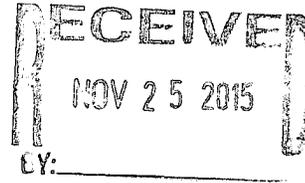


**ILLINOIS INDEPENDENT TAX TRIBUNAL
CHICAGO, ILLINOIS**

PEPPERIDGE FARM INCORPORATED)
)
Petitioner,)
)
v.)
)
ILLINOIS DEPARTMENT OF REVENUE,)
)
Respondent.)



No. 14 TT 139
Chief Judge James Conway

PETITIONER’S MOTION TO COMPEL PRODUCTION OF DOCUMENTS

Petitioner, Pepperidge Farm Incorporated (“Pepperidge Farm” or “Petitioner”), by its attorneys, Horwood Marcus & Berk Chartered, moves the Administrative Law Judge (“ALJ”) in this matter pursuant to Illinois Supreme Court Rule 214 and 86 Ill. Admin. Code § 5000.315 to enter an Order compelling the Illinois Department of Revenue (“Department” or “Respondent”) to produce certain documents requested in Petitioner’s Rule 214 discovery requests, and in support thereof, states as follows:

1. Pepperidge Farm filed its Petition against the Defendant in this matter, seeking adjudication that an affiliate, Campbell Sales Company, is not subject to Illinois corporate net income tax pursuant to Public Law 86-272 (15 U.S. C. Sec 381 et seq.).
2. Pepperidge Farm propounded written discovery requests upon Respondent in the form of Interrogatories pursuant to Illinois Supreme Court Rule 213 and Requests for Production pursuant to Illinois Supreme Court Rule 214.
3. Although Respondent provided some responses to the written discovery issued by Pepperidge Farm, Respondent raised certain objections to and failed and refused to produce responsive documents to no less than two of the document requests, specifically, Production

Request Nos. 6 and 7. Pepperidge Farm made the following requests and Respondent provided the following responses, now at issue herein:

Production Request No. 6:

A copy of Department's income tax audit manual.

Response:

The Department objects to Production Request No. 6 because the Department's Audit Manual is privileged and confidential, and therefore not subject to discovery. Further, the contents of the Department's audit manual do not constitute legal authority and is not the basis for issuing the Department's June 4, 2014 Notices of Deficiency. The Department's Audit manual provides guidance to the Department's auditors on auditing techniques and is not a policy statement. The disclosure of the contents of the audit manual would potentially harm the ability of the Department to effectively audit taxpayers and enforce the State's income tax statutes and regulations.

Production Request No. 7:

To the extent not covered by any of the above requests, any and all documents relating to the Board's review of the Years in Issue for Petitioner, including but not limited to any Board files for Petitioner, member recommendations and internal correspondence or memoranda.

Response:

The Board's Action Decision is included in the Audit file being presented in response to Production Request No. 3. The Department's litigation attorneys are prohibited by statute from accessing any documents provided to the Board or any other documentation pertaining to the Board determination.

4. On October 16, 2015, counsel for Pepperidge Farm wrote a letter to Respondent's counsel, pursuant to Illinois Supreme Court Rule 201(k), in an attempt to resolve the objections raised by Respondent to Production Request Nos. 6 and 7. A copy of the October 16, 2015, 201(k) letter is attached hereto as Exhibit A.

5. On October 29, 2015, counsel for Respondent wrote a letter to Petitioner's counsel responding to the 201(k) issues raised in the October 16, 2015 letter. A copy of the October 29, 2015, 201(k) response letter is attached hereto as Exhibit B. Respondent continues to stand on its objections and refuses to produce documents responsive to Request Nos. 6 and 7.

6. **Production Request No. 6**

Respondent should be compelled to produce a copy of its income tax audit manual. Under Illinois Supreme Court Rule 201(b)(1), the Department is required to provide "full disclosure regarding any matter relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking disclosure or of any other party, including the existence, description, nature, custody, condition, and location of any documents or tangible things, and the identity and location of persons having knowledge of relevant facts." The Respondent's audit manual is certainly relevant in this matter as it contains information used by auditors in their auditing role, and it likely contains information related to the auditor's determinations in this case. At the very least, it contains information that could lead to the discovery of relevant information.

Respondent's blanket assertion that the document is "privileged and confidential, and therefore not subject to discovery," is not sufficient. Indeed, the Respondent fails to expressly identify an alleged privilege as required by Rule 201(n). The Respondent also did not request a protective order. Significantly, the Director of the Department of Revenue recently announced that the Department will release a copy of the audit manual for public availability at some point in the future. CITE

Moreover, Respondent's October 29, 2015 letter inaptly argues that the audit manual cannot be relevant because it does not contain "any facts specific to the Petitioner or any other taxpayer."

The underlying tax assessment, on which the claim in this petition is based, stems from an audit of Petitioner by Respondent. The audit manual is a document created and maintained by Respondent and used by its auditors during the audit process. While it does not contain specific

facts regarding Petitioner, it likely contains information related to Respondent's position, approach and/or guidelines on which the auditor in this matter, or the Department itself, relied upon in determining its assessment. There is no basis for Respondent's withholding of this document and this Tribunal should compel its production.

