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**REPORT TO THE ERIE COUNTY LEGISLATURE  
92 FRANKLIN STREET  
BUFFALO, NEW YORK 14202**

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**MAY 2007**

**AUDIT OF THE COLLECTION PROCEDURES  
FOR THE ERIE COUNTY HOTEL OCCUPANCY TAX  
FOR THE PERIOD FEBRUARY 28, 2006 TO FEBRUARY 28, 2007**



**MARK C. POLONCARZ  
ERIE COUNTY COMPTROLLER**

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**Michael R. Szukala  
Deputy Comptroller - Audit & Control**

**ERIE COUNTY  
COMPTROLLER'S OFFICE**

**HON. MARK C. POLONCARZ  
DIVISION OF AUDIT & CONTROL  
95 FRANKLIN STREET  
BUFFALO, NEW YORK 14202**

May 15, 2007

Erie County Legislature  
92 Franklin Street, 4<sup>th</sup> Floor  
Buffalo, New York 14202



Dear Honorable Members:

The Erie County Comptroller's Office has completed an audit of the Erie County (the "County") Hotel Room Occupancy Tax Law, and Hotel Occupancy Tax and associated collection procedures for the Hotel Occupancy Tax for the quarters ended February 28, 2006 through February 28, 2007.

The objectives of the audit were to evaluate the accuracy of Hotel Occupancy Taxes remitted to the County and the timeliness of those payments made to the County by hotel establishments. In addition, this audit reviewed the County Executive's Division of Budget, Management and Finance's enforcement of Hotel Occupancy Tax collection from delinquent hotel establishments. This audit did not examine nor review the County's relationship and contract with the Buffalo Niagara Convention and Visitors Bureau, Inc. or the Convention Center Management Corporation, or the County's remittance of Hotel Occupancy Tax revenues to those entities.

Our review primarily examined Hotel Occupancy Tax returns for the quarter ending February 28, 2007, (the first Hotel Occupancy Tax quarter for the County's 2007 fiscal year is December 2006 January 2007 and February 2007) although other quarters ending in 2006 were reviewed under certain circumstances.

This audit, performed in accordance with Generally Accepted Government Auditing Standards with the exception of a peer review every three years<sup>1</sup>, included such tests of records, inquiries, and analyses as considered necessary under the circumstances. This includes the testing of records at a sample of hotels within the County, the first time that procedure has been performed in more than three years.

No significant matters adversely affecting compliance with applicable laws, rules, and procedures came to our attention except as disclosed in this report. Our review was performed for the objectives previously described and would not necessarily disclose all instances of noncompliance with respect to areas of operation not reviewed.

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<sup>1</sup> The last peer review was for the three year period ending December 31, 2003. The Comptroller's Office has contracted with an outside accounting firm and a peer review will be completed in 2007.

## Background

Pursuant to Erie County Local Law No. 12-1974, and Chapter 614 of the Laws of the State of New York, (the Erie County Hotel Occupancy Tax Law ), the County started imposing the Hotel Occupancy Tax in December 1974. Managed and administered by the County Executive's Division of Budget, Management and Finance (Real Property Tax unit),<sup>2</sup> the tax is composed of two separate sections: a three percent (3%) tax and a five percent (5%) tax. A tax of 3% is applied to net room rentals by those hotels with thirty (30) or fewer rooms. A tax of 5% is applied to net room rentals by those hotels with more than thirty (30) rooms. The Hotel Occupancy Tax covers only the rental of a room in Erie County. Any hotel charges for telephone, cable movies, bar or restaurant charges or dry cleaning, for instance, while taxable for sales and compensating use taxes, are not taxable under the Hotel Occupancy Tax.

After an individual has rented the same room for thirty (30) days or more, the Hotel Occupancy Tax does not apply. Such rentals are reported to the County as exemptions to the Hotel Occupancy Tax, on the same line as other non-taxable exemptions, such as governmental employees renting rooms on official business. Someone renting a room for thirty (30) days or more pays no tax – the tax only applies if the rental is for less than thirty (30) days.

Under the law, all hotel/motel/lodging establishments must register and collect the tax. An application is requested from the County, and a certificate to collect Hotel Occupancy Tax is transmitted to the hotel. This certificate must be posted at the hotel. A copy of this certificate is included as Appendix A.

