

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, STATE OF FLORIDA

ARK HOLLYWOOD, LLC,
Plaintiff/Petitioner,

Case No.: 2012 CA003609

vs.

STATE OF FLORIDA, DEPARTMENT OF REVENUE,
Defendant/Respondent.

SUMMONS; PERSONAL SERVICE ON AN INDIVIDUAL
ORDEN DE COMPARECENCIA; SERVICIO PERSONAL EN UN INDIVIDUO
CITATION: L'ASSIGNATION PERSONAL SUR UN INDIVIDUEL

TO/PARA/A: *{enter other party's full legal name}* State of Florida, Department of Revenue
{address(including city and state)/location for service} c/o Sarah Wachman, Agency Clerk,
Office of the General Counsel, 2450 Shumard Oak Blvd., Bldg. No. 1, Suite 2400
Tallahassee, Florida 32399.

IMPORTANT

A lawsuit has been filed against you. You have 20 calendar days¹ after this summons is served on you to file a written response to the attached complaint/petition with the clerk of this circuit court, located at, 301 South Monroe Street, Tallahassee, FL 32301. A phone call will not protect you. Your written response, including the case number given above and the names of the parties, must be filed if you want the Court to hear your side of the case.

If you do not file your written response on time, you may lose the case, and your wages, money, and property may be taken thereafter without further warning from the Court. There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may call an attorney referral service or a legal aid office (listed in the phone book).

If you choose to file a written response yourself, at the same time you file your written response to the Court, you must also mail or take a copy of your written response to the party serving this summons at: *{Name and address of party serving summons}* Glen A. Stankee, Esq.,
Akerman Senterfitt, 305 Las Olas Blvd., Suite 1600, Ft. Lauderdale, FL 33301

¹ Rule 1.140(a), Florida Rules of Civil Procedure, provides: (2) (A) Except when sued pursuant to FS 768.28, the state of Florida, an agency of the state, or an officer or employee of the state sued in an official capacity shall serve an answer to the complaint or crossclaim, or a reply to a counterclaim, within 40 days after service; (B) When sued pursuant to FS 768.28, the Department of Financial Services or the defendant state agency shall have 30 days from the date of service within which to serve an answer to the complaint or crossclaim or a reply to a counterclaim.

Rcvd 11/0/12 at 12:00 P.m. &
Srvd 11/12/12 at 12:28.m. by
[Signature] Chris J. Colson #142
Certified Process Server, 2nd Judicial Cret, FL

Copies of all court documents in this case, including orders, are available at the Clerk of the Circuit Court's office. You may review these documents, upon request. You must keep the Clerk of the Circuit Court's office notified of your current address. Future papers in this lawsuit will be mailed to the address on record at the clerk's office.

IMPORTANTE

Usted ha sido demandado legalmente. Tiene veinte (20) días, contados a partir del recibo de esta notificación, para contestar la demanda adjunta, por escrito, y presentarla ante este tribunal. Localizado en: 301 South Monroe Street, Tallahassee, FL 32301. Una llamada telefónica no lo protegerá. Si usted desea que el tribunal considere su defensa, debe presentar su respuesta por escrito, incluyendo el número del caso y los nombres de las partes interesadas. Si usted no contesta la demanda a tiempo, pudiese perder el caso y podría ser despojado de sus ingresos y propiedades, o privado de sus derechos, sin previo aviso del tribunal. Existen otros requisitos legales. Si lo desea, usted puede consultar a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a una de las oficinas de asistencia legal que aparecen en la guía telefónica.

Si desea responder a la demanda por su cuenta, al mismo tiempo en que presente su respuesta ante el tribunal, usted debe enviar por correo o entregar una copia de su respuesta a la persona denominada abajo.

