

**STATE OF ILLINOIS  
DEPARTMENT OF REVENUE  
OFFICE OF ADMINISTRATIVE HEARINGS  
CHICAGO, ILLINOIS**

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<b>THE DEPARTMENT OF REVENUE</b>	)	Docket No. 13-ST-0308
<b>OF THE STATE OF ILLINOIS</b>	)	
v.	)	
<b>ECD GREAT STREET, LLC,</b>	)	John E. White,
Taxpayer	)	Administrative Law Judge

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**ORDER**

This matter coming on to be heard following notice of Taxpayer's Motion to Transfer Case to Illinois Tax Tribunal (Taxpayer's Motion), filed on January 30, 2014, and the Administrative Law Judge being advised or taking of the following facts:

1. Taxpayer's Motion seeks to make a statutory election to transfer jurisdiction of this matter from the Department of Revenue to the Tribunal.

**IT IS HEREBY ORDERED THAT:**

2. Taxpayer's Motion is granted.
3. Taxpayer's election to transfer jurisdiction to the Tribunal is irrevocable.
4. The administrative hearing record for this case will be transferred to the Tribunal.
5. Taxpayer will be required to perfect its protest before the Tribunal, in accordance with 35 ILCS 1010/1-1 *et seq.*
6. All further proceedings in this matter are cancelled and the proceedings before the Illinois Department of Revenue's Office of Administrative Hearings are closed.



January 31, 2014  
Date

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John E. White, Administrative Law Judge



**Illinois Department of Revenue  
OFFICE OF ADMINISTRATIVE HEARINGS**

James R. Thompson Center  
100 West Randolph Street, Level 7-900  
Chicago, Illinois 60601  
(312) 814-6114

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<b>THE DEPARTMENT OF REVENUE</b>	)	Docket No. 13-ST-0308
<b>OF THE STATE OF ILLINOIS</b>	)	
v.	)	
<b>ECD GREAT STREET, LLC,</b>	)	John E. White,
Taxpayer	)	Administrative Law Judge

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**NOTICE OF DISPOSITION**

To:

David Hughes  
Horwood Marcus & Berk, Chtd.  
500 West Madison Street Suite 3700  
Chicago, Illinois 60661

Michael Coveny  
Illinois Department of Revenue  
100 West Randolph Street 7<sup>th</sup> Floor  
Chicago, Illinois 60601

**YOU ARE HEREBY NOTIFIED** that the attached Order of the Administrative Law Judge transferring the above captioned matter to the Illinois Independent Tax Tribunal has been approved by the Director of Revenue. By such Order, all proceedings before the Administrative Hearings Division of the Illinois Department of Revenue relative to this cause have been concluded.

Date: \_\_\_\_\_

\_\_\_\_\_  
Brian A. Hamer, Director  
Illinois Department of Revenue

STATE OF ILLINOIS  
DEPARTMENT OF REVENUE  
OFFICE OF ADMINISTRATIVE HEARINGS

OFFICE OF THE  
ADMINISTRATIVE CLERK  
FILED

JAN 30 2014

IDOR  
ADMINISTRATIVE HEARINGS  
CHICAGO, ILLINOIS

THE DEPARTMENT OF REVENUE  
OF THE STATE OF ILLINOIS

v.

ECD GREAT STREET LLC,

TAXPAYER.

No. 13-ST-0308

**TAXPAYER'S MOTION TO TRANSFER CASE TO ILLINOIS TAX TRIBUNAL**

Taxpayer, ECD Great Street, LLC ("Taxpayer"), by its attorneys, Horwood Marcus & Berk Chartered, hereby moves the Illinois Department of Revenue's ("Department") Office of Administrative Hearings ("Administrative Hearings") for an Order granting Taxpayer's election to transfer the captioned matter to the Illinois Independent Tax Tribunal ("Tax Tribunal"). In support of this Motion, Taxpayer states as follows:

1. On July 15, 2013, Taxpayer timely filed a Protest and Request for Hearing with the Office of Administrative Hearings, a true and accurate copy of which is attached hereto as Exhibit A.
2. Pursuant to Section 1-15(d) of the Illinois Independent Tax Tribunal Act ("Tribunal Act"), codified at 35 ILCS §1010/1-15, a taxpayer may elect to transfer a matter that was commenced at Administrative Hearings on or after June 1, 2013, in which the aggregate amount deemed due and owing exceeds fifteen-thousand dollars, to the Tax Tribunal.

3. Pursuant to the Tribunal Act, a taxpayer's election must be made prior to February 1, 2014.
4. Pursuant to Section 1-15(d) of the Tribunal Act, Taxpayer hereby elects to transfer this pending matter to the Tax Tribunal for hearing. A copy of Taxpayer's petition to be filed with the Tax Tribunal is attached hereto as Exhibit B.

**WHEREFORE**, for the reasons stated above, Taxpayer respectfully requests that this matter be transferred to the Tax Tribunal.

**ECD GREAT STREET LLC**  
**Taxpayer**

  
\_\_\_\_\_  
Attorney for Taxpayer

January 30, 2014

Prepared by:

Attorney for Taxpayer  
David A. Hughes  
Christopher T. Lutz  
Horwood Marcus & Berk Chartered  
500 W. Madison St., Ste. 3700  
Chicago, IL 60661  
(312) 606-3212

HORWOOD MARCUS & BERK  
Chartered

David A. Hughes  
Direct Dial: (312) 606-3212  
Direct Fax: (312) 267-2193  
Direct e-mail: Dhughes@hmbllaw.com

Attorneys at Law

500 West Madison Street  
Suite 3700  
Chicago, Illinois 60661

phone: (312) 606-3200  
fax: (312) 606-3232

www.sallawyers.com

July 15, 2013

**PROTEST AND REQUEST FOR HEARING**

**BY CERTIFIED MAIL (7013 0600 0000 1580 2641)  
RETURN RECEIPT REQUESTED**

Illinois Department of Revenue  
Office of Administrative Hearings MC 5-500  
101 W. Jefferson Street  
P.O. Box 19014  
Springfield, Illinois 62794-9014

**Re: ECD Great Street LLC  
Account ID: 3749-0728  
January 1, 2008 through December 31, 2010 ("Periods at Issue")**

Greetings:

The Taxpayer, ECD Great Street LLC ("Great Street"), by and through its attorneys, Horwood Marcus & Berk Chartered, hereby protests and takes exception to the Notices of Tax Liability ("Notices") issued by the Illinois Department of Revenue ("Department") on May 17, 2013 asserting Illinois sales and use tax, penalties and interest due in the amount of \$359,128.58. In support of this protest, Great Street states as follows:

**I. NOTICE**

On May 17, 2013, the Department issued two Notices to Great Street totaling tax, penalties and interest of \$359,128.58. True and accurate copies of the Notices are attached hereto as Exhibit A. The Department asserts that the amount due is a result, among other things, of: (1) disallowed deductions for exempt organizations; (2) sales tax due on under-reported taxable sales; (3) banquet gratuities disallowed; (4) fixed asset purchases; and (5) use tax due on consumable supplies. A true and accurate copy of the Sales Tax Audit System Summary Analysis is attached hereto as Exhibit B.