The Hotel Occupancy Tax and an attached tax return is due and payable to the County, without penalty or interest, within twenty (20) days of the end of each quarterly reporting period. Those periods are: December 1 to February 28, March 1 to May 31, June 1 to August 31, and September 1 to November 30. Returns filed late incur a 5% penalty, and interest of 1% per month after the first month of delinquency.

To be considered as a timely tax filing, the return and a check for all monies owed must be remitted to the Commissioner of Finance in accord with aforementioned reporting periods. A copy of a sample Hotel Occupancy Tax return is attached as Appendix B. The payments and returns are to be sent to the Division of Budget, Management and Finance (Commissioner of Finance).

The Hotel Occupancy Tax is a personal liability of the operator of the hotel as well as a liability of the business. Section 7 (b) of the Erie County Hotel Occupancy Tax Law states: "The operator and any officer of any corporate operator shall be personally liable for the tax collected or required to be collected." Accordingly, any hotel that is unable or fails to remit the Hotel

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<sup>2</sup> Pursuant to Erie County Local Law No. 7-2006 and as approved at public referendum on November 7, 2006, in mid-March 2007 the responsibilities, functions and staff of the Division of Budget, Management and Finance's Finance cost center were transferred to the Office of Comptroller. While these responsibilities did not come under de facto Comptroller authority until mid-March 2007, this charter change is retroactive to January 1, 2007. During the period of the audit, the Division of Budget, Management and Finance administered and oversaw the collection and remittance of Hotel Occupancy Tax revenues and filing of tax returns with the County.

Occupancy Tax to the County places its operator or officer of its corporate operator in the position of being personally liable for the debt and in violation of the law. If a hotel that is delinquent in Hotel Occupancy Tax payments is sold, the original owner can still be liable for the debt. When establishments fail to remit the Hotel Occupancy Tax, the County has the authority to compel payments by seizing assets.

The Hotel Occupancy Tax Law allows the County to audit Hotel Occupancy Tax returns, hence this audit. However the law includes a provision that any audit may not disclose the amount of Hotel Occupancy Tax paid by a specific business, nor can sales or other revenue-related figures be released. Because of this provision, this audit report does not discuss the revenues or exemptions of the specific hotels visited during our audit. As such, in this audit we report our findings at specific hotels through the use of pseudonyms (i.e., hotel Alpha, hotel Beta).

### **Detailed Findings**

#### **Accuracy of Hotel Occupancy Tax Provided to Erie County**

Our audit examined the Hotel Occupancy Tax returns submitted by hotel establishments in Erie County to the County Executive's Division of Budget, Management and Finance (Director/Deputy Commissioner for Real Property Tax Services), who maintained authority over such returns and remittance of tax revenues during the audit period. Our intention was to determine if (1) hotels submitted quarterly returns within 20 days of the end of the quarter; (2) hotels submitted Hotel Occupancy Tax revenues with the returns; and (3) to ascertain whether the returns and tax payments were complete and accurately reflected hotel stays and guests.

Quarterly, hotel establishments are required to submit a Hotel Occupancy Tax return and remit the quarterly tax revenue with that report. The return includes the following data: Hotel Occupancy Tax gross room rentals, exemptions (deductions from gross rentals), and net room rentals. Our audit determined that 125 hotel establishments report Hotel Occupancy Tax to the County for the period of our audit. This includes the largest hotels in Erie County ranging downward to the smallest bed and breakfast-type establishments.

There were 110 returns filed for the quarter starting December 1, 2006, and ending February 28, 2007 remitting \$1.825 million to Erie County. Those 110 hotels are composed of 44 hotels that have 30 rooms or less, resulting in a 3% tax rate and 66 hotels with more than 30 rooms resulting in a 5% rate. The period from March 1, 2006 through February 28, 2007 produced a total of 453 quarterly tax returns from 125 active hotels. We note that not every hotel files a return for every quarter due to seasonal business, or establishments opening or closing.

For comparison purposes, the Hotel Occupancy Tax quarter covering the period December 1, 2005 and ending February 28, 2006, produced 114 quarterly tax returns remitting \$1.552 million in tax to Erie County.