Si usted elige presentar personalmente una respuesta por escrito, en el mismo momento que usted presente su respuesta por escrito al Tribunal, usted debe enviar por correo o llevar una copia de su respuesta por escrito a la parte entregando esta orden de comparecencia a: Nombre y dirección de la parte que entrega la orden de comparecencia: _____

Copias de todos los documentos judiciales de este caso, incluyendo las ordenes, estan disponibles en la oficina del Secretario de Juzgado del Circuito [Clerk of the Circuit Court's office]. Estos documentos pueden ser revisados a su solicitud. Usted debe de mantener informada a la oficina del Secretario de Juzgado del Circuito de su dirección actual. Los papeles que se presenten en el futuro en esta demanda judicial seran enviados por correo a la dirección que este registrada en la oficina del Secretario.

IMPORTANT

Des poursuites judiciaires ont été entreprises contre vous. Vous avez 20 jours consécutifs à partir de la date de l'assignation de cette citation pour déposer une réponse écrite à la plainte ci-jointe auprès de ce tribunal. Qui se trouve à: {L'Adresse} 301 South Monroe Street, Tallahassee, FL 32301. Un simple coup de téléphone est insuffisant pour vous protéger; vous êtes obligés de déposer votre réponse écrite, avec mention du numéro de dossier ci-dessus et du nom des parties nommées ici, si vous souhaitez que le tribunal entende votre cause.

Si vous ne déposez pas votre réponse écrite dans le délai requis, vous risquez de perdre la cause ainsi que votre salaire, votre argent, et vos biens peuvent être saisis par la suite, sans aucun préavis ultérieur du tribunal. Il y a d'autres obligations juridiques et vous pouvez requérir les

services immediats d'un avocat. Si vous ne connaissez pas d'avocat, vous pourriez telephoner a un service de reference d'avocats ou a un bureau d'assistance juridique (figurant a l'annuaire de telephones).

Si vous choisissez de déposer vous-meme une reponse ecrite, il vous faudra egalement, en meme temps que cette formalite, faire parvenir ou expedier une copie au carbone ou une photocopie de votre reponse ecrite a la partie qui vous depose cette citation. Nom et adresse de la partie qui depose cette citation: _____

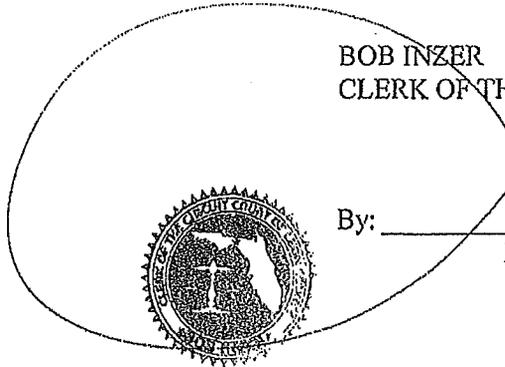
Les photocopies de tous les documents tribunaux de cette cause, y compris des arrêts, sont disponible au bureau du greffier. Vous pouvez revue ces documents, sur demande. Il faut aviser le greffier de votre adresse actuelle. Les documents de l'avenir de ce proces seront envoyer a l'adresse que vous donnez au bureau du greffier.

THE STATE OF FLORIDA
TO EACH SHERIFF OF THE STATE:

You are commanded to serve this summons and a copy of the complaint in this lawsuit on the above-named person.

DATED: 11-2-12

(SEAL)



BOB INZER
CLERK OF THE CIRCUIT COURT

By: _____

Deputy Clerk

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN AND
FOR LEON COUNTY, FLORIDA

CASE NO. 2012-CA-00-3609

ARK HOLLYWOOD, LLC,

Plaintiff,

vs.

STATE OF FLORIDA,
DEPARTMENT OF REVENUE,

Defendant.

COMPLAINT

Plaintiff, ARK HOLLYWOOD, LLC ("Ark Hollywood"), hereby sues Defendant, STATE OF FLORIDA, DEPARTMENT OF REVENUE (the "Department") for (1) a refund of wrongfully collected sales/use taxes under Section 72,011, Florida Statutes, and (2) a declaratory judgment declaring (a) the "rentals" at issue paid by Ark Hollywood to the Seminole Tribe of Florida (the "Tribe") are actually non-taxable distributions of the Tribe's share of profits from its on-reservation restaurant activities; (b) the legal incidence of the tax on rentals paid to the Tribe is borne by the Tribe and that the tax is therefore prohibited by Federal law; or (c) the tax on the rentals paid to the Tribe is preempted and prohibited by Federal law. In support, Ark Hollywood states as follows:

PARTIES

1. Plaintiff, Ark Hollywood, is a Delaware limited liability company qualified to do business in Florida that is wholly owned by Ark Hollywood/Tampa Investment, LLC, a Delaware limited liability company that is wholly owned by Ark Hollywood/Tampa Corp., a

Delaware corporation that is a wholly owned subsidiary of Ark Restaurants Corp., a New York, NASDAQ traded company ("ARKR").