EA

Illinois Department of Revenue  
July 15, 2013  
Page 2

## **II. INFORMAL REVIEW REQUESTED**

Pursuant to the Department's regulation, 86 Ill. Admin. Code §200.135, Great Street respectfully requests an informal review on this matter.

## **III. HEARING REQUESTED**

If this matter is not resolved through informal review, Great Street hereby respectfully requests a hearing pursuant to the Department's regulation, 86 Ill. Admin. Code §200.120.

## **IV. ILLINOIS TAX TRIBUNAL**

Great Street reserves the right to transfer this matter to the Illinois Tax Tribunal by making a timely and proper election on or after January 1, 2014 in accordance with Illinois law.

## **V. BACKGROUND FACTS**

Great Street was formed as a limited liability company in 2005 to raise capital for, to construct, and later to operate, the Wit Hotel. Construction of the hotel commenced in late 2006 and the hotel opened in May, 2009.

On audit, in addition to auditing Great Street's fixed assets, the auditor looked to 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. As a result of the audit, the Department issued the Notices totaling \$359,128.58. The Department made several adjustments that resulted in the assessed liability.

First, the Department disallowed deductions claimed by Great Street for sales to tax exempt customers.

Second, the Department refused to reduce the tax liability for audio visual ("AV") taxes paid by both Great Street and the AV company.

Third, the audit liability includes sales tax on sales which involved hotel use for investor meetings. In exchange for the hotel's use, Great Street Investors, LLC ("Investors"), a related entity which was owned by Great Street's investors, paid \$600,000 for six months to the hotel. The audit treated the entire \$100,000 per month as taxable even though the payment included meeting room rentals with no taxable food and beverage component.

Illinois Department of Revenue  
July 15, 2013  
Page 3

The Notices also include tax owed on "banquet gratuities." Great Street 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. The Department treated the "bonus pool" as taxable. The Notices also include use tax on a variety of fixed asset purchases. Finally, the Notices include use tax on consumable supplies for both the hotel and the restaurant within the hotel.

## VI. ARGUMENTS

For the reasons expressed below, the Notices issued by the Department drastically overstate the sales and use tax that might be owed by Great Street. First, several of the tax periods contained in the Notices were closed under the statute of limitations because a statute waiver which purported to extend the statute of limitations for these otherwise closed periods was invalid and ineffective. Thus, all tax prior to the reporting period for January 1, 2010 was erroneously included in the Notices.

Second, the Department utilized a sample period of 2010 to forecast tax that would have been owed when the hotel was not yet in operation. Thus, the manner in which the auditor used the sample period distorted the amount of tax owed, specifically with regard to, underreported consumable supplies. Third, the Department used a one month sample period (June, 2010, which was the highest volume month) to forecast tax owed for the banquet gratuities for the period of May, 2009 through December, 2010. Fourth, the Department refused to reduce the tax liability for audio visual taxes paid by both Great Street and the AV company. Fifth, the Department inflated the amount of tax owed for underreported taxable sales as a number of those sales were not taxable. Sixth, sales to exempt organizations were properly deducted. Finally, a number of the fixed assets on which the Department assessed use tax were either nontaxable or Great Street has already paid tax.

In short, many of the Department's audit adjustments lack merit and the liabilities reflected in the Notices must be reduced significantly if not eliminated entirely.

### A. The Statute of Limitations Has Closed for Certain Periods

The Notices cover the tax periods from January 1, 2008 through December 31, 2010. The Illinois Retailers' Occupation Tax 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. In this case, the Notices were issued on May 17, 2013. Thus, the Department may only assess tax for periods beginning January 1, 2010. Any tax due from January 1, 2008 through December 31,

Illinois Department of Revenue  
July 15, 2013  
Page 4

2009 may not be included in the Notices unless Great Street and the Department executed a proper and binding waiver to extend the statute of limitations.

During audit, the Department never received an audit waiver from a Great Street employee let alone a responsible officer. Rather, the Department obtained a waiver signed on March 10, 2011, and then again on April 26, 2012 by a person named Tim Ditmer. Great Street never employed Mr. Ditmer. Instead, he was employed by an unaffiliated hospitality services company, which provided services to the Wit Hotel. Mr. Ditmer was never authorized to sign a waiver or to act as Great Street's agent, and at no point did Great Street represent to the Department's auditor that Mr. Ditmer was permitted to sign the waivers. *See Rock Island Tobacco v. Dep't of Revenue*, 87 Ill. App. 3d 476 (3d Dist. 1980).

Had the auditor discussed this with Great Street's management, the auditor would have learned that Mr. Ditmer had no authority to execute a waiver. Indeed, Great Street was not aware that either waiver had been signed until the audit was nearly completed. After learning that Mr. Ditmer had signed the waivers, Great Street refused to sign any more waivers. Moreover, Great Street notified the Department in writing that it never authorized the waivers and in no way did it ratify the waivers. See Letter from Scott Greenberg to Danzie Dicker dated May 31, 2013 (attached hereto as Exhibit C).

For these reasons, the waivers in issue are null and void and any tax period ending prior to January 1, 2010 is closed and not subject to assessment.

**B. The Department's Sample Grossly Overstates Great Street's Audit Liability**

On audit, the Department used a sample month and a sample year in calculating whether additional sales and use tax were owed during the periods at issue. Specifically, 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.

The Wit Hotel opened on May 28, 2009. Prior to opening, Great Street purchased no consumables for either its hotel or restaurant business. By extrapolating the 2010 figures for this adjustment, the Department drastically and unreasonably inflated Great Street's audit liability because the Department applied the 2010 adjustments to periods prior to May 2009 when the Wit Hotel was not even open.

Illinois Department of Revenue  
July 15, 2013  
Page 5

**C. Underreported Taxable Sales**

The Notices include underreported taxable sales for the periods at issue. This liability stems from payments made by Investors to Great Street. In exchange for their ability to use the Wit Hotel and its amenities, Investors paid Great Street a set monthly fee. Great Street did not report these receipts on its sales tax returns. The auditor included all of the receipts from Investors as "underreported taxable sales."

Some of the payments made by Investors relate to taxable transactions. For instance, food sales were included in this monthly sum. However, other receipts relate to meeting room rentals without a food and beverage component. These receipts are not subject to sales tax and must be removed from the calculation of Great Street's audit liability.

**D. Sales to Exempt Organizations**

During the periods at issues, Great Street made sales to exempt organizations for using its banquet halls. On audit, the Department disallowed Great Street's deductions for sales to these exempt organizations because Great Street did not provide certain exemption certificates requested by the Department. These customers were, in fact, exempt and Great Street has exemption certificates for almost all customers to establish that the customers were exempt entities. Accordingly, deductions for sales to these exempt entities should be allowed.

**E. Fixed Assets**

The Department imposed use tax on several fixed assets. For at least two reasons, these fixed assets are not taxable.

