IN THE ILLINOIS INDEPENDENT TAX TRIBUNAL

CSX TRANSPORTATION, INC.	)	
	)	
Petitioner,	)	19 TT 130
	)	20 TT 135
v.	)	21 TT 125
	)	
THE ILLINOIS DEPARTMENT OF REVENUE,	)	Chief Judge James M. Conway
	)	
Defendant.	)	

NOTICE OF ELECTRONIC FILING

To:

Sean P. Cullinan
Lori L. Jordan
Joseph Kasiak
Special Assistant Attorneys General
Illinois Department of Revenue
(312) 814-3078; (312) 814-3842; (312) 814-6012
sean.cullinan@illinois.gov; lori.jordan@illinois.gov; joseph.kasiak@illinois.gov

PLEASE TAKE NOTICE that on December 5, 2022, I electronically filed with the Illinois Independent Tax Tribunal (ITT.TaxTribunal@illinois.gov) and Chief Administrative Law Judge, James M. Conway (James.Conway@illinois.gov) 160 N. LaSalle Street, Room N506, Chicago, IL 60601, **Petitioner's Reply to Respondent's Response to Petitioner's Motion to Compel**, a copy of which accompany this notice and is served on you herewith.

Respectfully Submitted,

CSX Transportation, Inc.
Petitioner

By: */s/ Timothy J. McCaffrey*
One of Petitioner's Attorneys

Timothy J. McCaffrey
Illinois Attorney No. 6229804
Eversheds Sutherland (US) LLP

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	)	Chief Judge James M. Conway
THE ILLINOIS DEPARTMENT OF REVENUE,	)	
	)	
Defendant.	)	

PETITIONER'S REPLY TO RESPONDENT'S RESPONSE TO PETITIONER'S MOTION TO COMPEL

Petitioner CSX Transportation, Inc., ("Petitioner"), by and through its attorneys, Eversheds Sutherland (US) LLP, hereby seeks leave to reply to Respondent's Response to Petitioner's Motion to Compel. Leave to reply should be granted so that Petitioner may clarify facts and legal assumptions Respondent confuses in its response. Should leave to reply be granted, Petitioner hereby replies as follows:

BACKGROUND

1. The relevant background and facts have previously been presented to the Tribunal in Petitioner's Motion to Compel, a copy of which is attached hereto for the Tribunal's convenience at **Exhibit A**.

2. Respondent has already disclosed correspondence that reflects an interest in retaliating against Petitioner due to circumstances arising from a prior audit period. The question before this Tribunal is whether evidence of animus against Petitioner throughout the course of this audit is relevant to Petitioner's claim that the assessment is not entitled to a presumption of correctness—not whether Petitioner can later attempt to claim estoppel against Respondent.

Because administrative agency actions that are arbitrary and capricious are *per se* unlawful, evidence of animus against Petitioner is highly relevant to the claims at bar.

ARGUMENT

ROBERT CIOFALO'S AUDIT NARRATIVE IS RELEVANT TO THIS CASE BECAUSE RESPONDENT RELIED ON ITS CONTENTS TO ISSUE THE ASSESSMENTS

3. Respondent concedes that "[g]reat latitude is allowed in the scope of discovery, and the concept of relevance is broader for discovery purposes than for purposes of admitting evidence to trial." (Resp. Response to Pet. Mot. to Compel ¶ 5.) Yet, Respondent's opposition to this discovery motion is premised wholly on the potential inadmissibility *at trial* of the evidence at issue. Respondent's opposition further presumes that Petitioner intends to use the evidence for the purpose of binding Respondent to a prior audit. However, Petitioner has made no such allegation, nor could it because it has not reviewed the contents of the materials in question.

4. Respondent has in effect already conceded the relevance of the evidence in question—the prior audit file of Robert Ciofalo—because Respondent reviewed, analyzed, and considered the contents of the audit file in determining to issue the assessments here at issue. Respondent does not dispute this fact in its opposition. Nor does Respondent allege any prejudice or burden in producing these documents. Just as Respondent believed the prior audit materials were relevant, so too does Petitioner.

5. Respondent cites to a litany of cases for the obvious proposition that, generally, estoppel will not lie against the Department of Revenue. But the Illinois Supreme Court recognizes that materials may be relevant for purposes of discovery (as opposed to admission at trial) and therefore discoverable even if they could not be admitted or used at trial. And, as noted above,

Petitioner has not asserted estoppel against the Department based on the prior audit rendering the cases Respondent cites entirely inapposite.

6. Respondent relies on *Austin Liquor Mart, Inc. v. Department of Revenue*, 51 Ill. 2d 1 (1972), but that case is inapposite. There, the taxpayer sought to enjoin the Department from investigating the taxpayer's books and records for certain tax periods. The taxpayer argued that it had already been issued an assessment for part of the period in question, which it had paid without protest, and therefore the Department was in effect estopped from further investigating its records for an overlapping period. *Id.* at 2-3. A majority of the Illinois Supreme Court rejected the taxpayer's argument, holding that a taxpayer's payment of a prior assessment covering an overlapping period does not give rise to estoppel *against the Department* from reinvestigating the taxpayer's books and records. *Id.* at 5-6.

7. *Austin Liquor Mart* is inapposite for two reasons. First, the party seeking disclosure in that case was the Department, not the taxpayer as in this matter. Second, the taxpayer sought to enjoin the Department from carrying out that investigation because it had already paid an assessment for part of the period in question. Here, in contrast, CSX is seeking disclosure of materials the Department itself appeared to consider relevant *and* CSX has not sought to enjoin the Department from carrying out its investigation. The Department's "audit" has been completed and an assessment has been issued; the procedural posture in *Austin Liquor Mart* is therefore entirely different from the one at bar.