Not surprisingly, the largest hotels in the County provide nearly all the Hotel Occupancy Tax income to Erie County. The 66 hotels that reported tax at the 5% rate provided \$1.781 million in tax for the quarter ending February 28, 2007, or more than 97% of all Hotel Occupancy Tax

revenues for that quarter. The top fifteen largest hotels (by number of rooms) in Erie County provide more than 47% of Hotel Occupancy Tax revenues.

We note that actual Hotel Occupancy Tax revenue for 2006 exceeded budgeted revenues. The Adopted 2006 County Budget included \$5,947,181 for revenue while actual revenues were \$6,509,305. Total annual hotel rentals in Erie County in 2006 were approximately \$177 million dollars.

In fact, total annual Hotel Occupancy Tax revenue has been steadily increasing over the past five years.

2002	\$4,915,130
2003	\$5,773,962
2004	\$5,404,819
2005	\$5,713,213
2006	\$6,509,305

Our audit examined a sample of fifteen (15) hotels in Erie County, ten (10) of which have thirty (30) or more rooms. Our examination included the verification of a sample of daily receipts to either a weekly or monthly internal hotel summary, and the agreement of those summaries to one or more quarterly tax returns in the audit period. We also verified exemptions reported, and supporting documentation. The hotels covered by our sample generated about sixteen percent (16%) of Occupancy Tax revenues collected in the 2006 Hotel Occupancy Tax year.

We found that, except for minor adjustments, the hotel establishments examined in this audit have accurately reported their gross and net taxable revenues, or were not required to file a Hotel Occupancy Tax return.

However, regarding exemptions applicable to gross Hotel Occupancy Tax receipts, we identified two concerns: Hotel Occupancy Tax exemptions granted to qualified entities and the reporting of Hotel Occupancy Tax exemptions.

A person renting a room can avoid paying the Hotel Occupancy Tax by presenting an Exemption Certificate at the time they check-in. Such a certificate is completed by a not-for-profit or other qualified entity and provided to the person renting the room. This audit reviewed these certificates to confirm that a hotel claiming that a rented room was exempt could in fact, prove that an Exemption Certificate was presented. In no case did we determine that a hotel claimed an exemption without a proper certificate.

We examined the issue of specific individuals and organizations using Exemption Certificates under certain circumstances. We identified some areas of concern and brought those concerns to the attention of the County's Department of Law. We reviewed five specific occasions with the Department of Law. They rendered an opinion that the usage in these cases was acceptable.

Additionally, long term room rentals and hotel occupancy tax exemptions are both noted in only one category on the Hotel Occupancy Tax return. That practice creates confusion. We found

that returns have been filed with Hotel Occupancy Tax exemptions of 50% or more of revenues. Such returns immediately draw attention. To differentiate those hotels that have a high percentage of long-term residents from other hotels that accept large numbers of tax Exemption Certificates from their guests, we believe a new line should be created on the Hotel Occupancy Tax return.

**WE RECOMMEND** that the Hotel Occupancy Tax return be changed as follows: Hotel Occupancy Tax exemptions should be reported on two lines: one indicating exemptions due to long term occupancy of 30 days or more and another line noting the exemptions granted to employees representing government agencies on official business or eligible non-profit agency occupancies. The redesigned form we recommend is shown as Appendix C.

The process for the reporting and collection of the Hotel Occupancy Tax begins with the hotel/motel establishment's application to the County to collect the tax – which all hotel establishments are required to do under local law. To confirm that hotels have registered with the County and filed applications to collect and remit Hotel Occupancy Taxes (and thus ensure no hotel establishments are evading the law), we selected the hotel/motel section of a 2005-2006 local telephone book and matched all the establishments to the County Executive's Division of Budget, Management and Finance Hotel Occupancy Tax records.

This process revealed businesses that have the word "hotel" in their name, but do not rent rooms and are not actual hotels. Based on our review, we conducted field visits to two locations that were not remitting Hotel Occupancy Tax payments to the County but which use the word "hotel" in their advertisements. In both cases, we ascertained and verified that no Hotel Occupancy Tax was due to the County.