First, Great Street did in fact pay tax on many of the assets in question. For a number of the assets, Great Street bought the property in another state and paid tax there. Thus, Great Street is entitled to a credit for tax paid on these purchases. Moreover, Great Street actually paid Illinois tax on some of the fixed assets.

Second, some of the fixed assets in question were installed by construction contractors. Under Illinois law, 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. Instead, the construction contractor pays tax to its suppliers when it purchased the materials to be incorporated into the property. As a result, Great Street is not subject to tax on these purchases.

Illinois Department of Revenue  
July 15, 2013  
Page 6

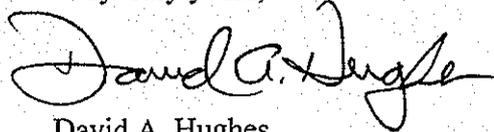
**VII. CONCLUSION**

Based on the foregoing, Great Street respectfully requests that the Department withdraw its Notices based on the positions stated in Part VI of this Protest and Request for Hearing. Great Street respectfully reserves the right to amend this Protest at any time prior to the entry of a pre-trial order.

\* \* \* \* \*

I hereby certify and declare that I have prepared this Protest and Request for Hearing based on information supplied by Great Street and, to the best of my knowledge and belief, the facts stated herein are true, correct and complete. A Power of Attorney authorizing me to represent Great Street in this matter is enclosed.

Very truly yours,



David A. Hughes

DAH:mla  
Enclosures

cc: Scott Greenberg  
Renee Solomon  
David Lilierose  
Bruce Abrams

# **EXHIBIT A**

**Notice of Tax Liability**  
for Form EDA-105-R, ROT Audit Report



#BWNKMGV  
#CNXX XX52 X525 4X82#  
ECD GREAT STREET LLC  
ATTN: BRUCE J. ABRAMS  
250 PARKWAY DR STE 320  
LINCOLNSHIRE IL 60069-4305

May 17, 2013



Letter ID: CNXXXX52X5254X82

Account ID: 3749-0729

We have audited your account for the reporting periods January 01, 2008, through June 30, 2009. As a result we have assessed the amounts shown below.

	<u>Liability</u>	<u>Payments/Credit</u>	<u>Unpaid Balance</u>
Tax	110,839.00	0.00	110,839.00
Late Payment Penalty Increase	48,465.00	0.00	48,465.00
Interest	28,918.88	0.00	28,918.88
<b>Assessment Total</b>	<b>\$188,222.88</b>	<b>\$0.00</b>	<b>\$188,222.88</b>

If you do not agree, you may file a protest and request an administrative hearing within 60 days of the date of this notice, which is **July 16, 2013**. Your request must be in writing, clearly indicate that you want to protest, and explain in detail why you do not agree with our actions. 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.

If you have questions, please write us or call our Springfield office weekdays between 8:00 a.m. and 4:00 p.m. Our address and telephone number are listed below.

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

217 785-6579

### Taxpayer Bill of Rights

- You have the right to call the Department of Revenue for help in resolving tax problems.
- You have the right to privacy and confidentiality under most tax laws.
- You have the right to respond within specified time periods to department notices by asking questions, paying the amount due, or providing proof to refute the department's findings.
- You have the right to appeal department decisions in many instances within specified time periods by asking for department review, or by taking the issue to court.
- If you have overpaid your taxes, you have the right to a credit (or, in some cases, a refund) of that overpayment.
- For more information about these rights and other department procedures, you may write or call us. Our address and telephone number are on the front of this notice.

### Penalty, Fee, Interest, and Credit Information

**Note:** A general explanation of the penalties, fees, and interest that may have been assessed is below. For more detailed information, including specific rates in effect for different liability periods, see Publication 103, Penalties and Interest for Illinois Taxes, available on our web site at [tax.illinois.gov](http://tax.illinois.gov) or by calling 1 800 356-6302.

- \* You owe a **late-filing penalty** if you do not file a processable return by the due date.
- \* You owe a **late-payment penalty** if you
  - are required to make quarter-monthly tax payments and do not do so, or do not pay the required amount by the payment due date.
  - do not pay the amount you owe by the original due date of the return.
- \* You owe an **additional late-payment penalty** if you do not pay the full amount of tax required to be shown due on a return (and that is not shown) within 30 days of the date we send you a notice of arithmetic error or a final assessment.
- \* You owe an **underreporting penalty** if you do not report the correct amount of tax required to be shown due on your return before the due date of the return.
- \* You owe a **bad check penalty** if your remittance is not honored by your financial institution.
- \* You owe a **cost of collection fee** if you do not pay the amount you owe (including penalties and interest) within 30 days of the date printed on an assessment.

Interest is charged on tax not paid when due and is calculated on tax from the day after the original due date of your return through the date you pay the tax. For returns due January 1, 1994, through December 31, 2000, interest also accrues on penalties.

The discount rate is 1.75 percent (.0175). If you made an error when figuring the discount, it is included in the tax calculation. You may not take a discount on returns filed late or on tax paid late.

The credit applied by the Department of Revenue is from a current credit balance in your account.

**Notice of Tax Liability**  
for Form EDA-105-R, ROT Audit Report



#BWNKMGV  
#CNXX XX19 3727 X726#  
ECD GREAT STREET LLC  
ATTN: BRUCE J. ABRAMS  
250 PARKWAY DR STE 320  
LINCOLNSHIRE IL 60069-4305

May 17, 2013



Letter ID: CNXXXX193727X726

Account ID: 3749-0729

We have audited your account for the reporting periods July 01, 2009, through December 31, 2010. As a result we have assessed the amounts shown below.

	<u>Liability</u>	<u>Payments/Credit</u>	<u>Unpaid Balance</u>
Tax	134,900.00	0.00	134,900.00
Late Payment Penalty Increase	26,980.00	0.00	26,980.00
Interest	9,025.70	0.00	9,025.70
<b>Assessment Total</b>	<b>\$170,905.70</b>	<b>\$0.00</b>	<b>\$170,905.70</b>

If you do not agree, you may file a protest and request an administrative hearing within 60 days of the date of this notice, which is **July 16, 2013**. Your request must be in writing, clearly indicate that you want to protest, and explain in detail why you do not agree with our actions. 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.

If you have questions, please write us or call our Springfield office weekdays between 8:00 a.m. and 4:00 p.m. Our address and telephone number are listed below.

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

217 785-6579

### Taxpayer Bill of Rights

- You have the right to call the Department of Revenue for help in resolving tax problems.
- You have the right to privacy and confidentiality under most tax laws.
- You have the right to respond within specified time periods to department notices by asking questions, paying the amount due, or providing proof to refute the department's findings.
- You have the right to appeal department decisions in many instances within specified time periods by asking for department review, or by taking the issue to court.
- If you have overpaid your taxes, you have the right to a credit (or, in some cases, a refund) of that overpayment.
- For more information about these rights and other department procedures, you may write or call us. Our address and telephone number are on the front of this notice.

