

ILLINOIS INDEPENDENT
TAX TRIBUNAL

ECD GREAT STREET LLC)	
)	
Petitioner,)	
v.)	No. 14 TT 8
)	
)	
ILLINOIS DEPARTMENT OF)	
REVENUE,)	
)	Judge Brian Barov
)	
Respondent.)	

DEPARTMENT’ S VERIFIED ANSWER TO PETITIONER’ S VERFIED 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 Verified Petition (“Petition”), hereby states as follows:

PARTIES

1. Petitioner is an Illinois limited liability company located at 250 Parkway Drive, Suite 120, Lincolnshire, IL 60069 and can be reached at 847-229-9200.

ANSWER: The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 1 and therefore neither admits or denies the allegations

2. Petitioner is represented by David A. Hughes of Horwood Marcus & Berk Chartered located at 500 West Madison St., Suite 3700, Chicago, Illinois 60661, who can be reached at 312-606-3212 or dhughes@hmbllaw.com.

ANSWER: The Department admits the allegations contained in paragraph 2.

3. Petitioner's Illinois Business Tax number is 3749-0729.

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

4. Petitioner was formed as a limited liability company in 2005 to raise capital for, to construct, and later to operate the Wit Hotel.

ANSWER: The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 4 and therefore neither admits or denies the allegations.

5. The Department is an agency of the Executive Department of the State Government and is tasked with the enforcement and administration of Illinois tax laws. 20 ILCS 5/5-15.

ANSWER: The Department admits the existence, force and effect, at all relevant times of the statutory provision set forth or referred to in paragraph 5 and state such provision speaks for itself.

6. Director Hamer is the current Director of the Department.

ANSWER: The Department admits the allegations contained in paragraph 6.

7. Director Hamer is lawfully appointed by the Governor of the State of Illinois to execute the powers and discharge the duties vested by law in the Director of the Department. 20 ILCS 5/5-20.

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

NOTICES

8. On May 17, 2013, the Defendants issued two Notices of Tax Liability ("Notices") totaling tax, penalties, and interest of \$359,128.58 for the periods January 1, 2008 through December 31, 2010 ("Periods at Issue"). True and accurate copies of the Notices are attached hereto as Exhibit A.

ANSWER: The Department admits the existence, force and effect, at all relevant times of the documents attached to Plaintiff's Petition as Exhibit A and referred to in paragraph 8 and state that such documents speak for themselves

JURISDICTION

10. Petitioner brings this action pursuant to the Illinois Independent Tax Tribunal Act (“Tribunal Act”), 35 ILCS 1010/1-1 to 35 ILCS 1010/1-100.

ANSWER: The Department admits the allegations contained in paragraph 10.

11. The Tribunal has jurisdiction over this matter pursuant to Sections 1-15, 1-45, and 1-50 of the Tribunal Act because Petitioner timely filed a protest with the Department’s Office of Administrative Hearings within 60 days of the Notices and elected to transfer the case to the Tribunal before February 1, 2014

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

BACKGROUND

12. Petitioner was formed to raise capital for, to construct, and later to operate the Wit Hotel (“hotel”).

ANSWER: The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 12 and therefore neither admits or denies the allegations.

13. Construction of the hotel commenced in late 2006 and the hotel opened in May, 2009.

ANSWER: The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 13 and therefore neither admits or denies the allegations.

14. The Department audited the Petitioner’s books and records for the Periods at Issue.

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

15. In addition to performing a detailed audit of Petitioner’s fixed assets, the Department’s auditor also utilized a sample period and extrapolated those figures to either the full audit period of January 1, 2008 through December 31, 2010 or to a 20 month audit period.

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

16. The Department made several adjustments to Petitioner's sales and use tax returns that resulted in the assessed liability at issue.

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

17. The Department disallowed deductions claimed by Petitioner for sales to exempt customers.

ANSWER: The Department admits the allegations contained in paragraph 17.