During this review, we found one establishment, a "rooming house" that was renting rooms with less than one month leases. ("Gamma") Under the terms of the local law, this rental situation means Gamma should be charging tenants/guests the Hotel Occupancy Tax for those rooms and remitting payment of the tax to the County. For the period of our audit, although the leases were less than one month in length, the patrons of this establishment signed several consecutive leases. In every case, stays were more than one month in length, exempting this establishment from collecting Hotel Occupancy Tax on these rooms. This establishment had not filed any paperwork with the County authorizing it to collect Hotel Occupancy Tax, nor had it filed any Hotel Occupancy Tax returns since its inception. The ownership has promised to file the appropriate paperwork authorizing the collection of Hotel Occupancy Tax when applicable and will also change its agreements with its tenants to eliminate the week-to-week leases in favor of month-to-month leases.

**WE RECOMMEND** that the former Finance employees now working in the Erie County Comptroller's Office that oversee the collection of the Hotel Occupancy Tax confirm that Gamma applies for a license to collect Hotel Occupancy Tax and does in fact, file Hotel Occupancy Tax returns, even if those returns show no income due to the County.

## **Timeliness of Hotel Occupancy Tax Payments and Collection Procedures**

Our review of 453 Hotel Occupancy Tax returns filed in the 2006 Hotel Occupancy Tax year found twenty-four (24) delinquent returns. These returns should have incurred total penalties of \$19,898.00 as compared to Hotel Occupancy Tax revenues of \$6.5 million dollars. The County Executive's Division of Budget, Management and Finance, however, had not levied these penalties on the hotels involved, nor initiated any collection efforts to secure the required payments. Upon our discovery of these delinquent returns, our office sent an Internal Audit Memorandum to the Director of Real Property Tax Services informing him of these delinquent returns.

During the audit period, we became aware that the County maintained repayment agreements with two separate entities delinquent in remitting their Hotel Occupancy Tax payments to the County. The first agreement with hotel owner "Alpha" covered Alpha's failure to remit collected taxes. This hotel also levied the Hotel Occupancy Tax improperly on non-room costs provided by the hotel. The owner of the hotel owes approximately \$50,000. This debt has been outstanding for over two years.

A second hotel owner, "Beta," was previously found to be delinquent in compliance with a payment agreement negotiated in 1993. Another payment agreement was entered into in 1996. A third payment agreement was entered into in 2003. Payments were made according to the terms of the 2003 agreement, but only for one year. As of May 9, 2007, Beta is more than twenty (20) months in arrears against this agreement, totaling more than \$100,000. The total sum of Hotel Occupancy Tax payments due to the County under this agreement is more than \$500,000.00. Prior to our audit, the County Executive's Division of Budget, Management and Finance and/or Department of Law had taken no steps to address this apparent default.

A review revealed that the payment agreement with Beta is not recorded on the County's SAP system.

**WE RECOMMEND** that the Director of Real Property Tax Services immediately obtain compliance with the repayment agreement negotiated with Beta and that collection proceedings begin against Beta and any other potentially liable parties.

**WE FURTHER RECOMMEND** that the Division of Budget, Management and Finance, including the Director of Real Property Tax Services, and the Department of Law report in writing to the Office of Comptroller and Legislature how Beta was allowed to fall behind more than 20 months in its remittance of taxes to the County with no response from the County.

**WE ALSO RECOMMEND** that remedies available to protect the Hotel Occupancy Tax revenue stream be implemented timely in all future collection periods to ensure that no hotel again becomes severely delinquent. Specifically, similar to our 2002 audit recommendation described in the "Auditor Comment" section below, and as per the terms of the Hotel Occupancy Tax Law, we believe that a performance bond should be required from any delinquent hotel to guarantee performance and remittance of collected Hotel Occupancy Taxes.

**WE ALSO RECOMMEND** that the County update its accounts receivable records to include the payment agreement with Beta.

### **Auditor Comment**

Some of the findings contained within this audit have previously been referred to the Director of Real Property Tax Services for response and remediation. Upon completion of an exit conference with that official, this report will also be filed with those employees of the Comptroller's Office (formerly Division of Budget, Management and Finance employees) who are responsible for the collection and administration of the Hotel Occupancy Tax.