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- \* You owe an **additional late-payment penalty** if you do not pay the full amount of tax required to be shown due on a return (and that is not shown) within 30 days of the date we send you a notice of arithmetic error or a final assessment.
- \* You owe an **underreporting penalty** if you do not report the correct amount of tax required to be shown due on your return before the due date of the return.
- \* You owe a **bad check penalty** if your remittance is not honored by your financial institution.
- \* You owe a **cost of collection fee** if you do not pay the amount you owe (including penalties and interest) within 30 days of the date printed on an assessment.

Interest is charged on tax not paid when due and is calculated on tax from the day after the original due date of your return through the date you pay the tax. For returns due January 1, 1994, through December 31, 2000, interest also accrues on penalties.

The discount rate is 1.75 percent (.0175). If you made an error when figuring the discount, it is included in the tax calculation. You may not take a discount on returns filed late or on tax paid late.

The credit applied by the Department of Revenue is from a current credit balance in your account.

# **EXHIBIT B**



# **EXHIBIT C**

**ECD GREAT STREET LLC**  
**250 PARKWAY DRIVE**  
**SUITE 120**  
**LINCOLNSHIRE, IL 60069**

Scott Greenberg  
President  
ECD Great Street Manager, Inc  
Manager, ECD Great Street DE, LLC  
Phone : 847-229-9200  
Direct e-mail: scott@ecdco.com

May 31, 2013

Danzie Dicker  
Revenue Auditor 3  
Illinois Department of Revenue  
Field Audit  
Maine North Regional Building  
9511 W. Harrison Street  
Des Plaines, IL 60016

**Re: ECD Great Street LLC ("Taxpayer")**  
**Id. No. 3749-0729**  
**Tax Periods 1/1/2008 through 12/31/2010**

Dear Mr. Dicker:

I am writing with respect to a Statute of Limitations Waiver ("Waiver") that was signed on May 10, 2011, and then again on April 26, 2012 by Tim Ditmer. This letter is to advise you that Mr. Ditmer never had the authority, nor was he ever specifically authorized, to extend the period during which the Illinois Department of Revenue could complete its audit of Taxpayer's books and records. Accordingly, the Waiver is null and void.

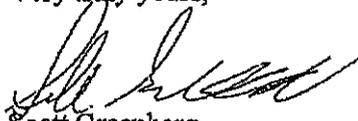
In this regard, the Taxpayer never employed Mr. Ditmer. Rather, Mr. Ditmer was employed by a hospitality services company, which provided services to the hotel owned by the Taxpayer. Mr. Ditmer was not an officer of the Taxpayer nor did he have any check signing authority.

Further, at no point did the Taxpayer represent to the Department that Mr. Ditmer was permitted to sign the Waiver, and any communication with Taxpayer's management would have made clear that Mr. Ditmer had no authority to execute the Waiver. Indeed, the Taxpayer was not even aware that Mr. Ditmer had signed the waiver until the audit was nearly complete.

Danzie Dicker  
May 31, 2013  
Page 2

Finally, as soon as Taxpayer became aware of the Waiver, it refused to sign another waiver extending the audit period to 6/30/2014. Thus, Taxpayer never ratified the faulty Waiver and the Department may not rely on that Waiver to support its Notice of Tax Liability.

Very truly yours,



Scott Greenberg  
President  
ECD Great Street Manager, Inc.  
Manager, ECD Great Street DE LLC

SG:mla

cc: Ms. Renee Solomon  
Mr. David Lillierose  
Mr. Bruce J. Abrams



Illinois Department of Revenue  
**IL-2848 Power of Attorney**

**Read this information first**

Attach a copy of this form to each specific tax return or item of correspondence for which you are requesting power of attorney. Do not send this form separately.

**Step 1: Complete the following taxpayer information**

1 <u>EGD Great Street LLC</u> Taxpayer's name	3 <u>30 S Havana St Ste 307</u> Taxpayer's street address
2 <u>3749-0729</u> Taxpayer's identification number(s)	<u>Aurora</u> <u>CO</u> <u>80012</u> City State ZIP

**Step 2: Complete the following information**

4 The taxpayer named above appoints the following to represent him before the Illinois Department of Revenue.

<u>David A. Hughes</u> Name	<u>Christopher T. Lutz</u> Name	_____ Name
<u>Horwood Marcus &amp; Berk</u> Name of firm	<u>Horwood Marcus &amp; Berk</u> Name of firm	_____ Name of firm
<u>500 W. Madison St., Ste. 3700</u> Street address	<u>500 W. Madison St., Ste. 3700</u> Street address	_____ Street address
<u>Chicago</u> <u>IL</u> <u>60661</u> City State ZIP	<u>Chicago</u> <u>IL</u> <u>60661</u> City State ZIP	_____ City State ZIP
<u>(312) 606-3212</u> Daytime phone number	<u>(312) 606-3222</u> Daytime phone number	_____ Daytime phone number
<u>dhughes@hmblaw.com</u> E-mail address	<u>clutz@hmblaw.com</u> E-mail address	_____ E-mail address
<u>Sales/Use</u> <u>1/2008-12/10</u> Specific tax type Year or period	<u>Sales/Use</u> <u>1/2008-12/10</u> Specific tax type Year or period	_____ Specific tax type Year or period

5 The attorneys-in-fact named above shall have, subject to revocation, full power and authority to perform any act that the principals can and may perform, including the authority to receive confidential information.

The attorneys-in-fact named above do not have the power to - Check only the items below you do not wish to grant.

- \_\_\_\_\_ endorse or collect checks in payment of refunds.
- \_\_\_\_\_ receive checks in payment of any refund of Illinois taxes, penalties, or interest.
- \_\_\_\_\_ execute waivers (including offers of waivers) of restrictions on assessment or collection of deficiencies in tax and waivers of notice of disallowance of a claim for credit or refund.
- \_\_\_\_\_ execute consents extending the statutory period for assessments or collection of taxes.
- \_\_\_\_\_ delegate authority or substitute another representative.
- \_\_\_\_\_ file a protest to a proposed assessment.
- \_\_\_\_\_ execute offers in compromise or settlement of tax liability.
- \_\_\_\_\_ represent the taxpayer before the department in all proceedings including hearings (requiring representation by an attorney) pertaining to matters specified above.
- \_\_\_\_\_ obtain a private letter ruling on behalf of the taxpayer.
- \_\_\_\_\_ perform other acts (explain) \_\_\_\_\_

6 This power of attorney revokes all prior powers of attorney on file with the department with respect to the same matters and years or periods covered by this form, except for the following:

_____ Name	_____ Name	_____ Name
_____ Street address	_____ Street address	_____ Street address
_____ City State ZIP	_____ City State ZIP	_____ City State ZIP
_____ Daytime phone number	_____ Daytime phone number	_____ Daytime phone number
_____ Date granted	_____ Date granted	_____ Date granted





U.S. Postal Service  
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Restricted Delivery Fee (Endorsement Required)		
<b>Total Postage &amp; Fees</b>	<b>\$ 7.37</b>	PAH/14750,000

Illinois Department of Revenue  
 Office of Administrative Hearings MC 5-504  
 101 W. Jefferson Street  
 P.O. Box 19014  
 Springfield, Illinois 62794-9014

McA

7013 0600 0000 1500 2643

**SENDER: COMPLETE THIS SECTION**

- Complete items 1, 2, and 3. Also complete item 4 if you are using a return address so that we can return the card to you.
- Attach this card to the back of the mailpiece or on the front if space permits.