8. The other cases to which Respondent cites also involve fact patterns not here present. Instead, they all involve situations where taxpayers claimed the Department was bound by prior administrative determinations, audit results, or the like. But since none of them concern discovery disputes, they fail to apply the relevant standard and are therefore also inapposite. As

Respondent acknowledged in its Response, the concept of relevance for discovery is quite broad, including not only what is admissible at trial, but "also that which leads to what is admissible." *Pemberton v. Tieman*, 117 Ill. App. 3d 502, 504-5 (1st Dist. 1983) (citations omitted).

9. The material sought here is directly relevant to the allegations made in Petitioner's complaint, as it may prove something in issue. *See Bauter v. Reding*, 68 Ill. App. 3d 171, 175 (3rd Dist. 1979) (holding documents pertaining to party's course of conduct relevant and noting that "something is relevant if it tends to prove or disprove something in issue"). Count V of Petitioner's Amended Complaint alleges that the Respondent has failed to establish a prima facie case, violated the Illinois Taxpayer Bill of Rights, and that the ensuing notice of deficiency is invalid and should not be afforded a presumption of correctness. The materials sought may assist in determining whether the Respondent retaliated against or discriminated against Petitioner, or is otherwise entitled to a presumption of correctness.

10. Correspondence between Department employees or agents indicate that the Department was unsatisfied with a prior settlement and was looking for ways to impose an assessment in contravention of the spirit of that agreement. The documents provided further show that Department representatives believed Petitioner was "getting away with something [it] shouldn't." (*See* Pet. Mot. to Compel ¶ 7.) In correspondence from Bates Stamp IDOR006128, Joann Lariviere wrote that "[t]here was an agreement reached about a decade ago. Charles Campbell entered into it allowing BOCT to be included in the transportation group. *We agree this is a horrible decision but we are bound by it*…". Mr. Ciofalo wrote the next day that "I want to make something clear, we did not agree with the position we were told to follow and we were not given specific such as this agreement. We were instructed by Charles to include the company in

the unitary transportation group and to not include the factor and to not pursue this in the future." Bates Stamp IDOR006178.

11. To that end, Mr. Ciofalo's prior audit materials were material in the Department's estimate, and relied upon for purposes of the same.

12. The Department appears to have expressly relied on Mr. Ciofalo's prior audit in its efforts to undo the settlement agreement with which it apparently took issue. On Bates Stamp Page IDOR006210, the Department's Revenue Audit Supervisor, Marsha Seitz, clearly states that she reviewed, analyzed, and thus found relevant Mr. Ciofalo's 2007-2009 audit narrative for purposes of *this* assessment: "I did read your 2007-2009 audit narrative…" (Pet. Mot. to Compel ¶ 5.)

13. Respondent cannot have it both ways. It cannot consider the prior audit narrative and materials in the audit file relevant for purpose of making its assessment here while claiming that such materials are irrelevant *in any way* to Petitioner's complaint alleging that the assessment was invalid. Especially so, since Petitioner has not made any allegations of estoppel.

14. The fact that Respondent's agents considered the 2007-2009 audit comments relevant flatly contradicts the notion that "there is nothing in Bob Ciofalo's 2007-2009 audit comments that is relevant *or that would ever lead to relevant evidence*." (*Cf.* Resp. Response to Pet. Motion to Compel ¶ 7.)

THE CONTENTS OF THE EMAIL STRING REQUESTED ARE INCOMPLETE

15. It appears that the e-mail string provided at Bates Stamp Pages IDOR005411 through 5417 is incomplete. A copy of these pages is attached hereto as **Exhibit B**. On Bates Stamp Page IDOR005413, an e-mail from Robert Ciofalo time stamped Tuesday, August 7, 2018 at 10:23 A.M. appears in the e-mail string *after* an e-mail on the same Bates Stamp Page from Mr.

Ciofalo time stamped the same day at 11:08 A.M. The response in the e-mail sent at 10:23 A.M. is disjointed from the response in the e-mail sent at 11:08 A.M. Additionally, in the 10:23 A.M. email from Mr. Ciofalo, the reference to "number 19" appears to be in response to something specific that is not otherwise included in the email string. Because the response is disjointed and the time stamps are not in chronological order as the remainder of the e-mail string, Petitioner has reason to believe that the e-mail string provided at Bates Stamp Pages IDOR005411 through 5417 is incomplete and respectfully asks for an order compelling the production of the full e-mail string.

CONCLUSION

Petitioner respectfully requests that the Tribunal grant this motion and enter an order directing Defendant to provide Mr. Ciofalo's audit narrative for tax years ending 2007 through 2009 and compelling disclosure of the complete correspondence from the e-mail string at Bates Stamp Pages IDOR005411 through 5417 and awarding Petitioner such other relief as the Tribunal deems just and proper.

Respectfully Submitted,

CSX Transportation, Inc.
Petitioner

By: */s/ Timothy J. McCaffrey*
One of Petitioner's Attorneys

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she caused a copy of the foregoing Petitioner's Reply to Respondent's Response to Petitioner's Motion to Compel to be served by electronic mail before the hour of 5:00 p.m. on the 5th day of December, 2022 as follows:

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Lori L. Jordan
Joseph Kasiak
Special Assistant Attorneys General
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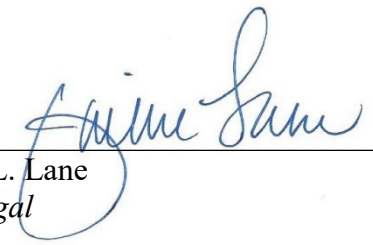

Jaime L. Lane
Paralegal

Exhibit A

to Petitioner's Reply to Respondent's Response to Petitioner's Motion to Compel

IN THE ILLINOIS INDEPENDENT TAX TRIBUNAL

CSX TRANSPORTATION, INC.	)	
	)	
Petitioner,	)	19 TT 130
	)	20 TT 135
v.	)	21 TT 125
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THE ILLINOIS DEPARTMENT OF REVENUE,	)	Chief Judge James M. Conway
	)	
Defendant.	)	

NOTICE OF ELECTRONIC FILING

To:

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Sean P. Cullinan
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PLEASE TAKE NOTICE that on the 9th day of November 2022, I electronically filed with the Illinois Independent Tax Tribunal (ITT.TaxTribunal@illinois.gov) and Chief Administrative Law Judge, James M. Conway (James.Conway@illinois.gov) 160 N. LaSalle Street, Room N506, Chicago, IL 60601, **Notice of Motion and Motion to Compel**, copies of which accompany this notice and is served on you herewith.

