

**ILLINOIS INDEPENDENT  
TAX TRIBUNAL**

---

---

C-U MERRY ANN' S DINER, INC.,	)	
	)	
Petitioner,	)	
v.	)	No. 14 TT 70
	)	Judge Brian Barov
ILLINOIS DEPARTMENT OF	)	
REVENUE,	)	
	)	
	)	
Respondent.	)	

---

---

**DEPARTMENT' S ANSWER TO PETITIONER' S PETITION**

NOW COME the Respondent, the Illinois Department of Revenue (the "Department"), by and through its attorney, Lisa Madigan, Illinois Attorney General, and for its Answer to Petitioner' s Petition ("Petition"), hereby states 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.

**ANSWER:** The Department admits the existence, force and effect, at all relevant times of the documents attached to the Petition as Exhibits and referred to in paragraph 1 and state that such documents speaks for themselves.

2. Chronologically, the four NTL' s 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”).

**ANSWER:** The Department admits the existence, force and effect, at all relevant times of the documents attached to the Petition as Exhibits A–D and referred to in paragraph 2 and state that such documents speaks for themselves.

3. Each NTL arose out of a Retail Occupation Tax audit report conducted and prepared by the Department.

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

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. 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.

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

5. Petitioner opened a restaurant on the campus of the University of Illinois 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.

**ANSWER:** The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 5 and therefore neither admits or denies the allegations.

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.

**ANSWER:** The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 6 and therefore neither admits or denies the allegations.

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 Dailey Register Tape.

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

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.

**ANSWER:** The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 8 and therefore neither admits or denies the allegations

9. When the Z Tape Summaries were reconciled by the manager with the Dailey 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.

**ANSWER:** The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 9 and therefore neither admits or denies the allegations

10. After the manager reconciled the Z Tape Summaries that pertained to the respective Daily Register Tape, that Daily Register Tape was discarded.

**ANSWER:** The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 10 and therefore neither admits or denies the allegations.

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.

**ANSWER:** The Department admits the allegations contained in paragraph 11.

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.

**ANSWER:** The Department denies the allegations contained in paragraph 12.

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 of each Z Tape Summary.

**ANSWER:** The Department denies the allegations contained in paragraph 13.

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 Dailey Register Tapes.

**ANSWER:** The Department admits the allegations contained in paragraph 14.

15. Petitioner told the Department the Daily Register Tapes had all been discarded by the Petitioner.

**ANSWER:** The Department admits the allegations contained in paragraph 15.

16. The Department informed Petitioner that the handwritten over-rings amounts on the Z Tape Summaries were not acceptable to the Department as proof of those over-rings.

**ANSWER:** The Department admits the allegations contained in paragraph 16.

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.

**ANSWER:** Paragraph 17 is not an allegation of material fact but a statement of Petitioner's belief or position and as such does not require an answer pursuant to Tribunal Rule 86 III.Adm.Code § 5000.310(b).

18. It was unreasonable for the Department to preclude any proof of the over-rings claimed by Petitioner.

**ANSWER:** Although paragraph 18 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 18.

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.

**ANSWER:** Although paragraph 19 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 19.

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.

**ANSWER:** The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 20 and therefore neither admits or denies the allegations.

21. However, the average daily receipts for the 39 highest sales days, without subtracting over-rings, were \$17,600.00.

**ANSWER:** The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 21 and therefore neither admits or denies the allegations

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.

**ANSWER:** The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 22 and therefore neither admits or denies the allegations.

23. 70% of the payments made by customers at the Diner are by charge card; 30% of payments are in cash.

**ANSWER:** The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 23 and therefore neither admits or denies the allegations.

24. If the daily sales figures utilized by the Department, were actual sales, there would have been either a substantial spike in credit card sales fees received by Petitioner (which there was not) or trunk loads of cash being wheeled into the diner to pay for the \$95,000 lunch special, which there were not.

**ANSWER:** Paragraph 24 is not a material allegation of fact but a statement of Petitioner's belief or position and as such does not require an answer pursuant to Tribunal Rule 86 Ill.Adm.Code § 5000.310(b).

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

**ANSWER:** Paragraph 25 is not a material allegation of fact but a statement of Petitioner's belief or position and as such does not require an answer pursuant to Tribunal Rule 86 Ill.Adm.Code § 5000.310(b).

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).

**ANSWER:** Although paragraph 26 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 26.

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

2010	27.5%
2011	24.5%
2012	27.8%

**ANSWER:** The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 27 and therefore neither admits or denies the allegations.

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 \$326,477.00, 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%.

**ANSWER:** Paragraph 28 is not a material allegation of fact but a statement of Petitioner's belief or position and as such does not require an answer pursuant to Tribunal Rule 86 Ill.Adm.Code § 5000.310(b).

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

**ANSWER:** Although paragraph 29 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 29.

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.

**ANSWER:** Although paragraph 30 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 30.

31. The Department refused to conduct a mark-up audit that would have exonerated Petitioner from paying sales tax on over-rings where not tax was due.

**ANSWER:** Although paragraph 31 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 31.

WHEREFORE, the Department prays:

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

Respectfully Submitted,

LISA MADIGAN  
Illinois Attorney General

ILLINOIS DEPARTMENT OF REVENUE  
LEGAL SERVICES BUREAU  
100 W. RANDOLPH ST., 7-900  
CHICAGO, IL 60601  
By: Michael Coveny (312) 814-6697



By \_\_\_\_\_  
Michael Coveny,  
Assistant Attorney General

STATE OF ILLINOIS        )  
  ) SS  
COUNTY OF SANGAMAN    )

AFFIDAVIT AS TO LACK OF SUFFICIENT KNOWLEDGE

I, THOMAS CLARK, being first duly sworn, deposes and says that I am an employee of the Illinois Department of Revenue, that I have read the foregoing Department's Answer to Petitioner's Petition, that I am well acquainted with its contents, and under penalties as provided by law pursuant to 735 ILCS 5/1-109 of the Illinois Code of Civil Procedure, I certify that I lack the required personal knowledge to either admit or deny paragraphs 5, 6, 8-10, 20-23, and 27 pursuant to 735 ILCS 5/2-610(b) and Tribunal Rule 5000.310(b)(3). I hereby certify that the statements set forth in this affidavit are true and correct to the best of my knowledge, information and belief.

 06/06/2014  
Thomas Clark  
Revenue Auditor  
Illinois Department of Revenue

CERTIFICATE OF SERVICE

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

Jeffrey W. Tock  
Harrington & Tock LLC  
201 W. Springfield Avenue / Suite 601  
Champaign, IL 61824-1550

By email to [jtock@harringtontock.com](mailto:jtock@harringtontock.com) on June 11, 2014.



---

Michael Coveny,  
Assistant Attorney General