The Erie County Comptroller's Office last conducted an audit concerning the collection and remittance of Hotel Occupancy Taxes for the period January 1, 2000 to June 30, 2002 which was released in December 2002. In that 2002 audit, this office found that six area hotels had not remitted approximately \$860,000 of Hotel Occupancy Taxes to the County (not including penalties and interest), and hotel establishments had cumulatively failed to provide forty five (45) returns amounting to approximately \$267,000 (not including penalties and interest). The audit findings, which the then and current Director of Real Property Tax Services concurred with, recommended that the Division of Budget, Management and Finance take steps to (1) immediately collect all outstanding taxes, penalties and interest; (2) take steps to ensure returns are filed; and (3) that the Division of Budget, Management and Finance take all necessary enforcement and legal measures to ensure the collection and remittance of Hotel Occupancy Taxes owed to the County.

The findings of the previous audit were not completely addressed. Beta was not pursued when payments were late; even after a second separate agreement was negotiated. Late payments from other hotels also did not generate any collections action. The response to the 2002 audit by the Director of Real Property Tax Services stated that he concurred with the findings regarding Beta and stated his intention to begin collection remedies. These steps were not taken. These steps were critical to collecting funds collected on the County's behalf, but held by these businesses. This is a significant failure on the part of the Director of Real Property Tax Service to address a known deficiency.

### **RESULTS OF EXIT CONFERENCE**

An exit conference was held on May 14, 2007 with the Director of Real Property Tax Services, the County Attorney and members of their staff.

On March 7, 2007 we received a response to our Internal Audit Memorandum number one from the Director of Real Property Tax Services advising us that letters "are being drafted and prepared for mailing to notify delinquent hotels of the assessed required penalties due for late filings." At the Exit Conference, the Director of Real Property Tax Services stated that the \$19,898 in penalties and interest discovered during our audit was not the subject of collection efforts because he waived those penalties and interest. These penalties and interest resulted from returns being filed later than the due date. The Director stated that in these cases no returns were

filed later than seven days after the due date. Of the twenty-four (24) returns comprising the late filings, however, we found that eleven (11) were more than seven (7) days late. The Director felt that a waiver of these penalties was appropriate. He provided no documentation that these penalties were waived.

The Director of Real Property Tax Services also insisted that the agreement with Beta was recorded within the County's accounting system. We have found no evidence that this is so.

In accordance with the County's Audit Response System and Procedures, we request that the Director prepare a written response to our office, the Director of Budget, Management and Finance and the County Executive concerning the findings and recommendations by June 15, 2007.

We further request that the Director forward copies of the response to the Erie County Legislature and the Erie County Fiscal Stability Authority by June 15, 2007.

**ERIE COUNTY COMPTROLLER'S OFFICE**

cc: Hon. Joel A. Giambra, Erie County Executive  
Joseph Maciejewski, Director of Real Property Tax Services  
James Hartman, Director of Budget, Management and Finance  
Laurence Rubin, Esq., Erie County Attorney  
Anthony Baynes, Jr., Chair, Erie County Fiscal Stability Authority

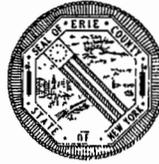
# Appendix A

**CERTIFICATE OF AUTHORITY**  
**COUNTY OF ERIE — DEPARTMENT OF FINANCE — HOTEL TAX DIVISION**

IDENTIFICATION NUMBER

H-										
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(USE THIS NUMBER ON ALL RETURNS  
AND CORRESPONDENCE)



VALIDATION

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Business Name \_\_\_\_\_

Address \_\_\_\_\_

is authorized to collect Hotel Occupancy Tax under Local Law Number 12 pursuant to Chapter Number 614 of the Laws of 1974 of the State of New York. This certificate must be prominently displayed in your place of business.