Respectfully submitted,

CSX Transportation, Inc.
Petitioner

By: */s/ Timothy J. McCaffrey*
One of Petitioner's Attorneys

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IN THE ILLINOIS INDEPENDENT TAX TRIBUNAL

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THE ILLINOIS DEPARTMENT OF REVENUE,	)	Chief Judge James M. Conway
	)	
Defendant.	)	

NOTICE OF MOTION

PLEASE TAKE NOTICE that on November 10, 2022, at 10 A.M., or as soon thereafter as counsel may be heard, we shall appear telephonically before the Honorable Chief Judge James M. Conway or any Judge sitting in his stead, and then and there present Petitioner CSX Transportation, Inc.'s Motion to Compel, a copy of which is attached and served upon you. Counsel for Defendant the Illinois Department of Revenue has not consented to the Motion.

Dated: November 9, 2022

Respectfully submitted,

CSX Transportation, Inc.
Petitioner

By: */s/ Timothy J. McCaffrey*
One of Petitioner's Attorneys

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IN THE ILLINOIS INDEPENDENT TAX TRIBUNAL

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	)	Chief Judge James M. Conway
THE ILLINOIS DEPARTMENT OF REVENUE,	)	
	)	
Defendant.	)	

MOTION TO COMPEL

Pursuant to 35 ILCS 1010/1-60 and Ill. Sup. Ct. R. 219, Petitioner CSX Transportation, Inc., ("Petitioner"), by and through its attorneys, Eversheds Sutherland (US) LLP, hereby moves this Tribunal for an order compelling Defendant The Illinois Department of Revenue ("Defendant") to respond to Petitioner's discovery requests and states as follows:

BACKGROUND

1. On or about October 19, 2020, Petitioner served a demand for discovery on Defendant requesting certain documents to be produced (the "Discovery Request"). A copy of the October 19, 2020, discovery request is attached hereto as **Exhibit A**.

2. On January 13, 2021, Petitioner and Defendant had a telephonic conference regarding the status of the demands in the Discovery Request. During the call, Defendant objected to Petitioner's request for the audit narrative of the prior auditor, Bob Ciofalo, on the grounds that such request was outside the scope of discovery. Defendant claimed that Mr. Ciofalo opined only on matters that were not in dispute. In response, Petitioner agreed to provide specific citations to the audit file in which Mr. Ciofalo directly commented on the issues pending in this matter,

namely, the intercompany nature of the transactions between members of Petitioner's unitary transportation group.

3. In a letter to Defendant dated January 29, 2021, Petitioner provided the specific citations as indicated in the January 13, 2021 conference call. As noted in that letter, the Defendant has provided the following documents.

4. Bates Stamped Page IDOR006218 – 8/8/18 Email from Marsha Seitz to Robert Ciofalo, CC: Brian Fliflet, Carla Hawkins, and Joann Lariviere. The email states: "*...I am just trying to make sure we have all of our ducks in a row. It seemed when reading the prior agreement, the taxpayer was saying all the sales were intercompany so I want to get as much documentation as possible if we are going to pursue this…Please send what you have on intercompany as we certainly want to compare it to what Carla gets. Thank you for all of your input on this.*"

5. Bates Stamped Page IDOR006210 – 8/8/18 Email from Marsha Seitz to Robert Ciofalo, CC: Brian Fliflet, Carla Hawkins, and Joann Lariviere. The email states: "*...Bob, you are stating that the sales would not be intercompany, is that correct?... In the settlement agreement, it appears that the taxpayer stated that 98% of sales were between two members, however, Bob you are saying that is not the case and that you determined these sales were from 3rd parties. I did read your 2007-2009 audit narrative and if so would like to see what you have. ...Anyway Bob, if you have proof from an earlier audit showing that these were 3rd party receipts, it would help when we ask the taxpayer why are all receipts eliminated which I think they will do. We all know that special apportionment doesn't last forever.*

6. Bates Stamped Page IDOR006053 – 8/7/18 Email from Robert Ciofalo to Carla Hawkins, CC: Marsha Seitz and Joann Lariviere. The email states: "*...I can't say for certain that B&OCT sales are not part of it, but from having conducting prior audits, it is my understanding*

that none of the B&OCT line 1 sales are intercompany with CSXT or any other transportation company in the group. We determined that their sales were 100% from outside customers. It never came up that there were any intercompany sales with any companies in the consolidated return."

7. Bates Stamped Page IDOR 006162 – 8/7/18 Email from Robert Ciofalo to Brian Fliflet; CC: Carla Hawkins, Marsha Seitz, and Joann Lariviere. The email states: "*...They are getting away with something they shouldn't. The Illinois sales are not being reported in the numerator (or denominator). If we could include these sales in the numerator, somewhere, that would be fair. The question is which avenue is a stronger case to pursue. The decision would be which case would have a better chance for us to win, trying to show the services are transportation or non-transportation services.*"

8. Bates Stamped Page IDOR006244 – 8/13/18 Email from Robert Ciofalo to Carla Hawkins; CC: Joann Lariviere, Marsha Seitz. The email states: "*The possible intercompany sales between BOCT and CSXT is another issue, they will have to prove sales are strictly intercompany. It was NOT our understanding that BOCT was performing a service for CSXT, I'm not sure I buy that argument they are making about intercompany sales between these two companies. I think they wanted the numerator out of the non-insurance group in the past and would want it out of the transportation factor since its 100% Illinois.*"

9. Bates Stamped Page IDOR006219 – 8/8/18 Email from Robert Ciofalo to Marsha Seitz; CC: Brian Fliflet, Carla Hawkins, Joann Lariviere. The email states: "*If you are going to pursue the switching services as transportation services, then their federal line 1 amount is 100% Illinois sales. These sales were not eliminated on consolidation and I don't see how the taxpayer could claim they are intercompany when the revenue originates from outside customers of*

B&OCT…There may be some administrative services that are intercompany but it was our understanding that line 1 sales was from outside customers to B&OCT."