2. Defendant, the Department, is an agency established under the laws of the State of Florida (the "State").

JURISDICTION AND VENUE

3. This is an original action brought pursuant to Section 72.011(1)(a), Florida Statutes, to contest the Department's denial of Ark Hollywood's claim for declaratory judgment and refund of a tax assessment paid pursuant to Section 212.031, Florida Statutes, for the period July 1, 2005 through June 30, 2008.

4. The amount in controversy exceeds \$15,000. This Court has jurisdiction under Section 72.011(1)(a), Florida Statutes.

5. Venue is proper in this Court pursuant to Section 72.011(4)(a), Florida Statutes, because an action brought under Section 72.011(4)(a) must be brought in Leon County, Florida unless the plaintiff exercises its right to bring the action elsewhere.

FACTUAL ALLEGATIONS

6. On May 2, 2005, Ark Hollywood, as lessee, entered into a 25 year lease agreement ("Contract") with the Seminole Tribe of Florida, a recognized Indian Tribe under the Indian Reorganization Act of 1934, 25 U.S.C. § 461 *et seq.*, as amended (the "Tribe"), as lessor, for space in the Tribe's Seminole Hard Rock Hotel and Casino ("Seminole Casino") that is located on the Tribe's Hollywood, Florida, Indian reservation.

7. Title to the Tribe's reservation land is held by the United States of America in trust for the benefit of the Tribe.

8. Under the Contract, Ark Hollywood is permitted to operate a food court style restaurant in the Seminole Casino, provided that a percentage of the gross receipts from the restaurant operations is paid to the Tribe. A true and correct copy of the Contract is attached.

(Exh. A.).

9. In compliance with federal law, 25 CFR Part 162, the Tribe submitted the Contract to the United States Department of Interior, Bureau of Indian Affairs (the "Bureau") for approval and the Contract was approved.

10. Federal regulation of the leasing of Indian land, including the Tribe's reservation property, is pervasive and preempts State law. The objective of the Federal regulation of the leasing of Indian land is to assure that the Indian Tribes derive the maximum benefit from the leasing of their land.

11. State taxation of leases of Indian land interferes with the objectives of Federal law. Federal law, including 25 U.S.C. § 465 and 25 CFR Part 162, specifically prohibits State taxation of the leasing of Indian land. Thus, the tax the Department is assessing is a violation of Federal law.

12. In addition—although titled a "lease" and the monies paid thereunder characterized as "rent"—the Contract and the facts under which it functions clearly establish that the monies paid by Ark Hollywood to the Tribe are actually distributions of the Tribe's share of the profits of the business conducted on the Tribe's reservation pursuant to the Contract.

13. The Seminole Casino is a multi-faceted entertainment facility whose amenities include a 130,000 square foot gaming complex, convention hotel, 17 restaurants, 11 bars and lounges, and 22 retail shops.

14. Substantially all of entertainment activities at the Seminole Casino, including the operation of such restaurants as the Tribe's signature Hard Rock Café, Council Oak Steak & Seafood restaurant and Blue Plate restaurant, are conducted by the Tribe through its own employees.