18. The Department refused to reduce tax liability for taxes paid by both Petitioner and an audio visual ("AV") company.

ANSWER: The Department denies the allegations contained in paragraph 18

19. In exchange for the hotel's use, Great Street Investors, LLC ("Investors"), a related entity which was owned by Petitioner's investors, paid \$600,000 for six months to the hotel.

ANSWER: The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 19 and therefore neither admits or denies the allegations

20. The Defendants treated the entire \$100,000 per month as taxable even though the payment included meeting room rentals with no taxable food and beverage component.

ANSWER: The Department denies the allegations contained in paragraph 20.

21. Petitioner charges a 21% service charge, of which 18% goes directly to service employees. The remaining 3% goes into a bonus pool, which is split among managers and other employees who do not typically receive gratuities.

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 Defendants treated the bonus pool as taxable.

ANSWER: The Department admits the allegations contained in paragraph 22.

23. The Defendants imposed use tax on a variety of fixed asset purchases.

ANSWER: The Department admits the allegations contained in paragraph 23.

24. The Defendants imposed use tax on consumable supplies for both the hotel and the restaurant within the hotel.

ANSWER: The Department admits the allegations contained in paragraph 24

25. On July 15, 2013, Petitioner timely filed a request for hearing with the Department's Office of Administrative Hearings, specifically reserving the right to transfer the case from the Office of Administrative Hearings to the Illinois Independent Tax Tribunal when the Tribunal began operation. A true and accurate copy of Petitioner's protest is attached hereto as Exhibit B

ANSWER: The Department admits that Petitioner timely filed its request for hearing but neither admits nor denies the remaining allegations of paragraph 25 as they are legal conclusions, not material allegations of fact, and therefore do not require an answer pursuant to Tribunal Rule 310(b)(2).

COUNT I

The Statute of Limitations Has Closed for Periods from January 1, 2008 through December 31, 2009

26. Petitioner realleges and incorporates by this reference the allegations made in paragraphs 1 through 25, inclusive, hereinabove.

ANSWER: The Department repeats and incorporates its answers to paragraphs 1-25 as if fully set forth herein.

27. The Notices cover the tax periods from January 1, 2008 through December 31, 2010.

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

28. The applicable statute of limitations provides that "no notice of tax liability shall be issued on and after each January 1 and July 1 covering gross receipts received during any month or period of time more than 3 years prior to such January 1 and July 1, respectively." 35 ILCS 120/4.

ANSWER: The Department admits the existence, force and effect, at all relevant times of the statutory provision set forth or referred to in paragraph 28 and state such provision speaks for itself.

29. The Notices were issued on May 17, 2013.

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

30. The Department may only assess tax for periods beginning January 1, 2010.

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

31. None of Petitioner's employees or responsible officers executed a proper and binding waiver to extend the statute of limitations.

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

32. All liabilities assessed for periods ending prior to January 1, 2010 are null and void because the applicable statute of limitations bars the Department from assessing tax for those periods.

ANSWER: Although paragraph 32 is not an allegation of fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 32.

WHEREFORE, the Department prays:

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

COUNT II

Defendants' Audit Sample Grossly Overstates Petitioner's Liability

33. Petitioner realleges and incorporates by this reference the allegations made in paragraphs 1 through 32, inclusive, hereinabove.

ANSWER: The Department repeats and incorporates its answers to paragraphs 1-32 as if fully set forth herein.

34. On audit, the Department used a sample month and a sample year in calculating whether additional sales and use tax was owed during the Periods at Issue.

ANSWER: The Department admits that it used a sample month for gratuities and a sample year for consumable supplies, but denies that it used a sample period for fixed assets. The Department further affirmatively states that it used a detail audit for fixed assets.

35. The auditor used June, 2010 to extrapolate the audit results with regard to disallowed banquet gratuities and used 2010 use tax on consumable supplies to extrapolate use tax on consumable supplies for all periods at issue.

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

36. The hotel opened on May 28, 2009.

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

37. Prior to opening, Petitioner purchased no consumables for either its hotel or restaurant business.

ANSWER: The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 37 and therefore neither admits or denies the allegations.