1. Article Addressed to:

Illinois Department of Revenue  
Office of Administrative Hearings, MC-5500  
101 W. Jefferson Street  
P.O. Box 99014  
Springfield, Illinois 62794-9014

**COMPLETE THIS SECTION ON DELIVERY**

A. Recipient  
 Agent  
 Addressee

B. Response to this postmarking  
To read or follow:  Yes  No

C. Delivery address different from item 1?  Yes  No  
If Yes, enter delivery address below:

3. Service Code  
 Certified Mail  Express Mail  
 Registered  Return Receipt for Merchandise  
 Insured Mail  G.O.D.  
4. Restricted Delivery? (Basic Fee)  Yes  No

2. Article Number (Number from sample form) 7013 0600 0000 1580 2441

PS Form 3811, February 2004

Domestic Return Receipt

12259-024-104

UNITED STATES POSTAL SERVICE

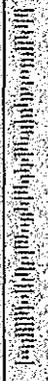


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Permit No. G-10

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Horwood Marcus & Berk Chtd.  
500 W. Madison Street, Suite 3700  
Chicago, IL 60661

DAW/1450 000



**IN THE ILLINOIS INDEPENDENT TAX TRIBUNAL**

ECD GREAT STREET LLC	)	
	)	
Petitioner,	)	
	)	
v.	)	No.
	)	
BRIAN HAMER, in his official capacity as	)	
DIRECTOR OF THE ILLINOIS DEPARTMENT	)	
OF REVENUE, and the ILLINOIS DEPARTMENT	)	
OF REVENUE,	)	
	)	
Defendants.	)	

**PETITION**

Petitioner, ECD Great Street LLC (“Petitioner”), by and through its attorneys, Horwood Marcus & Berk Chartered, complains of the Defendants, the Illinois Department of Revenue (“Department”) and Brian Hamer, Director of the Department (“Director Hamer”), and alleges 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.
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](mailto:dhughes@hmbllaw.com).
3. Petitioner’s Illinois Business Tax number is 3749-0729.
4. Petitioner was formed as a limited liability company in 2005 to raise capital for, to construct, and later to operate theWit Hotel.

*ES. B*

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.

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

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.

### **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.

### **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.

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.

### **BACKGROUND**

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

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

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

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.

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

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

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

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.

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.

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.

22. The Defendants treated the bonus pool as taxable.

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

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

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.

**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.

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

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.

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

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

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

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.

**WHEREFORE**, Petitioner prays that the Tribunal enter an order that:

- (a) finds and declares that Defendants may not assess a liability against Petitioner for periods ending prior to January 1, 2010;
- (b) enters judgment in favor of Petitioner and against the Defendants and cancels the Notices;
- (c) enjoins the Department from taking any action to assess, lien, levy, offset, or in any other way prosecute and collect the amount due on the Notices; and
- (d) grants such further relief as the Tribunal deems appropriate under the circumstances.

## **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.

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.

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.

36. The hotel opened on May 28, 2009.

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

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.

**WHEREFORE**, Petitioner prays that the Tribunal enter an order that:

- (a) enters judgment in favor of Petitioner and against the Defendants and cancels the Notices;
- (b) enjoins the Department from taking any action to assess, lien, levy, offset, or in any other way prosecute and collect the amount due on the Notices; and
- (c) grants such further relief as the Tribunal deems appropriate under the circumstances.

### **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.

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

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

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

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

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

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

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

**WHEREFORE**, Petitioner prays that the Tribunal enter an order that:

- (a) enters judgment in favor of Petitioner and against the Defendants and cancels the Notices;
- (b) enjoins the Department from taking any action to assess, lien, levy, offset, or in any other way prosecute and collect the amount due on the Notices; and
- (c) grants such further relief as the Tribunal deems appropriate under the circumstances.

#### **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.

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

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.

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.

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

**WHEREFORE**, Petitioner prays that the Tribunal enter an order that:

- (a) enters judgment in favor of Petitioner and against the Defendants and cancels the Notices;
- (b) enjoins the Department from taking any action to assess, lien, levy, offset, or in any other way prosecute and collect the amount due on the Notices;
- (c) enters judgment in favor of Petitioner and against the Defendants and cancels the Notices; and
- (d) grants such further relief as the Tribunal deems appropriate under the circumstances.

#### **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.

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

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

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

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

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

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.

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

**WHEREFORE**, Petitioner prays that the Tribunal enter an order that:

- (a) enters judgment in favor of Petitioner and against the Defendants and cancels the Notices;
- (b) enjoins the Department from taking any action to assess, lien, levy, offset, or in any other way prosecute and collect the amount due on the Notices; and
- (c) grants such further relief as the Tribunal deems appropriate under the circumstances.

## **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.

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

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.

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).

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).

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

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

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

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

**WHEREFORE**, Petitioner prays that the Tribunal enter an order that:

- (a) finds and declares that all penalties should be fully abated based on reasonable cause;
- (b) enjoins the Department from taking any action to assess, lien, levy, offset, or in any other way prosecute and collect the amount of penalties on the Notices; and
- (c) grants such further relief as the Tribunal deems appropriate under the circumstances.

Respectfully submitted,

**ECD GREAT STREET LLC**  
Petitioner

By: \_\_\_\_\_  
One of Petitioner's Attorneys

David A. Hughes  
Christopher T. Lutz  
Horwood Marcus & Berk Chartered  
500 W. Madison Street, Suite 3700  
Chicago, IL 60661  
(312) 606-3200

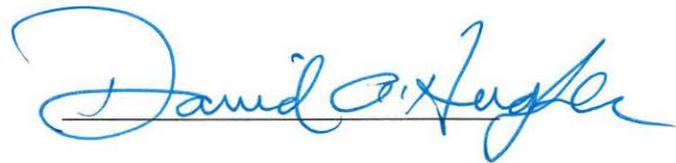
**CERTIFICATE OF SERVICE**

Undersigned counsel of record hereby certifies that he caused a copy of the foregoing **TAXPAYER'S MOTION TO TRANSFER** to be served on other counsel of record by messenger delivery before the hour of 5:00 p.m. on the 30<sup>th</sup> day of January, 2014, addressed as follows:

Administrative Clerk  
Office of Administrative Hearings  
Illinois Department of Revenue  
James R. Thompson Center  
100 West Randolph Street, 7-900  
Chicago, Illinois 60601  
Fax: 312-814-3109

and

Michael Coveny  
Illinois Department of Revenue  
Office of Administrative Hearings  
100 W. Randolph St., 7-900  
Chicago, IL 60601  
Phone: (312) 814-6697  
Fax: (312) 814-4344





**Illinois Department of Revenue  
OFFICE OF ADMINISTRATIVE HEARINGS**

James R. Thompson Center  
100 West Randolph Street, Level 7-900  
Chicago, Illinois 60601  
(312) 814-6114

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**THE DEPARTMENT OF REVENUE  
OF THE STATE OF ILLINOIS**

v.