15. The Tribe exercises complete control over every aspect of the food court restaurant operations at the Seminole Casino, and, accordingly (i) Ark Hollywood functions as the Tribe's restaurant concessionaire rather than as its lessee; (ii) the food court restaurant constitutes a small, but integral, component of the Tribe's massive gaming and entertainment facility that is conducted jointly by Ark Hollywood and the Tribe; and (iii) Ark Hollywood's payments to the Tribe under the "Percentage Rent" provision of the Contract constitute distributions to the Tribe of its share of the profits from the jointly conducted business rather than lease payments:

- a. All menu offerings and prices are subject to the Tribe's approval.
- b. Ark Hollywood is required to offer each of (and only) the following five food court units: (i) a delicatessen under the name "Greenberg & Sons Deli"; (ii) Italian and pizzeria under the name "Sirricos Pizza"; (iii) hamburgers and fries under the name "Shake n Burger"; (iv) Asian under the name "Asian Palace"; and (v) Latin American under the name "ChaChaCha." Ark Hollywood is also required to offer smoothies, shakes and ice cream under the name "Sweet Lucille's," and pastries, muffins, cookies, and other baked goods under the name "Cake Masters."
- c. The Tribe sets the hours of the food court restaurant's operations.
- d. Any advertisements relating to the food court restaurant must be pre-approved by the Tribe.

e. All disposable paper or plastic plates, cups and utensils that are used by the food court restaurant must be approved by the Tribe.

16. The food court restaurant is presented to the public as a restaurant that is owned and operated by the Tribe:

a. Ark Hollywood's employees are required to wear shirts and hats bearing the "Hard Rock" name and logo.

b. Ark Hollywood's employees are required to wear a "Seminole Tribe of Florida" ID badge at all times that they are working at the food court restaurant.

c. Ark Hollywood is not allowed to display its name anywhere on or about the food court restaurant.

d. The food court appears on the Seminole Tribe's Hard Rock website as a restaurant that is operated by the Tribe in exactly the same manner as the Tribe's other restaurants, including the Hard Rock Café, Council Oak Steaks & Seafood restaurant, and the Blue Plate restaurant.

e. Any advertisements relating to the food court restaurant must include the Tribe's "Hard Rock" trade name and logo.

f. Ark Hollywood must allow the Tribe's hotel guests to charge food court restaurant purchases to their rooms and honor any discount coupons that the Tribe provides to its customers.

17. Ark Hollywood also functions as the Tribe's restaurant concessionaire, rather than its lessee, for the following reasons:

a. The Tribe provides 100% of Ark Hollywood's customers.

- b. Ark Hollywood's employees are required to comply with the same dress, grooming, and conduct codes that apply to the Tribe's employees.
- c. The Tribe provides services to Ark Hollywood that are not typically provided by a lessor of real property, including the disposition of its trash and cooking oil, at no cost to Ark Hollywood.
- d. Telephone access to the food court restaurant is available only through the Tribe's PBX system by calling the Seminole Casino.
- e. Any telephone call made from the food court restaurant appears on the recipient's caller ID as a call from the "Seminole Tribe."
- f. The Tribe provides all utilities to the food court restaurant, including electricity and water, at no cost to Ark Hollywood.
- g. The Tribe's employees have unfettered access to the non-public areas of the food court restaurant.
- h. The Tribe's employees receive the same 10% discount on food court restaurant purchases that Ark Hollywood's employees receive.
- i. Ark Hollywood's employees receive the same 10% discount on purchases from the Tribe's other businesses in the Seminole Casino that the Tribe's employees receive.
- j. Customer seating for the food court restaurant is not included in the Contract and is provided and maintained by the Tribe at no cost to Ark Hollywood.
- k. The Tribe has the right to move the food court restaurant to any other location in the Seminole Casino at any time in its sole discretion.

l. Ark Hollywood is required to display such of the Tribe's merchandise in the display cases in the food court restaurant as the Tribe directs.

m. Ark Hollywood's employees' access to the food court restaurant is strictly controlled by the Tribe.

n. The monies paid under the Contract are directly determined and derived from the annual "gross sales" of the food court restaurant resulting from the prices of all food, drink, goods, wares and merchandise—said prices being specifically approved by the Tribe.

18. Ark Hollywood does not own property or conduct any business operations in Florida or otherwise have any presence in Florida other than at the Seminole Casino on the Tribe's Hollywood, Florida, reservation.

19. The State provides no services that directly or indirectly benefit the Tribe, its members or lessees, on or off of the reservation.