10. Bates Stamped Pages IDOR006222-006223 – 8/7/18 Email Exchange Between Brian Fliflet and Carla Hawkins, Joann Lariviere; CC: Marsha Seitz, Robert Ciofalo. One of the emails in the exchange states: " *Looks like we treated BOCT as a disregarded entity and flowed up its factors and income to CSX. Wouldn't most/all of BOCT's transactions be intercompany and be eliminated.*" Mr. Ciofalo responded: "*To answer your question, the answer would be no, it wouldn't be eliminated. It was determined through research on the 12/05 – 12/07 audit which eventually was submitted together with the 01-02 and 03-04 audits (although the 01-02 audit was the one submitted at an earlier time and the one in court) that BOCT derived its income from outside customers. There were several contracts documented with outside customers. Therefore, its income and factors were not from payments from services from CSXT.*"

11. On February 11, 2021, a telephonic status conference was held with this Cournt, at which the Defendant asserted its sole issue was the "cherry-picking" of receipts by CSX and it represented that it if found no separate line items for intercompany switching services that it would no longer pursue this matter.

12. Based on Defendant's assertions and representations, Plaintiff subsequently produced 75,000 consecutive invoices to address Defendant's concerns and the Plaintiff's outstanding discovery requests were held in abeyance.

13. On May 4, 2022, a telephonic status conference was held with this Court, at which the Defendant seemingly acknowledged that it had not found any separate line items and that it was working to determine next steps.

14. On June 2, 2022, a telephonic status conference was held with this Court, at which the Defendant stated it would making a settlement offer to CSX.

15. On July 29, 2022, Defendant submitted a settlement proposal to Plaintiff.

16. By letter dated August 23, 2022, Plaintiff responded with a counter-offer to the Defendant's July 29, 2022, proposal.

17. Plaintiff has continued to hold its outstanding discovery requests in abeyance pending settlement discussions with the Defendant.

18. A telephonic conference with this Court was scheduled for September 8, 2022.

19. By that date, the Defendant had not yet evaluated Plaintiff's counteroffer. Instead, Defendant sought to adjourn the status conference originally scheduled for September 8 by another 45-60 days.

20. Plaintiff opposed Defendant's adjournment request. In its opposition, Plaintiff explained that the Defendant had been provided an inordinate amount of time to analyze the facts of this case, and that additional time to evaluate the counterproposal was therefore unwarranted.

21. A telephonic status conference with this Court was then scheduled for October 6, 2022.

22. At the October 6 conference, the Defendant informed the Court that it had not yet evaluated Plaintiff's counterproposal as it had yet to schedule an internal meeting to discuss Plaintiff's counterproposal. The Court requested specific details from Defendant regarding its internal meeting, and Defendant asserted a meeting was tentatively set for the week of October 17. The Court then set a conference for November 10 to report on the parties' progress, if any.

23. Since October 6, Defendant has failed to convene a meeting with Plaintiff to discuss the settlement proposals. By all appearances, it does not appear that Defendant has evaluated Plaintiff's counterproposal.

24. Due to Defendant's continued pattern and practice of delaying this matter, Plaintiff determined it could no longer hold is outstanding discovery demands in abeyance. On November 1, 2022, Plaintiff requested for immediate production the following items:

a. The audit narrative of the prior auditor Bob Ciofalo;

b. Complete correspondence from the e-mail string (see IDOR005416); and

c. The Settlement Agreement or Agreements referenced at IDOR005792 and IDOR005411.

25. The November 1, 2022, requested that Defendant advise by 4:00 CST on November 3, 2022, whether it would produce the requested items. The November 1 request also informed Defendant that if Defendant failed to respond, Plaintiff would pursue relief from this Court.

26. On November 3, 2022, Defendant timely responded, and advised Plaintiff that it would locate and provide the requested documentation prior to the November 10, 2022, status conference.

27. The next day, on November 4, 2022, Defendant wrote that it was *still* preparing a response to Plaintiff's settlement counterproposal. Plaintiff further responded to Defendant's November 1, 2022, discovery request, reneging on its assurance that it would produce the requested documentation.

28. Instead of making good on its representation that it would produce the requested documents, and despite having been advised of the relevance of Mr. Ciofalo's audit comments were relevant in *January 2021*, the Defendant requested yet another explanation why the audit

comments could in any way lead to relevant information in this matter. The Defendant also advised as to the second item requested that "The email strings we provided to you are numbered on the bottom in sequential order. For example, IDOR bate stamp 5411 (page 1) is the first page of the string of emails which ends at IDOR bate stamp 5417 (page 7)." Finally, as to the third item requested in Plaintiff's November 1, 2022, demand, Defendant responded "Please see bate stamps IDOR 5043-5051."

ARGUMENT

29. Ill. Sup. Ct. R. 201(b)(1) allows for broad discovery "regarding any matter relevant to the subject matter involved in the pending action."

30. Discovery "is intentionally broad in scope: it is intended to reveal not only facts admissible at trial, but also facts that may lead to admissible evidence." *Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214, 236, 730 N.E.2d 4 (2000) (*citing Monier v. Chamberlain*, 35 Ill. 2d 351, 357, 221 N.E.2d 410 (1966)).