ECD Great Street LLC

Taxpayers

No.13-ST-0308

---

**NOTICE OF INITIAL STATUS CONFERENCE**

To:

Horwood Marcus & Berk  
David A. Hughes  
Christopher T. Lutz  
500 West Madison St Ste 3700  
Chicago IL 60661

ECD Great Street LLC  
30 S. Havana St Ste 307  
Aurora CO 80012

**YOU ARE HEREBY NOTIFIED**, pursuant to 86 Ill. Admin. Code, Ch. I, Section 200.140, that a **MANDATORY** status conference in regard to the protest you have filed in the above entitled matter will be held on Wednesday, August 28, 2013 at 3:15 p.m. at the offices of the Illinois Department of Revenue, 100 W. Randolph Street, Level 7-900, Chicago, Illinois. **All parties are required to be present or to otherwise participate by telephone** to ascertain the status of this case and determine the course of action, if any, to be taken to expedite resolution. **Legal representatives (other than State's Attorneys) are required to file a Power of Attorney (IDR Form 2848-AH) before they may participate in these proceedings or acquire the right to obtain information in regard to the above named taxpayer.** Should you have any questions or concerns with respect to this Notice, please call the number listed above and ask to speak with the Department's representative as designated on the bottom left side of this notice.

PLEASE TAKE NOTE THAT YOUR FAILURE TO APPEAR OR PARTICIPATE PURSUANT TO THIS NOTICE WILL RESULT IN AN IMMEDIATE TERMINATION OF THE PROCEEDINGS AND A FINALIZATION OF THE LIABILITIES AND/OR CLAIMS AT ISSUE.

**Date: 08/09/2013**  
**Litigator: Mike Coveny 312-814-6697**

**Issued by the Administrative Clerk**  
**Office of Administrative Hearings**

Please Note: Applicable hearing regulations (Sec. 200.140a) do not permit any continuance of this conference

**STATE OF ILLINOIS  
DEPARTMENT OF REVENUE  
OFFICE OF ADMINISTRATIVE HEARINGS  
CHICAGO, ILLINOIS**

**THE DEPARTMENT OF REVENUE  
OF THE STATE OF ILLINOIS**

v.

ECD Great Street LLC

Taxpayer

No. 13-ST-0308

To:

Horwood Marcus & Berk  
David A. Hughes  
Christopher T. Lutz  
500 West Madison St Ste 3700  
Chicago IL 60661

ECD Great Street LLC  
30 S. Havana St Ste 307  
Aurora CO 80012

The undersigned hereby certifies that a copy of the attached notice was served upon the above named person or persons by placing it in a sealed envelope, postage prepaid, addressed as indicated, and depositing same in the United States Mail at the James R. Thompson Center, 100 W. Randolph Street, Chicago, Illinois on the date indicated below, before 5:00 p.m., all in the regular course of my duties as an employee of the Illinois Department of Revenue.

First Class

Certified - Return Receipt  
Request#

Special Delivery

Registered - Return Receipt  
Request #

(Signed)



Date:

8-9-2013

(Attach Receipt Here)

Please return to Administrative Law Judge John White 7-900

13-ST-0308

**Notice of Tax Liability**  
**for Form EDA-105-R, ROT Audit Report**



#BWNKMGV  
#CNXX XX52 X525 4X82#  
ECD GREAT STREET LLC  
ATTN: BRUCE J. ABRAMS  
250 PARKWAY DR STE 320  
LINCOLNSHIRE IL 60069-4305

May 17, 2013



Letter ID: CNXXX52X5254X82

Account ID: 3749-0729

We have audited your account for the reporting periods January 01, 2008, through June 30, 2009. As a result we have assessed the amounts shown below.

	<u>Liability</u>	<u>Payments/Credit</u>	<u>Unpaid Balance</u>
Tax	110,839.00	0.00	110,839.00
Late Payment Penalty Increase	48,465.00	0.00	48,465.00
Interest	28,918.88	0.00	28,918.88
<b>Assessment Total</b>	<b>\$188,222.88</b>	<b>\$0.00</b>	<b>\$188,222.88</b>

If you do not agree, you may file a protest and request an administrative hearing within 60 days of the date of this notice, which is **July 16, 2013**. Your request must be in writing, clearly indicate that you want to protest, and explain in detail why you do not agree with our actions. 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.

If you have questions, please write us or call our Springfield office weekdays between 8:00 a.m. and 4:00 p.m. Our address and telephone number are listed below.

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

217 785-6579

**Notice of Tax Liability**  
**for Form EDA-105-R, ROT Audit Report**



#BWNKMGV  
#CNXX XX19 3727 X726#  
ECD GREAT STREET LLC  
ATTN: BRUCE J. ABRAMS  
250 PARKWAY DR STE 320  
LINCOLNSHIRE IL 60069-4305

May 17, 2013



Letter ID: CNXXXX193727X726

Account ID: 3749-0729

We have audited your account for the reporting periods July 01, 2009, through December 31, 2010. As a result we have assessed the amounts shown below.

	<u>Liability</u>	<u>Payments/Credit</u>	<u>Unpaid Balance</u>
Tax	134,900.00	0.00	134,900.00
Late Payment Penalty Increase	26,980.00	0.00	26,980.00
Interest	9,025.70	0.00	9,025.70
<b>Assessment Total</b>	<b>\$170,905.70</b>	<b>\$0.00</b>	<b>\$170,905.70</b>

If you do not agree, you may file a protest and request an administrative hearing within 60 days of the date of this notice, which is **July 16, 2013**. Your request must be in writing, clearly indicate that you want to protest, and explain in detail why you do not agree with our actions. 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.

If you have questions, please write us or call our Springfield office weekdays between 8:00 a.m. and 4:00 p.m. Our address and telephone number are listed below.

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

217 785-6579

HORWOOD MARCUS & BERK  
Chartered

David A. Hughes  
Direct Dial: (312) 606-3212  
Direct Fax: (312) 267-2193  
Direct e-mail: Dhughes@hmbllaw.com

Attorneys at Law  
500 West Madison Street  
Suite 3700  
Chicago, Illinois 60661  
phone: (312) 606-3200  
fax: (312) 606-3232  
www.saltlawyers.com

July 15, 2013

**PROTEST AND REQUEST FOR HEARING**

**BY CERTIFIED MAIL (7013 0600 0000 1580 2641)  
RETURN RECEIPT REQUESTED**

Illinois Department of Revenue  
Office of Administrative Hearings MC 5-500  
101 W. Jefferson Street  
P.O. Box 19014  
Springfield, Illinois 62794-9014

**Re: ECD Great Street LLC  
Account ID: 3749-0728  
January 1, 2008 through December 31, 2010 ("Periods at Issue")**

Greetings:

The Taxpayer, ECD Great Street LLC ("Great Street"), by and through its attorneys, Horwood Marcus & Berk Chartered, hereby protests and takes exception to the Notices of Tax Liability ("Notices") issued by the Illinois Department of Revenue ("Department") on May 17, 2013 asserting Illinois sales and use tax, penalties and interest due in the amount of \$359,128.58. In support of this protest, Great Street states as follows:

**I. NOTICE**

On May 17, 2013, the Department issued two Notices to Great Street totaling tax, penalties and interest of \$359,128.58. True and accurate copies of the Notices are attached hereto as Exhibit A. The Department asserts that the amount due is a result, among other things, of: (1) disallowed deductions for exempt organizations; (2) sales tax due on under-reported taxable sales; (3) banquet gratuities disallowed; (4) fixed asset purchases; and (5) use tax due on consumable supplies. A true and accurate copy of the Sales Tax Audit System Summary Analysis is attached hereto as Exhibit B.

