

IN THE ILLINOIS INDEPENDENT TAX TRIBUNAL

ECD GREAT STREET LLC

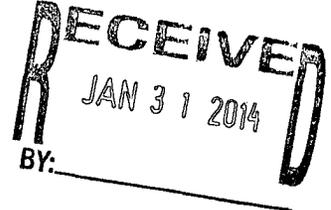
Petitioner,

v.

BRIAN HAMER, in his official capacity as
DIRECTOR OF THE ILLINOIS DEPARTMENT
OF REVENUE, and the ILLINOIS DEPARTMENT
OF REVENUE,

Defendants.

No.



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@hmblaw.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 the Wit Hotel.

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.

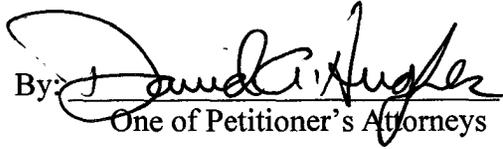
68. The Department's determination that Petitioner owes penalties on late payment of tax is not supported by fact or law.

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

VERIFICATION

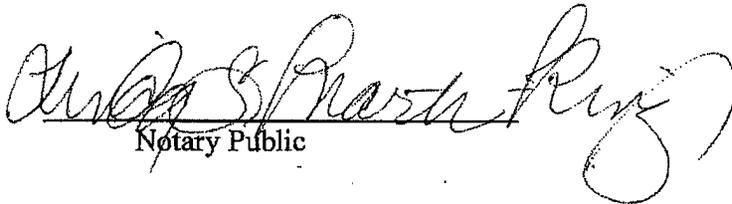
Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in the foregoing **Petition** are true, accurate and correct.

By: 

Name: Scott Greenberg

Its: President
ECD Great Street Manager, Inc.
Manager, ECD Great Street LLC

Subscribed and Sworn to before me
this 30th day of January, 2014


Notary Public



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
Assessment Total	\$188,222.88	\$0.00	\$188,222.88

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 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
Assessment Total	\$170,905.70	\$0.00	\$170,905.70

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.

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

217 785-6579

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- 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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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 or by calling 1 800 356-6302.

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- * You owe a **late-payment penalty** if you
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 - 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.
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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.

HORWOOD MARCUS & BERK
Chartered

David A. Hughes
Direct Dial: (312) 606-3212
Direct Fax: (312) 267-2193
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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
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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
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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.

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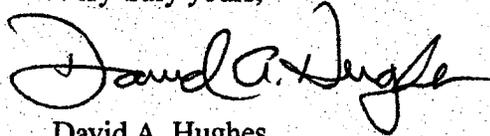
VII. CONCLUSION

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

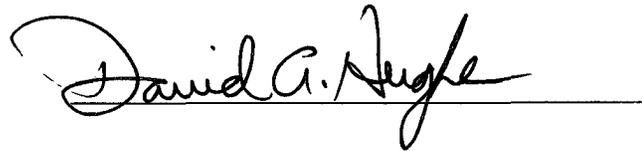
DAH:mla
Enclosures

cc: Scott Greenberg
Renee Solomon
David Lillierose
Bruce Abrams

CERTIFICATE OF SERVICE

Undersigned counsel of record hereby certifies that he caused a copy of the foregoing **Petition** to be served upon other counsel of record herein by causing the same to be delivered by messenger before the hour of 5:00 p.m. on the 31st day of January, 2014.

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

A handwritten signature in black ink, reading "David A. Hughes", is written over a horizontal line. The signature is cursive and includes a large initial "D".