31. Based on documents produced to date, it is evident that Defendant relied on Mr. Ciofalo's opinion and historic knowledge gained through auditing Petitioner in tax periods prior to the one at issue in this matter. Further, based on documents produced to date, it is clear that Mr. Ciofalo played a direct role in the outcome of the audit from which the instant dispute arises. Specifically, Mr. Ciofalo concluded that Petitioner's receipts were not intercompany receipts.

32. Defendant specifically relied on Mr. Ciofalo's previous audit narrative in reaching its determination here that the receipts at issue were not from intercompany sales. ¶¶ 5-10, *supra*. For example, in an email dated August 7, 2018, from Mr. Ciofalo to Defendant, he explained that he conducted prior audits of the taxpayer and reached a conclusion that the receipts at issue in

those audits, which are the same as those at issue here, were not for intercompany sales. *See* ¶ 6, *supra*.

33. Further, in an email dated August 8, 2018, from Marsha Seitz to Robert Ciofalo, the Defendant specifically mentions that it relied on Mr. Ciofalo's prior audit narrative – "*I did read your 2007-2009 audit narrative*" – and that if it was in fact true that Mr. Ciofalo concluded the receipts at issue were not from intercompany sales, then Defendant would like to seek additional information from Mr. Ciofalo supporting his conclusion. *See* ¶ 5, *supra*.

34. The above demonstrates that Defendant relied heavily on Mr. Ciofalo's reasoning and analysis in prior audit cycles to support its faulty assessment for the years at issue in this case. That reliance makes Mr. Ciofalo's prior audit narrative "relevant" to the issues in this case. Not only may the audit narrative lead to additional facts that could be relevant, but it goes to the heart of the matter here.

CONCLUSION

Petitioner respectfully requests that the Tribunal grant this motion and enter an order directing Defendant to provide Mr. Ciofalo's audit narrative for tax years ending 2007 through 2009; awarding Petitioner its costs in connection with filing this motion, including attorneys' fees; and awarding Petitioner such other relief as the Tribunal deems just and proper.

Dated: November 9, 2022

Respectfully submitted,

CSX Transportation, Inc.
Petitioner

By: */s/ Timothy J. McCaffrey*
One of Petitioner's Attorneys

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Sacramento, CA 95814
(916) 302-9527
NikkiDobay@eversheds-sutherland.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she caused a copy of the foregoing Notice of Motion and Motion to Compel to be served by electronic mail before the hour of 5:00 p.m. on the 9th day of November, 2022 as follows:

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Illinois Department of Revenue
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Special Assistant Attorney General
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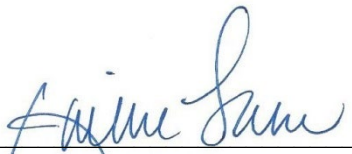


Jaime L. Lane
Paralegal

EXHIBIT A

IN THE ILLINOIS INDEPENDENT TAX TRIBUNAL

CSX TRANSPORTATION, INC.	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 19 TT 130
	)	
THE ILLINOIS DEPARTMENT OF REVENUE,	)	
	)	
Respondent.	)	

PETITIONER'S SECOND REQUEST FOR PRODUCTION

Petitioner, CSX Transportation, Inc. ("Petitioner"), by and through its attorneys, EVERSHEDS SUTHERLAND (US) LLP, and pursuant to Illinois Supreme Court Rules 201 and 213, and Illinois Administrative Code Title 86, Section 200.125(e), requests that the Defendant, the Illinois Department of Revenue ("Department"), answer the following requests for production within twenty-eight (28) days from the date of this request (the "Request").

DEFINITIONS

1. "Document" or "documents" shall mean every original (and every copy of any original or copy which differs in any way from the original) of every writing or recording of every kind or description.
2. "Refer," "relate," and "concern" mean, in addition to their customary and usual meanings and without limitation, discuss or discussing, reflect or reflecting, assess or assessing, record or recording, mentioning, summarizing and/or touching upon.
3. "Person" or "persons" shall mean each and every individual, corporation, partnership, franchisor/franchisee, joint venture, social or political organization or any other entity, whether real or juridical or incorporated or unincorporated, encompassed within the usual

or customary meaning of "person" or "persons" or otherwise encompassed within this definition.

4. The words "and" and "or" shall be construed conjunctively or disjunctively rather than exclusive. The word "including" shall be construed without limitation.

5. "Communication" means, in addition to its customary and usual meaning and without limitation, any oral or written exchange of words, thoughts or ideas to another person(s) whether person-to-person, in group, by telephone, telex or by any other process, electronic or electrical means, mechanical or otherwise. All such communication in writing shall include, without limitations, all such items defined as "Document" above.

6. "Department" means the Illinois Department of Revenue, its employees and any other person or persons acting on its behalf.

7. "Policy" means, in addition to its customary and usual meaning and without limitation, any position or approach of the Department or any related agency whether formally or informally adopted and communicated to those acting for the Department as to how the Department shall act, as to how a matter should be treated or resolved by the Department and as to any similar positions or approach.

8. "Authorities" means, without limitation, a decision from any federal or state trial or appellate court, an administrative agency decision or ruling from any state, a Department regulation, a Department private letter ruling or general information letter, a Department informational bulletin, a technical advice memoranda or any other written document that the Department relied on in making its audit determinations in this matter.

9. "CSX" refers to CSX Corporation, Petitioner's parent company and a publicly held company that, during the Years in Issue, through its subsidiaries, engaged in four business segments: Rail, Intermodal, Domestic Container Shipping and International terminals.

10. "BOCT" refers to the Baltimore and Ohio Chicago Terminal Railroad Company, a switching company and wholly owned subsidiary of Petitioner.

11. "CSXIT" refers to CSX Intermodal Terminals, Inc., a standalone integrated intermodal company that links customers to railroads via trucks and terminals, providing coast-to-coast intermodal lift services.

12. "Non-Transportation Group" shall mean the Illinois unitary combined group composed of CSXIT and CSX's non-transportation companies.