# Appendix B

County of Erie – State of New York  
**RETURN OF TAX ON  
 OCCUPANCY OF HOTEL ROOMS**

*(Pursuant to Chapter 614 of the Laws of the State of New York)*



Due on or before \_\_\_\_\_  
 Period from \_\_\_\_\_

Mailing Address

Att: \_\_\_\_\_  
 Hotel Name \_\_\_\_\_  
 Owner \_\_\_\_\_  
 Bill Add \_\_\_\_\_  
 City St Zip \_\_\_\_\_

Certificate of Authority Number

Cert Auth # \_\_\_\_\_

Hotel/Motel Address

Hotel Name \_\_\_\_\_  
 Hotel Addr \_\_\_\_\_

Hotel \_\_\_\_\_  
 Motel \_\_\_\_\_  
 Apartment Hotel \_\_\_\_\_  
 Lodging House \_\_\_\_\_  
 Other (describe) \_\_\_\_\_

*(Please correct any errors on the above)*

Business Activity:

Number of rooms \_\_\_\_\_  
 If Final Return, check here \_\_\_\_\_

Date Business Started \_\_\_\_\_  
 Reason for Final \_\_\_\_\_  
 Sold To \_\_\_\_\_  
 Other \_\_\_\_\_

Computation of Tax:

1	Gross Room Rentals .....	\$	_____
2	Less Non-Taxable Room Rentals.....	\$	_____
3	Net Taxable Room Rentals (Line 1 Minus Line 2) .....	\$	_____
4	Tax Due ____%% ( Line 3) .....	\$	_____
5	Penalty (5% of Line 4 due the first month of delay after the due date).....	\$	_____
6	Interest (1% of line 4 for each month of delay excepting the first month of delay after the due date).	\$	_____
7	<b>Total Due .....</b>	<b>\$</b>	<b>_____</b>

This return must be filed with your remittance in full for the amount of the tax within 20 days after the period covered by the return to avoid imposition of penalties. Make remittance payable to Commissioner of Finance of the County of Erie. Please mail your return in the enclosed addressed envelope or **ERIE COUNTY TAX 95 FRANKLIN ST BUFFALO, NY 14202.**

Certificate of Taxpayer

I hereby certify that this report, including any schedules is to the best of my knowledge and belief a true and complete return.

FOR OFFICE USE ONLY

\_\_\_\_\_  
*Signature (Agent, Officer of Corp., Etc.)*

\_\_\_\_\_  
*Date*

\_\_\_\_\_  
*Title*

# Appendix C

RETURN OF TAX ON

OCCUPANCY OF HOTEL ROOMS

(Pursuant to Chapter 614 of the Laws of the State of New York)



Due on or before: \_\_\_\_\_
Period from: \_\_\_\_\_

Mailing Address

Certificate of Authority Number
Cert. Auth. # \_\_\_\_\_

Attn: \_\_\_\_\_
Hotel Name: \_\_\_\_\_
Owner: \_\_\_\_\_
Billing Address: \_\_\_\_\_
City, State Zip: \_\_\_\_\_

Hotel \_\_\_\_\_
Motel \_\_\_\_\_
Apartment Hotel \_\_\_\_\_
Lodging House \_\_\_\_\_
Other (describe) \_\_\_\_\_

Hotel/Motel Address

Hotel Name \_\_\_\_\_
Hotel Address \_\_\_\_\_

(Please correct any errors on the above)

Business Activity:

Number of Rooms \_\_\_\_\_
If Final Return, check here \_\_\_\_\_

Date Business Started \_\_\_\_\_
Reason for Final \_\_\_\_\_
Sold To \_\_\_\_\_
Other \_\_\_\_\_

Computation of Tax:

- 1. Gross Room Rentals \$
2. Less Non-Taxable Room Rentals supported by an Exemption Certificate \$
3. Less Rental for Stays of 30 Days or More by a Guest \$
4. New Taxable Room Rentals (line 1 minus line 2) \$
5. Tax Due % (line 4) \$
6. Penalty (5% of line 5 due the first month of delay after the due date) \$
7. Interest (1% of line 5 for each month of delay excepting the first month of delay after due date) \$
8. Total Due \$

This return must be filed with your remittance in full for the amount of the tax within 20 days after the period covered by the return to avoid imposition of penalties. Make remittance payable to Commissioner of Finance of the County of Erie. Please mail your return in the enclosed addressed envelope or ERIE COUNTY TAX 95 FRANKLIN STREET, BUFFALO, NY 14202.

Certificate of Taxpayer

FOR OFFICE USE ONLY

I hereby certify that this report, including any schedules is to the best of my knowledge and belief a true and complete return.

Signature (Agent, Officer of Corp., etc.)

Date

Title