<u>Payments/Credit</u>	<u>Unpaid Balance</u>
Tax	6,820.00	0.00	6,820.00
Late Payment Penalty Increase	1,364.00	0.00	1,364.00
Interest	31.70	0.00	31.70
Assessment Total	\$8,215.70	\$0.00	\$8,215.70

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

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

- If the amount of this tax liability, exclusive of penalty and interest, is more than \$16,000, or if no tax liability is assessed but the total penalties and interest is more than \$15,000, file a petition with the Illinois Independent Tax Tribunal within 60 days of this notice. Your petition must be in accordance with the rules of practice and procedure provided by the Tribunal (35 ILCS 1010/1-1, et seq.).
- In all other cases that do not fall within the jurisdiction of the Illinois Independent Tax Tribunal, file a protest with us, the Illinois Department of Revenue, and request an administrative hearing within 60 days of the date of this notice, which is April 28, 2014. Submit your protest on Form AH-4, Protest and Request for Administrative Hearing with the Illinois Department of Revenue (available on our website at tax.illinois.gov). Mail form AH-4 along with a copy of this notice to the address on the form. If you do not file a protest within the time allowed, you will waive your right to a hearing, and this liability will become final. An administrative hearing is a formal legal proceeding conducted pursuant to the rules adopted by the Department and is presided over by an administrative law judge. A protest of this notice does not preserve your rights under any other notice.
- Instead of filing a petition with the Illinois Independent Tax Tribunal or a protest with us, the Illinois Department of Revenue, you may instead, under Sections 2a and 2a.1 of the State Officers and Employees Money Disposition Act (30 ILCS 230/2a, 230/2a.1), pay the total liability under protest using Form RR-374, Notice of Payment Under Protest (available on our website at tax.illinois.gov), and file a complaint with the circuit court for a review of our determination.

If you do not protest this notice or pay the assessment total in full, we may take collection action against you for the balance due, which may include levy of your wages and bank accounts, filing of a tax lien, or other action to satisfy your liability.

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

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

217 785-6579

EXHIBIT "C"

Notice of Tax Liability

for Form EDA-105-R, ROT Audit Report



#BWNKMGV
#CNXX XX1X 7162 8480#
C U MERRY-ANN'S DINER, INC
MERRY-ANN'S DINER
3307 LAKESHORE DR
CHAMPAIGN IL 61822-5205

February 26, 2014



Letter ID: CNXXXX1X71628480

Account ID: 4002-5918



We have audited your account for the reporting periods February 01, 2013, through February 28, 2013. As a result we have assessed the amounts shown below.

	<u>Liability</u>	<u>Payments/Credit</u>	<u>Unpaid Balance</u>
Tax	9,463.00	0.00	9,463.00
Late Payment Penalty Increase	1,893.00	0.00	1,893.00
Interest	44.78	0.00	44.78
Assessment Total	\$11,400.78	\$0.00	\$11,400.78

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

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

- If the amount of this tax liability, exclusive of penalty and interest, is more than \$15,000, or if no tax liability is assessed but the total penalties and interest is more than \$15,000, file a petition with the Illinois Independent Tax Tribunal within 60 days of this notice. Your petition must be in accordance with the rules of practice and procedure provided by the Tribunal (35 ILCS 1010/1-1, *et seq.*).
- In all other cases that do not fall within the jurisdiction of the Illinois Independent Tax Tribunal, file a protest with us, the Illinois Department of Revenue, and request an administrative hearing within 60 days of the date of this notice, which is April 28, 2014. Submit your protest on Form AH-4, Protest and Request for Administrative Hearing with the Illinois Department of Revenue (available on our website at tax.illinois.gov). Mail form AH-4 along with a copy of this notice to the address on the form. If you do not file a protest within the time allowed, you will waive your right to a hearing, and this liability will become final. An administrative hearing is a formal legal proceeding conducted pursuant to the rules adopted by the Department and is presided over by an administrative law judge. A protest of this notice does not preserve your rights under any other notice.
- Instead of filing a petition with the Illinois Independent Tax Tribunal or a protest with us, the Illinois Department of Revenue, you may instead, under Sections 2a and 2a.1 of the State Officers and Employees Money Disposition Act (30 ILCS 230/2a, 230/2a.1), pay the total liability under protest using Form RR-374, Notice of Payment Under Protest (available on our website at tax.illinois.gov), and file a complaint with the circuit court for a review of our determination.

If you do not protest this notice or pay the assessment total in full, we may take collection action against you for the balance due, which may include levy of your wages and bank accounts, filing of a tax lien, or other action to satisfy your liability.

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

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

217 785-8579

EXHIBIT "D"

Notice of Tax Liability

for Form EDA-105-R, ROT Audit Report



#BWVKMGV
#CNXX X118 X9X4 6725#
C U MERRY-ANN'S DINER, INC
MERRY-ANN'S DINER
3307 LAKESHORE DR
CHAMPAIGN IL 61822-5205

February 26, 2014



Letter ID: CNXX118X9X46725

Account ID: 4002-5918



We have audited your account for the reporting periods March 01, 2013, through March 31, 2013. As a result we have assessed the amounts shown below.

	<u>Liability</u>	<u>Payments/Credit</u>	<u>Unpaid Balance</u>
Tax	353.00	0.00	353.00
Late Payment Penalty Increase	71.00	0.00	71.00
Interest	1.81	0.00	1.81
Assessment Total	\$425.81	\$0.00	\$425.81

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

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

- If the amount of this tax liability, exclusive of penalty and interest, is more than \$16,000, or if no tax liability is assessed but the total penalties and interest is more than \$15,000, file a petition with the Illinois Independent Tax Tribunal within 60 days of this notice. Your petition must be in accordance with the rules of practice and procedure provided by the Tribunal (35 ILCS 1010/1-1, *et seq.*).
- In all other cases that do not fall within the jurisdiction of the Illinois Independent Tax Tribunal, file a protest with us, the Illinois Department of Revenue, and request an administrative hearing within 60 days of the date of this notice, which is April 28, 2014. Submit your protest on Form AH-4, Protest and Request for Administrative Hearing with the Illinois Department of Revenue (available on our website at tax.illinois.gov). Mail form AH-4 along with a copy of this notice to the address on the form. If you do not file a protest within the time allowed, you will waive your right to a hearing, and this liability will become final. An administrative hearing is a formal legal proceeding conducted pursuant to the rules adopted by the Department and is presided over by an administrative law judge. A protest of this notice does not preserve your rights under any other notice.
- Instead of filing a petition with the Illinois Independent Tax Tribunal or a protest with us, the Illinois Department of Revenue, you may instead, under Sections 2a and 2a.1 of the State Officers and Employees Money Disposition Act (30 ILCS 230/2a, 230/2a.1), pay the total liability under protest using Form RR-374, Notice of Payment Under Protest (available on our website at tax.illinois.gov), and file a complaint with the circuit court for a review of our determination.

If you do not protest this notice or pay the assessment total in full, we may take collection action against you for the balance due, which may include levy of your wages and bank accounts, filing of a tax lien, or other action to satisfy your liability.

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