13. "Transportation Group" means the Illinois unitary combined filing group including Petitioner and its unitary transportation companies.

14. "Years at Issue" mean the tax years ending December 2014 and December 2015.

15. "Notices" means any Notices of Deficiency issued by the Department related to the Years at Issue.

16. "Audit File" refers to Petitioner's Audit File as provided by the Department on November 4, 2019.

17. "Cross-Group Elimination" refers to the Department's elimination items of income and deduction arising from transactions between members of CSX's two separate Illinois unitary business groups during the Years at Issue.

18. "Attachments" refer to any and all documents, schedules, etc. that were attached to email correspondence included in the Department's Audit File.

INSTRUCTIONS

1. This request for documents calls for production of all documents, as defined herein, in the possession, custody or control of the Department including documents in the possession, custody or control of its present and former auditors, agents, employees, attorneys, representatives and entities of whatever type which they own or control, wherever located, including all individual or Department premises and all individual residences as well as the residence of any Department officers, employees, agents or representatives.

2. This request calls for production of each requested document in its entirety. You shall produce the original copy of each document requested herein, as well as any drafts, revisions, or copies of the same which bear any mark or notation not present on the original, or which otherwise differ from the original.

3. You shall segregate documents produced in response hereto according to the paragraph or subparagraph to which they are responsive. You shall also identify in writing paragraph or subparagraphs of this request for which no responsive documents are produced.

4. If you believe that any given document is responsive to more than one paragraph or subparagraph of this request, you shall produce the document only in response to the first such paragraph or subparagraph. You shall also identify in writing paragraphs or subparagraphs of this request for which you believe that responsive documents have been produced in response to any other paragraphs or subparagraphs of this request.

5. If objection is taken to any of the following requests, or if a request is otherwise not responded to in full, state in writing the specific grounds therefore and respond to the request to the extent to which there is no objection.

6. If any requested documents are withheld under a claim of privilege or the "work production doctrine," furnish a copy thereof which does not contain the information claimed to be privileged and fully describe or identify: (a) the author(s) of the document; (b) all persons to whom the documents were sent or has been shown; (c) the date of the document; (d) the identity of any person having possession, custody or control of copies of the document; (e) a description of the type of document (e.g., letter, memoranda, notes, report); (f) the subject matter of the document; and (g) state in detail the grounds upon which the document is withheld.

7. Whenever you are asked to produce a document and such document has ceased to exist, specify for each document: (a) the type of document; (b) the information contained therein; (c) the date of the document; (d) the circumstances under which such document ceased to exist; and (e) identify each person having knowledge of the circumstances under which the document ceased to exist and each person having knowledge of the document's contents.

8. Whenever you are asked to produce a document and you do not possess or control such document, specify for each such document: (a) the type of document; (b) the contents of the document; and (c) identify each person and/or entity having possession or control of the document, and each person having knowledge of the document's contents.

9. This request shall be deemed continuing in nature so as to require further and supplemental production if you receive, discover or create additional documents from the time of original production and the time of final judgment in this matter.

10. In each case where the Department finds there to be an ambiguity within a request, state the ambiguity including the alternative interpretations that the Department believes are

possible and then provide the response to each of the possible alternative interpretations of the request.

11. Petitioner hereby requests an affidavit attesting to the Department's complete compliance with this Second Request for Production of Documents pursuant to Illinois Supreme Court Rule 214 and signed by the Department's authorized representative with power and authority to fully and legally bind the Department under penalties of perjury pursuant to 735 ILCS 5/1-109 (735 ILCS 5/1-109).

DOCUMENTS TO BE PRODUCED

1. Any and all communications, including but not limited to e-mail or other correspondence, between or amongst members of the Department discussing, referring or regarding the short statute of limitations as referenced in Bate Stamped Page IDOR005411.

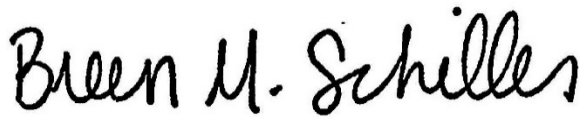
RESPONSE:

2. Any and all communications, including but not limited to e-mail or other correspondence, amongst or between members of the Department's audit staff and Brian Fliflet, not originally included in the Audit File, discussing, referring, regarding or the audit adjustments reflected in the Notices.

RESPONSE:

Respectfully submitted,

CSX Transportation, Inc.
Petitioner

By: 
_____
One of Its Attorneys

Breen M. Schiller
Eversheds Sutherland (US) LLP
900 N. Michigan Avenue, Suite 1000
Chicago, IL 60611
(312) 724-8521
BreenSchiller@eversheds-sutherland.com

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing **PETITIONER'S SECOND REQUEST FOR PRODUCTION** was served by electronic mail, before the hour of 5:00 pm on the 19th day of October, 2020, addressed as follows:

Lori L. Jordan
Special Assistant Attorney General
Illinois Department of Revenue
(312) 814-3842
Lori.Jordan@illinois.gov

Sean P. Cullinan
Special Assistant Attorney General
Illinois Department of Revenue
(312) 814-3842
Sean.Cullinan@illinois.gov

Jaime L. Lane
Paralegal

Exhibit B

to Petitioner's Reply to Respondent's Response to Petitioner's Motion to Compel

Darrow, Andrew

From: Fliflet, Brian
Sent: Tuesday, August 7, 2018 4:47 PM
To: Seitz, Marsha; Lariviere, Joann; Ciofalo, Robert
Cc: Hawkins, Carla
Subject: RE: CSX Intermodal
Attachments: CSX signed Settlement 11-7-12.pdf

Here is the Settlement Agreement. Laurie Evans had a copy.