38. By extrapolating the 2010 figures for this adjustment, the Department drastically and unreasonably inflated Petitioner's audit liability because the Department applied the 2010 adjustments to periods prior to May 2009 when the hotel was not even open.

ANSWER: Although paragraph 38 is not an allegation of fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 38.

WHEREFORE, the Department prays:

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

COUNT III

The Notices Are Invalid Because They Include Receipts Not Subject to Sales Tax

39. Petitioner realleges and incorporates by this reference the allegations made in paragraphs 1 through 38, inclusive, hereinabove.

ANSWER: The Department repeats and incorporates its answers to paragraphs 1-38 as if fully set forth herein.

40. The Notices include underreported taxable sales for the Periods at Issue.

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

41. This liability stems from payments made by Investors to Petitioner.

ANSWER: The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 41 and therefore neither admits or denies the allegations.

42. In exchange for their ability to use the hotel and its amenities, Investors paid Petitioner a set monthly fee.

ANSWER: The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 42 and therefore neither admits or denies the allegations

43. Petitioner did not report these receipts on its sales tax returns.

ANSWER: The Department admits the allegations contained in paragraph 43.

44. The Department included all of the receipts from Investors as “underreported taxable sales.”

ANSWER: The Department denies the allegations contained in paragraph 44

45. Many of the receipts relate to meeting room rentals without a food and beverage component.

ANSWER: Although paragraph 45 is not an allegation of fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 45.

46. These receipts are not subject to sales tax and must be removed from the calculation of Petitioner’s liability.

ANSWER: Although paragraph 46 is not an allegation of fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 46.

WHEREFORE, the Department prays:

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

COUNT IV

The Notices Are Invalid Because Many Sales Were Made to Exempt Organizations

47. Petitioner realleges and incorporates by this reference the allegations made in paragraphs 1 through 46, inclusive, hereinabove.

ANSWER: The Department repeats and incorporates its answers to paragraphs 1–46 as if fully set forth herein.

48. During the periods at issue, Petitioner made sales to exempt organizations for using its banquet halls.

ANSWER: The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 48 and therefore neither admits or denies the allegations.

49. On audit, the Department disallowed Petitioner's deductions for sales to these exempt organizations because Petitioner did not provide certain exemption certificates requested by the auditor.

ANSWER: The Department states the question of whether the organizations referred to in paragraph 49 are exempt is a question of law, not a material allegation of fact. Consequently, no answer is required pursuant to Tribunal Rule 310(b)(2).

50. These customers were, in fact, exempt and Petitioner has exemption certificates for almost all customers to establish that the customers were exempt entities for Illinois sales and use tax purposes.

ANSWER: Paragraph 50 contains both a legal conclusion and a material allegation of fact. The Department denies both the legal conclusion and material allegation of fact.

51. The deductions for sales to these exempt entities should be allowed.

ANSWER: Although paragraph 51 is not an allegation of fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 51.

WHEREFORE, the Department prays:

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

COUNT V

The Notices Are Invalid Because Defendants Erroneously Imposed Use Tax on Several Fixed Assets for Which Tax Had Already Been Paid or Which Were Installed By Construction Contractors

52. Petitioner realleges and incorporates by this reference the allegations made in paragraphs 1 through 51, inclusive, hereinabove.

ANSWER: The Department repeats and incorporates its answers to paragraphs 1-51 as if fully set forth herein.

53. For many of the assets at issue, Petitioner did in fact pay tax.

ANSWER: The Department denies the allegations contained in paragraph 53

54. For a number of the assets, Petitioner bought the property in another state and paid tax there.

ANSWER: The Department denies the allegations contained in paragraph 54

55. Petitioner is entitled to a credit for tax paid on these purchases.

ANSWER: Although paragraph 55 is not an allegation of fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 55.

56. Petitioner actually paid Illinois sales tax on many of the fixed assets in issue.

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

57. Some of the fixed assets in question were installed by construction contractors.

ANSWER: The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 57 and therefore neither admits or denies the allegations.