Illinois Department of Revenue  
July 15, 2013  
Page 2

## **II. INFORMAL REVIEW REQUESTED**

Pursuant to the Department's regulation, 86 Ill. Admin. Code §200.135, Great Street respectfully requests an informal review on this matter.

## **III. HEARING REQUESTED**

If this matter is not resolved through informal review, Great Street hereby respectfully requests a hearing pursuant to the Department's regulation, 86 Ill. Admin. Code §200.120.

## **IV. ILLINOIS TAX TRIBUNAL**

Great Street reserves the right to transfer this matter to the Illinois Tax Tribunal by making a timely and proper election on or after January 1, 2014 in accordance with Illinois law.

## **V. BACKGROUND FACTS**

Great Street was formed as a limited liability company in 2005 to raise capital for, to construct, and later to operate, the Wit Hotel. Construction of the hotel commenced in late 2006 and the hotel opened in May, 2009.

On audit, in addition to auditing Great Street's fixed assets, the auditor looked to 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. As a result of the audit, the Department issued the Notices totaling \$359,128.58. The Department made several adjustments that resulted in the assessed liability.

First, the Department disallowed deductions claimed by Great Street for sales to tax exempt customers.

Second, the Department refused to reduce the tax liability for audio visual ("AV") taxes paid by both Great Street and the AV company.

Third, the audit liability includes sales tax on sales which involved hotel use for investor meetings. In exchange for the hotel's use, Great Street Investors, LLC ("Investors"), a related entity which was owned by Great Street's investors, paid \$600,000 for six months to the hotel. The audit treated the entire \$100,000 per month as taxable even though the payment included meeting room rentals with no taxable food and beverage component.

Illinois Department of Revenue  
July 15, 2013  
Page 3

The Notices also include tax owed on “banquet gratuities.” Great Street 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. The Department treated the “bonus pool” as taxable. The Notices also include use tax on a variety of fixed asset purchases. Finally, the Notices include use tax on consumable supplies for both the hotel and the restaurant within the hotel.

## VI. ARGUMENTS

For the reasons expressed below, the Notices issued by the Department drastically overstate the sales and use tax that might be owed by Great Street. First, several of the tax periods contained in the Notices were closed under the statute of limitations because a statute waiver which purported to extend the statute of limitations for these otherwise closed periods was invalid and ineffective. Thus, all tax prior to the reporting period for January 1, 2010 was erroneously included in the Notices.

Second, the Department utilized a sample period of 2010 to forecast tax that would have been owed when the hotel was not yet in operation. Thus, the manner in which the auditor used the sample period distorted the amount of tax owed, specifically with regard to, underreported consumable supplies. Third, the Department used a one month sample period (June, 2010, which was the highest volume month) to forecast tax owed for the banquet gratuities for the period of May, 2009 through December, 2010. Fourth, the Department refused to reduce the tax liability for audio visual taxes paid by both Great Street and the AV company. Fifth, the Department inflated the amount of tax owed for underreported taxable sales as a number of those sales were not taxable. Sixth, sales to exempt organizations were properly deducted. Finally, a number of the fixed assets on which the Department assessed use tax were either nontaxable or Great Street has already paid tax.

In short, many of the Department’s audit adjustments lack merit and the liabilities reflected in the Notices must be reduced significantly if not eliminated entirely.

### A. The Statute of Limitations Has Closed for Certain Periods

The Notices cover the tax periods from January 1, 2008 through December 31, 2010. The Illinois Retailers’ Occupation Tax 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. In this case, the Notices were issued on May 17, 2013. Thus, the Department may only assess tax for periods beginning January 1, 2010. Any tax due from January 1, 2008 through December 31,

Illinois Department of Revenue  
July 15, 2013  
Page 4

2009 may not be included in the Notices unless Great Street and the Department executed a proper and binding waiver to extend the statute of limitations.

During audit, the Department never received an audit waiver from a Great Street employee let alone a responsible officer. Rather, the Department obtained a waiver signed on March 10, 2011, and then again on April 26, 2012 by a person named Tim Ditmer. Great Street never employed Mr. Ditmer. Instead, he was employed by an unaffiliated hospitality services company, which provided services to the Wit Hotel. Mr. Ditmer was never authorized to sign a waiver or to act as Great Street's agent, and at no point did Great Street represent to the Department's auditor that Mr. Ditmer was permitted to sign the waivers. *See Rock Island Tobacco v. Dep't of Revenue*, 87 Ill. App. 3d 476 (3d Dist. 1980).

Had the auditor discussed this with Great Street's management, the auditor would have learned that Mr. Ditmer had no authority to execute a waiver. Indeed, Great Street was not aware that either waiver had been signed until the audit was nearly completed. After learning that Mr. Ditmer had signed the waivers, Great Street refused to sign any more waivers. Moreover, Great Street notified the Department in writing that it never authorized the waivers and in no way did it ratify the waivers. See Letter from Scott Greenberg to Danzie Dicker dated May 31, 2013 (attached hereto as Exhibit C).

For these reasons, the waivers in issue are null and void and any tax period ending prior to January 1, 2010 is closed and not subject to assessment.

**B. The Department's Sample Grossly Overstates Great Street's Audit Liability**

On audit, the Department used a sample month and a sample year in calculating whether additional sales and use tax were owed during the periods at issue. Specifically, 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.

The Wit Hotel opened on May 28, 2009. Prior to opening, Great Street purchased no consumables for either its hotel or restaurant business. By extrapolating the 2010 figures for this adjustment, the Department drastically and unreasonably inflated Great Street's audit liability because the Department applied the 2010 adjustments to periods prior to May 2009 when the Wit Hotel was not even open.

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**C. Underreported Taxable Sales**

The Notices include underreported taxable sales for the periods at issue. This liability stems from payments made by Investors to Great Street. In exchange for their ability to use the Wit Hotel and its amenities, Investors paid Great Street a set monthly fee. Great Street did not report these receipts on its sales tax returns. The auditor included all of the receipts from Investors as “underreported taxable sales.”

Some of the payments made by Investors relate to taxable transactions. For instance, food sales were included in this monthly sum. However, other receipts relate to meeting room rentals without a food and beverage component. These receipts are not subject to sales tax and must be removed from the calculation of Great Street’s audit liability.