From: Seitz, Marsha
Sent: Tuesday, August 07, 2018 1:59 PM
To: Lariviere, Joann <Joann.Lariviere@Illinois.gov>; Fliflet, Brian <Brian.Fliflet@Illinois.gov>; Ciofalo, Robert <Robert.Ciofalo@Illinois.gov>
Cc: Hawkins, Carla <Carla.Hawkins@Illinois.gov>
Subject: RE: CSX Intermodal

I have worked for a railroad and a switching company moves cars from one train to another train in order to get it to the right destination. Considering that after 2008, transportation is based on receipts, not miles, I would definitely think this qualifies as transportation since the law states transportation services from movement. Brian and I spoke and he and Charles went to look at what happens in a switching yard and confirms what I have seen at a switching yard. According to the agreement I read from Brian earlier, I believe it says, the department originally thought this company was not a transportation company but then moved it to the transportation group while the court case was still in litigation, allowing the sales to be intercompany. Was this case ever actually determined and was the company's business defined as transportation? Do we actually have a court case? What I read didn't seem to actually make a determination by either the taxpayer or the department as to what this company was actually considered to be in the end.

Brian, do we have a court case to refer to?

Bob, you are stating that these sales would not be intercompany, is that correct?

I am getting mixed signals on the DRE comments. Are we saying that we just let them eliminate all BOTC sales and acting as a DRE, which it is not. It is a subsidiary. The federal return has an elimination column on the statements. It has several actually so Carla has asked for that breakdown. In the settlement agreement, it appears that the taxpayer stated 98% of sales were between the two members, however, Bob you are saying that is not the case and that you determined these sales were from 3rd parties. I did read your 2007-2009 audit narrative and if so would like to see what you have.

Brian we are very short statuted here and it seems the taxpayer is not willing to sign a waiver. If the taxpayer comes back and says all elims are between these members, we need to discuss how to proceed as we don't have much time to get CAA involved and pull the information. I am thinking we may need to include 100% in the numerator to force their hand for more time.

It's always frustrating that we treat a company the same way and this agreement was over in 2009. I have a company here that has been using the same agreement for 30 years but no one can find any paperwork.

Anyway Bob, if you have proof from an earlier audit showing that these were 3rd party receipts, it would help when we ask the taxpayer why are all receipts eliminated which I think they will do. We all know that special apportionment doesn't last forever.

IITA
For taxable years ending on or after December 31, 2008, business income derived from providing **transportation services** other than airline services shall be apportioned to this State by using a fraction, (a) the numerator of which shall be (i) **all receipts from any movement** or shipment of people, goods, mail, oil, gas, or any other substance (other than by airline) **that both originates and terminates in this State**,

A switching yard is similar to a bowl where cars are released from a train in a certain order and slides in to a bowl shaped area. An engine then connects to the car and moves it across the track to attach it to a new train in order to change its direction so it can get to its final destination. Why wouldn't this be a transporation service?

Please contact me with any questions.

Thank you,

Marsha Seitz
Revenue Audit Supervisor

Illinois Department of Revenue
15 Executive Drive
Suite 2
Fairview Heights, IL 62208

Cell: (618) 900-1037
Fax: (618) 624-7076

Marsha.Seitz@illinois.gov

From: Lariviere, Joann
Sent: Tuesday, August 07, 2018 12:54 PM
To: Fliflet, Brian <Brian.Fliflet@Illinois.gov>; Ciofalo, Robert <Robert.Ciofalo@Illinois.gov>
Cc: Hawkins, Carla <Carla.Hawkins@Illinois.gov>; Seitz, Marsha <Marsha.Seitz@Illinois.gov>
Subject: RE: CSX Intermodal

So, Carla will be adding the total sales from the switching company to the numerator and the denominator?

This is a 100% IL operation.

Joann

From: Fliflet, Brian
Sent: Tuesday, August 07, 2018 12:38 PM
To: Ciofalo, Robert <Robert.Ciofalo@Illinois.gov>
Cc: Hawkins, Carla <Carla.Hawkins@Illinois.gov>; Lariviere, Joann <Joann.Lariviere@Illinois.gov>; Seitz, Marsha <Marsha.Seitz@Illinois.gov>
Subject: RE: CSX Intermodal

Marsha and I agree that switching is transportation services. We phrased it that way to satisfy the Attorney General's Office, who were adamant that switching was not transportation.

From: Ciofalo, Robert
Sent: Tuesday, August 07, 2018 10:23 AM
To: Fliflet, Brian <Brian.Fliflet@Illinois.gov>
Cc: Hawkins, Carla <Carla.Hawkins@Illinois.gov>; Lariviere, Joann <Joann.Lariviere@Illinois.gov>; Seitz, Marsha <Marsha.Seitz@Illinois.gov>
Subject: FW: CSX Intermodal

Brian,

Number 19 left it somewhat open to interpretation, both sides did not take a position that the revenue was or was not from transportation services. If we can take the position that the switching services are considered transportation revenue, then we would be able to include 100% of the sales in the numerator as intrastate revenue from transportation services. In 2015 there was $ 118 million of BOCT sales which the taxpayer excluded from the factor. I think that would be the question, and as I understand it switching services are not transportation services, but I could be wrong about that. Perhaps we can make a case that switching revenue are from transportation services.

Thank You,

Bob Ciofalo
Revenue Auditor
Illinois Department of Revenue
(217) 441-1044

From: Ciofalo, Robert
Sent: Tuesday, August 07, 2018 11:08 AM
To: Fliflet, Brian
Cc: Hawkins, Carla; Lariviere, Joann; Seitz, Marsha
Subject: RE: CSX Intermodal

Brian,

To answer your question, the answer would be no, it wouldn't be eliminated. It was determined through research on the 12/05 – 12/07 audit which eventually was submitted together with the 01 - 02 and 03-04 audits, (although the 01-02 audit was the one submitted at an earlier time and the one in court) that BOCT derived its income from outside customers. There were several contracts documented with outside customers. Therefore, it's income and factors were not from payments for services from CSXT.