20. The State is prohibited from regulating and does not regulate, the leasing of reservation property or any on-reservation restaurant activities conducted by the Tribe, its members or lessees.

21. The Tribe uses the income it derives from the leasing of its reservation property and the operation of its on-reservation gaming and entertainment activities, including its restaurant activities, to provide essential governmental services to or for the benefit of its members, including police and fire protection, emergency medical services, public schools, public transportation, garbage pick-up, and road construction and maintenance.

22. Despite this overwhelming evidence, the Department conducted a sales and use tax audit of Ark Hollywood's on-reservation restaurant activities, determined that its payments to

the Tribe during the period July 1, 2005, through June 30, 2008, constituted rentals subject to tax under Section 212.031, Florida Statutes, and assessed Florida sales tax and interest the amount of \$110,306.29, which Ark Hollywood paid.

23. Ark Hollywood filed a Form DR-26S, Application for Refund – Sales and Use Tax, with the Department for refund of the \$110,306.29 sales tax and interest it paid. A true and correct copy of the Application for Refund – Sales and Use Tax is attached. **(Exh. B.)**

24. The Department issued its Notice of Proposed Refund Denial proposing to deny Ark Hollywood's refund claim. A true and correct copy of the Notice is attached. **(Exh. C.)**

25. Ark Hollywood submitted a Protest to the Department in which it contested the Department's right to tax such payments. A true and correct copy of the Protest is attached. **(Exh. D.)**

26. The Department issued its Notice of Decision of Refund Denial in which it sustained the refund denial. A true and correct copy of the Notice of Decision of Refund Denial is attached. **(Exh. E.)**

27. Ark Hollywood submitted a Petition for Reconsideration of the refund denial in which it requested that the Department reconsider its Notice of Decision of Refund Denial. A true and correct copy of the Petition for Reconsideration is attached. **(Exh. F.)**

28. The Department issued its Notice of Reconsideration of Refund Denial on September 5, 2012, in which it sustained its refund denial. A true and correct copy of the Notice of Reconsideration of Refund Denial is attached. **(Exh. G.)**

29. Pursuant to Section 72.011, Florida Statutes, on September 5, 2012, the denial of the refund became final and this dispute became ripe for adjudication by this Court.

30. All statutory prerequisites to the prosecution of this action have occurred and have been satisfied so as to entitle Ark Hollywood to the relief sought herein.

COUNT I
CLAIM FOR SALES/USE TAX REFUND UNDER SECTION 72.011,
FLORIDA STATUTES

31. Ark Hollywood restates and realleges the allegations contained in paragraphs 1 through 30 as though fully set forth herein.

32. Although titled a "lease" and the monies paid thereunder characterized as "rent," it is the substance of the transactions, rather than the form in which they are cast, that governs their tax consequences. Because Ark Hollywood actually acts as the Tribe's restaurant concessionaire rather than a lessee, the payments to the Tribe do not constitute lease payments, and the tax imposed by Section 212.031, Florida Statutes, does not apply.

33. Instead, the payments to the Tribe constitute income derived by the Tribe from its on-reservation activities, and the tax imposed by the Department is invalid because the State is prohibited by the Indian Commerce Clause of the United States Constitution from taxing such income in the absence of clear Congressional authorization—which has not been given.

34. In addition, even if Ark Hollywood is characterized as the Tribe's lessee rather than a restaurant concessionaire, the State tax on the rentals paid to the Tribe is invalid because the legal incidence of the tax is borne by the Tribe. The State is prohibited by the Indian Commerce Clause of the United States Constitution from imposing any tax relating to any on-reservation activity, including the leasing of Indian land, the legal incidence of which is borne by an Indian or Indian tribe in the absence of clear Congressional authorization which has not been given.

35. Moreover, even if Ark Hollywood is characterized as the Tribe's lessee rather than a restaurant concessionaire, and even if the legal incidence of the tax is not borne by the Tribe, the State is still prohibited by the Indian Commerce Clause of the United States Constitution from imposing any tax that burdens any on-reservation activity of an Indian tribe, including the leasing of Indian land, that is preempted by Federal law, unless such State tax compensates the State for services it specifically provides in connection with the particular on-reservation activity involved.