**D. Sales to Exempt Organizations**

During the periods at issues, Great Street made sales to exempt organizations for using its banquet halls. On audit, the Department disallowed Great Street’s deductions for sales to these exempt organizations because Great Street did not provide certain exemption certificates requested by the Department. These customers were, in fact, exempt and Great Street has exemption certificates for almost all customers to establish that the customers were exempt entities. Accordingly, deductions for sales to these exempt entities should be allowed.

**E. Fixed Assets**

The Department imposed use tax on several fixed assets. For at least two reasons, these fixed assets are not taxable.

First, Great Street did in fact pay tax on many of the assets in question. For a number of the assets, Great Street bought the property in another state and paid tax there. Thus, Great Street is entitled to a credit for tax paid on these purchases. Moreover, Great Street actually paid Illinois tax on some of the fixed assets.

Second, some of the fixed assets in question were installed by construction contractors. Under Illinois law, 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. Instead, the construction contractor pays tax to its suppliers when it purchased the materials to be incorporated into the property. As a result, Great Street is not subject to tax on these purchases.

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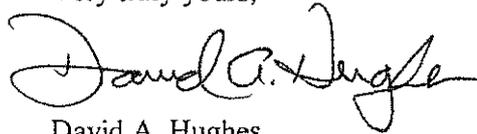
**VII. CONCLUSION**

Based on the foregoing, Great Street respectfully requests that the Department withdraw its Notices based on the positions stated in Part VI of this Protest and Request for Hearing. Great Street respectfully reserves the right to amend this Protest at any time prior to the entry of a pre-trial order.

\* \* \* \* \*

I hereby certify and declare that I have prepared this Protest and Request for Hearing based on information supplied by Great Street and, to the best of my knowledge and belief, the facts stated herein are true, correct and complete. A Power of Attorney authorizing me to represent Great Street in this matter is enclosed.

Very truly yours,



David A. Hughes

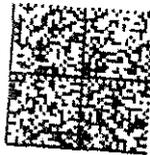
DAH:mla  
Enclosures

cc: Scott Greenberg  
Renee Solomon  
David Lillierose  
Bruce Abrams

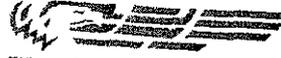
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**HORWOOD MARCUS & BERK**

Chartered

500 West Madison Street, Suite 3700  
Chicago, IL 60661

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Illinois Department of Revenue  
Office of Administrative Hearings MC 5-500  
101 W. Jefferson Street  
P.O. Box 19014  
Springfield, Illinois 62794-9014



7 Copies of notices and other written communications addressed to the taxpayer in proceedings involving the matters listed on the front of this form should be sent to the following:

<b>David A. Hughes</b>		
Name	Name	Name
<b>500 W. Madison St., Ste. 3700</b>		
Street address	Street address	Street address
<b>Chicago IL 60661</b>		
City State ZIP	City State ZIP	City State ZIP
<b>(312) 608-3212</b>		
Daytime phone number	Daytime phone number	Daytime phone number

**Step 3: Taxpayer's signature**

If signing as a corporate officer, partner, fiduciary, or individual on behalf of the taxpayer, I certify that I have the authority to execute this power of attorney on behalf of the taxpayer.

<i>[Signature]</i>	<b>Manager Member</b>	<b>7-11-13</b>
Taxpayer's signature	Title, if applicable	Date

**Step 4: Complete the following if the power of attorney is granted to an attorney, a certified public accountant, or an enrolled agent**

- I declare that I am not currently under suspension or disbarment and that I am
- a member in good standing of the bar of the highest court of the jurisdiction indicated below; or
  - duly qualified to practice as a certified public accountant in the jurisdiction indicated below; or
  - enrolled as an agent pursuant to the requirements of United States Treasury Department Circular Number 230.

<b>Attorney</b>	<b>IL</b>	<i>[Signature]</i>	<b>7/15/13</b>
Designation (attorney, C.P.A., enrolled agent)	Jurisdiction (state(s), etc.)	Signature	Date
<b>Attorney</b>	<b>IL</b>	<i>[Signature]</i>	<b>7/15/13</b>
Designation (attorney, C.P.A., enrolled agent)	Jurisdiction (state(s), etc.)	Signature	Date

**Step 5: Complete the following if the power of attorney is granted to a person other than an attorney, a certified public accountant, or an enrolled agent**

If the power of attorney is granted to a person other than an attorney, a certified public accountant, or an enrolled agent, this document must be witnessed or notarized below. Please check and complete one of the following.

Any person signing as or for the taxpayer

is known to and this document is signed in the presence of the two disinterested witnesses whose signatures appear here.

Signature of witness	Date
Signature of witness	Date

appeared this day before a notary public and acknowledged this power of attorney as his or her voluntary act and deed.

Signature of notary	Date
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**Notary seal**



**STATE OF ILLINOIS  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE HEARINGS DIVISION  
CHICAGO, ILLINOIS**

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**DEPARTMENT OF REVENUE  
OF THE STATE OF ILLINOIS**

**v.**

**ECD GREAT STREET LLC,  
Taxpayer**

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**Docket No. 13-ST-0308**

**John White,  
Administrative Law Judge**

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**ORDER**

This matter coming to be heard on Initial Status, Taxpayer and Department being represented by counsel, and the Administrative Law Judge being otherwise fully advised in the premises,

**IT IS HEREBY ORDERED THAT:**

Next Status is set for October 28, 2013 at 9:00 a.m., without further notice.

Date: August 28, 2013

Enter:



\_\_\_\_\_  
John White, Administrative Law Judge

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

**STATE OF ILLINOIS  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE HEARINGS DIVISION  
CHICAGO, ILLINOIS**

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**DEPARTMENT OF REVENUE  
OF THE STATE OF ILLINOIS**

**v.**

**ECD GREAT STREET LLC,  
Taxpayer**

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**Docket No. 13-ST-0308**

**John White,  
Administrative Law Judge**

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**ORDER**

This matter coming to be heard on Status, Taxpayer and Department being represented by counsel, and the Administrative Law Judge being otherwise fully advised in the premises,

**IT IS HEREBY ORDERED THAT:**

Next Status is set for January 6, 2014 at 10:00 a.m., without further notice.

Date: October 29, 2013

Enter:



\_\_\_\_\_  
John White, Administrative Law Judge

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

**STATE OF ILLINOIS  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE HEARINGS DIVISION  
CHICAGO, ILLINOIS**

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**DEPARTMENT OF REVENUE  
OF THE STATE OF ILLINOIS**

**v.**

**ECD GREAT STREET LLC,  
Taxpayer**

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**Docket No. 13-ST-0308**

**John White,  
Administrative Law Judge**

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**ORDER**

This matter coming to be heard on Status, Taxpayer and Department being represented by counsel, and the Administrative Law Judge being otherwise fully advised in the premises,

**IT IS HEREBY ORDERED THAT:**

- 1) Discovery cutoff set for June 30, 2014.
- 2) Next Status is set for April 21, 2014 at 9:00 a.m., without further notice.

Date: January 7, 2014

Enter:



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John White, Administrative Law Judge

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