Since BOCT was determined to be a disregarded entity, which is the same as saying it is a division of CSXT, and as over 50% of CSXT income qualifies CSXT as a transportation company, BOCT was included in the

transportation group as a division of CSXT, but the income of BOCT is not from transportation services, and there were no miles at the time associated with BOCT, its factor was zero but the income is still included.

Note: I just saw your comment before sending this. Although the factor is based on revenue since 12/31/2008, the Regulations are specific that the revenue be derived from transportation services.

The revenue that we use in the transportation factor for the first part (intrastate revenue) still must be derived from income from transportation services, which are receipts from movement or shipment of people, goods, etc. which originate and terminate in Illinois (which BOCT income does, as it is 100% Illinois). Then the second part of the computation is based on interstate miles which we use to arrive at the interstate revenue.

However, the court case and settlement determined that BOCT revenue was not from providing transportation services, so I don't think we would be able to include these sales in the factor, as the revenue is not from transportation services, but from the switching services.

Thank You,

Bob Ciofalo
Revenue Auditor
Illinois Department of Revenue
(217) 441-1044

From: Fliflet, Brian
Sent: Tuesday, August 07, 2018 10:15 AM
To: Hawkins, Carla; Lariviere, Joann
Cc: Seitz, Marsha; Ciofalo, Robert
Subject: RE: CSX Intermodal

Looks like we treated BOCT as a disregarded entity and flowed its factors and income up to CSX. Wouldn't most/all of BOCT's transactions be intercompany and eliminated?

Sincerely,

Brian Fliflet
Deputy General Counsel
Illinois Department of Revenue

From: Hawkins, Carla
Sent: Monday, August 06, 2018 11:42 AM
To: Fliflet, Brian <Brian.Fliflet@Illinois.gov>; Lariviere, Joann <Joann.Lariviere@Illinois.gov>
Cc: Seitz, Marsha <Marsha.Seitz@Illinois.gov>; Ciofalo, Robert <Robert.Ciofalo@Illinois.gov>
Subject: RE: CSX Intermodal

Thank you for your response. If you could provide a copy of the agreement for documentation purposes, that would be great. Thank you again.

Thank You

Carla Hawkins
Revenue Auditor III
IL Department of Revenue
P.O. Box 6525
Lee's Summit, MO 64064
217 685-1783
carla.hawkins@illinois.gov

From: Fliflet, Brian
Sent: Monday, August 06, 2018 11:38 AM
To: Hawkins, Carla; Lariviere, Joann
Cc: Seitz, Marsha; Ciofalo, Robert
Subject: RE: CSX Intermodal

I can get you a copy of the settlement agreement if you need it, but we did not allow alternative apportionment. We agreed with the taxpayer that the switching company was performing transportation services and belonged in the transportation group. I believe that we would reach the same conclusion unless their business practices have changed dramatically.

Sincerely,

Brian Fliflet
Deputy General Counsel
Illinois Department of Revenue

From: Hawkins, Carla
Sent: Monday, August 06, 2018 10:53 AM
To: Lariviere, Joann <Joann.Lariviere@Illinois.gov>; Fliflet, Brian <Brian.Fliflet@Illinois.gov>
Cc: Seitz, Marsha <Marsha.Seitz@Illinois.gov>; Ciofalo, Robert <Robert.Ciofalo@Illinois.gov>
Subject: RE: CSX Intermodal

Mr. Fliflet,
My name is Carla Hawkins and I am auditing CSX Transportation. I am wanting to know if I should still be honoring the agreement the department made with this taxpayer over 10 years ago, in which the taxpayer cannot provide written documentation for. It appears they were allowed to deviate from regular apportionment regulations and include a non-transportation company in their transportation group. Per the regulations, any agreement to special apportionment agreed to by the department must be up to date and be in writing. Thank you for your help.

Thank You

Carla Hawkins
Revenue Auditor III
IL Department of Revenue
P.O. Box 6525
Lee's Summit, MO 64064
217 685-1783
carla.hawkins@illinois.gov

From: Lariviere, Joann
Sent: Monday, August 06, 2018 10:26 AM
To: Hawkins, Carla
Cc: Seitz, Marsha
Subject: FW: CSX Intermodal

FYI

From: Fliflet, Brian
Sent: Monday, August 06, 2018 10:45 AM
To: Lariviere, Joann <Joann.Lariviere@Illinois.gov>
Subject: RE: CSX Intermodal

Our agreement was that the switching company could be in the transportation group.

From: Lariviere, Joann
Sent: Monday, August 06, 2018 5:46 AM
To: Forman, Ronald <Ronald.Forman@Illinois.gov>; Fliflet, Brian <Brian.Fliflet@Illinois.gov>
Cc: Ciofalo, Robert <Robert.Ciofalo@Illinois.gov>
Subject: FW: CSX Intermodal

It appears CSX does not want to abide by the agreement they signed and insisted on having that allowed them to save 3M a year for at least 10 years.
Let's set up a call to discuss how we want to proceed.

Joann

From: Ciofalo, Robert
Sent: Wednesday, August 01, 2018 5:01 PM
To: Lariviere, Joann <Joann.Lariviere@Illinois.gov>
Subject: CSX Intermodal

Joann,

It seems Carla is asking for that agreement that we would leave that company in the transportation group, and the taxpayer is saying they don't have one, and Carla's supervisor is saying not to honor it anyway, it seems like we can go after that adjustment.

Should we set up an audit on 2015 ? I completed 14 -15 but was following the history of not changing that adjustment ?

It should be kept separate from any 16-17 audit as that is a full audit and they were audited already so this would be one quick adjustment to include this company and their sales.

There could be issues, they could say its non-unitary and I think it's a paper company, but the parent holding company is in the transportation group. But then if not a transportation company and not unitary it's 100% Illinois separate company so I don't think they want that either, that would be worse for them.

I'll talk to you about it when you have a chance.

Thank You,

Bob Ciofalo
Revenue Auditor
Illinois Department of Revenue
(217) 441-1044