36. Because the taxes at issue are invalid, the Department must refund Ark Hollywood the sales tax and interest in the amount of \$110,306.29 that it assessed and collected in respect to the assessed monies it paid to the Tribe between July 1, 2005 and June 30, 2008.

37. Ark Hollywood has demanded the return of its \$110,306.29 payment, but the Department refused to refund it.

WHEREFORE, Plaintiff, Ark Hollywood, requests that the Court enter judgment in its favor and against Defendant, the Department, as follows:

a. Determining that the payments that Ark Hollywood paid to the Tribe are not rentals subject to the tax imposed by Section 212.031, Florida Statutes, but are distributions to the Tribe of its share of profits from its on-reservation restaurant activities which the State is prohibited from taxing; or

b. Determining that the legal incidence of the State tax on the rentals that Ark Hollywood paid to the Tribe is borne by the Tribe and that such tax is therefore invalid; or

c. Determining that the the State tax on the rentals that Ark Hollywood paid to the Tribe is invalid because State taxation of leases of Indian land is preempted, and

therefore prohibited, by Federal law, since such tax does not compensate the State for services that it specifically provides in connection with such on-reservation leasing activities; and

d. Finding that the Department erroneously denied Ark Hollywood's refund in the amount of \$110,306.29, and that Ark Hollywood is entitled to a refund of that amount; and

e. Ordering the Department to pay the refund, plus interest and costs, to Ark Hollywood; and

f. Ordering such other relief as the Court deems appropriate.

COUNT II
DECLARATORY JUDGMENT

38. Ark Hollywood restates and realleges the allegations contained in paragraphs 1 through 37 as though fully set forth herein.

39. State taxation of leasing of Indian land is prohibited by the Indian Commerce Clause of the United States Constitution and other provisions of Federal law absent clear Congressional authorization which has not been given.

40. Ark Hollywood requests that this Court enter a declaratory judgment pursuant to Section 86.021, Florida Statutes, declaring that the payments made by Ark Hollywood to the Tribe for space in the Seminole Casino on its Hollywood, Florida, Indian reservation are exempt from the Florida tax imposed by Section 212.031, Florida Statutes.

WHEREFORE, Plaintiff, Ark Hollywood, demands judgment against Defendant, the Department, as follows:

a. Declaring that the monies Ark Hollywood paid to the Tribe are not rentals subject to the tax imposed by Section 212.031, Florida Statutes, but are distributions to

the Tribe of its share of profits from its on-reservation restaurant activities which the State is prohibited from taxing; or

b. Declaring that the legal incidence of the State tax on the rentals that Ark Hollywood paid to the Tribe is borne by the Tribe and that such tax is therefore invalid; or

c. Declaring that the the State tax on the rentals that Ark Hollywood paid to the Tribe is invalid because State taxation of leases of Indian land is preempted and prohibited, by Federal law, since such tax does not compensate the State for services that it specifically provides in connection with such on-reservation leasing activities; and

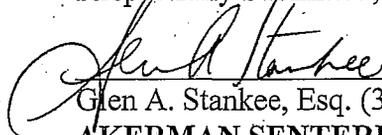
d. Ordering such other relief as the Court deems appropriate.

Demand for Jury Trial

Plaintiff, Ark Hollywood, demands a jury trial as to all issues so triable.

DATED this 1 day of ~~October~~, 2012.
November

Respectfully Submitted,



Glen A. Stankee, Esq. (331848)

AKERMAN SENTERFITT

305 East Las Olas Boulevard, Suite 1600

Fort Lauderdale, Florida 33301

Tel: 954-463-2700

Fax: 954-463-2224

Email: glen.stankee@akerman.com

Michael J. Larson, Esq. (96029)

AKERMAN SENTERFITT

106 East College Avenue, 12th Floor

Tallahassee, Florida 32301

Tel: 850-224-9634

Fax: 850-222-0103

Email: michael.larson@akerman.com

Counsel for Plaintiff, Ark Hollywood, LLC