58. Materials sold by a construction contractor, which are installed by the contractor into property owned by the purchaser, are not subject to tax. 86 Ill. Admin. Code 130.1940.

ANSWER: The Department admits the existence, force and effect, at all relevant times of the regulation set forth or referred to in paragraph 58 and state such regulation speaks for itself.

59. Petitioner is not subject to tax on materials purchased from and installed by a construction contractor.

ANSWER: Although paragraph 59 is not an allegation of fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 59.

WHEREFORE, the Department prays:

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

COUNT VI

All penalties should be abated based on reasonable cause

60. Petitioner realleges and reincorporates the allegations in paragraphs 1 through 59, inclusive, hereinabove.

ANSWER: The Department repeats and incorporates its answers to paragraphs 1-60 as if fully set forth herein.

61. In its Notices, Defendants assessed penalties in an amount totaling \$75,445.

ANSWER: The Department admits the allegations contained in paragraph 61.

62. Illinois law provides that penalties do not apply if a taxpayer shows that its failure to pay tax at the required time was due to reasonable cause. 35 ILCS § 734-8.

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

63. The most important factor to be considered in making a determination to abate a penalty will be the extent to which the taxpayer made a good faith effort to determine its proper tax liability and to pay its proper tax liability in a timely fashion. 86 Ill. Admin. Code § 700.400(b).

ANSWER: The Department admits the existence, force and effect, at all relevant times of the regulation set forth or referred to in paragraph 63 and state such regulation speaks for itself.

64. A taxpayer will be considered to have made a good faith effort to determine and pay its proper tax liability if it exercised ordinary business care and prudence in doing so. 86 Ill. Admin. Code § 700.400(b).

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

65. Petitioner reasonably paid tax on all purchase it made within and without Illinois.

ANSWER: Although paragraph 65 is not an allegation of fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 65.

66. Petitioner reasonably collected tax on all sales that it made within Illinois.

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

67. Petitioner, relying on Illinois law and regulations, exercised ordinary business care and prudence when it reasonably determined its sales and use tax liability.

ANSWER: Although paragraph 67 is not an allegation of fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 67.

68. The Department's determination that Petitioner owes penalties on late payment of tax is not supported by fact or law.

ANSWER: Although paragraph 68 is not an allegation of fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 68.

WHEREFORE, the Department prays:

A) That Judgment be entered against the Petitioner and in favor of the Department on Count VI;

- B) That the Department's Notice of Tax Liability be determined to be correct.
- C) That this Tribunal grant such other additional relief it deems just and proper

LISA MADIGAN
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REVENUE LITIGATION BUREAU
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By: Michael Coveny (312) 814-4142

Respectfully Submitted,

LISA MADIGAN
Illinois Attorney General



By _____
Michael Coveny,
Assistant Attorney General

STATE OF ILLINOIS)
) SS
COUNTY OF SANGAMAN)

VERIFICATION AND AFFIDAVIT AS TO LACK OF SUFFICIENT KNOWLEDGE

DAN HALL, being first duly sworn, deposes and says that he is an employee and duly authorized agent of the Illinois Department of Revenue, that he has read the foregoing Department's Verified Answer to Petitioner's Verified Petition, that he is 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, he certifies that the statements set forth in that instrument are true and correct, except as to allegations claiming lack of sufficient knowledge pursuant to 735 ILCS 5/2-610(b), which he verily believes to be true.

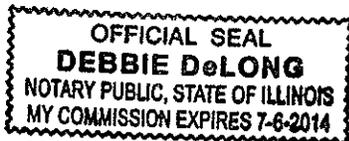


Dan Hall
Manager, Audit Bureau
Illinois Department of Revenue

SIGNED and SWORN TO before me
this 24 day of March, 2014



NOTARY PUBLIC



CERTIFICATE OF SERVICE

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

Petition upon:

David A. Hughes
Horwood Marcus & Berk Chartered
500 West Madison Street
Suite 3700
Chicago, IL 606661

By email to dhughes@hmblaw.com on March 24, 2014.