7. **Production Request No. 7**

Respondent should also be compelled to produce all documents related to Petitioner's Informal Conference Board ("ICB") proceeding. Respondent produced only the ICB Action Decision, a document that Petitioner had already received as part of the ICB hearing process.

The sole objection raised by Respondent in support of withholding the ICB file is, "The Department's litigation attorneys are prohibited by statute from accessing any documents provided to the Board or any other documentation pertaining to the Board determination." The citation in support of Respondent's objection is 86 Ill. Admin. Code § 215.120(a) and (e).

While the Administrative Code protects the integrity of the ICB process by providing for confidentiality and confirming that the Action Decision is not directly subject to Administrative Review, the ICB itself is still controlled by and included within the Department of Revenue, the Respondent in this matter. The confidentiality and non-disclosure aspect of the ICB process is meant to protect the taxpayer by maintaining privacy similarly dictated in other tax laws.

But the confidentiality protections and the fact that certain notes do not become part of the audit file should not be turned around and used against the taxpayer itself. It is the taxpayer, like the Petitioner in this case, who engages the ICB process to assist during the Department's audit. All documents and records related to that process, unless protected by some other legitimate privilege, must be subject to discovery requests made under the Illinois Supreme

Court Rules and produced accordingly. Respondent cannot unilaterally choose to produce only certain records that it maintains.

Finally, Respondent's assertion that its attorneys, its Office of Legal Services, do not have access to the ICB records or are themselves prohibited from obtaining the records by statute is ineffectual. The relevant inquiry is not whether the party's lawyer maintains or controls the requested records. Rather, the relevant inquiry is whether the party itself has the records or knows of their location. In this scenario, the Department controls the ICB and the records of the ICB are certainly within Respondent's custody and control. An order compelling production of the records will protect any statutory concerns raised by Respondent's counsel.

8. The Illinois discovery rules require, "full disclosure regarding any matter relevant to the subject matter involved in the pending action..." Rule 201(b)(1), *Full Disclosure Required*. Disclosure is the object of discovery procedures, and trial judges are to make disclosure a reality. *Bachman v. General Motors Corp.*, 332 Ill.App.3d 760 (4th Dist. 2002) "Discovery is not a tactical game; rather, it is intended to be a mechanism for the ascertainment of truth, for the purpose of promoting either a fair settlement or a fair trial." *Copeland v. Stebco Products Corp.*, 316 Ill. App. 3d 932 (Ill. App. 1st Dist. 2000) (quoting *Boland v. Kawasaki Motors Manufacturing Corp., USA*, 309 Ill. App. 3d 645, 651 (2000)).

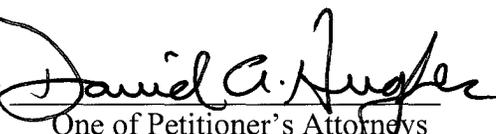
9. Respondent has failed to assert objections sufficient to withhold records responsive to Production Request Nos. 6 and 7 propounded by Petitioner. Petitioner should be granted an order compelling production of said requested documents.

WHEREFORE, Petitioner, Pepperidge Farm Incorporated, respectfully requests this Tribunal grant its motion and enter an Order compelling Respondent, the Illinois Department of

Revenue, to produce complete responses to Production Request Nos. 6 and 7, including, but not limited to, the Audit Manual and the relevant ICB file including all related records; and to grant any further relief as this Tribunal deems just and proper.

Respectfully submitted,

PEPPERIDGE FARM INCORPORATED,
Petitioner

By: 
One of Petitioner's Attorneys

Fred O. Marcus (fmarcus@hmblaw.com)
David A. Hughes (dhughes@hmblaw.com)
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(312) 606-3200

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he caused a copy of the foregoing **PETITIONER'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS** to be served on the other counsel of record by electronic mail before the hour of 5:00 p.m. this 25th day of November, 2015 addressed as follows:

Ronald Forman
ronald.forman@illinois.gov
Illinois Department of Revenue
100 W Randolph Street
Level 7-900
Chicago, IL 60601

Rebecca L. Kulekowskis
rebecca.kulekowskis@illinois.gov
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PEPPERIDGE FARM INCORPORATED)	
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Petitioner,)	
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v.)	No. 14 TT 139
)	
ILLINOIS DEPARTMENT OF REVENUE,)	Chief Judge James Conway
)	
Respondent.)	

NOTICE OF MOTION

To: Illinois Department of Revenue
Office of Legal Services
100 W. Randolph Street, Suite 7-900
Chicago, IL 60601

PLEASE TAKE NOTICE that on the 3rd day of December, 2015, the undersigned will appear before James M. Conway, Chief Administrative Law Judge, or another Administrative Law Judge designated in his stead, at the Illinois Independent Tax Tribunal, to present PETITIONER’S MOTION TO COMPEL PRODUCTION OF DOCUMENTS in the above captioned matter.

Respectfully submitted,

PEPPERIDGE FARM INCORPORATED
Petitioner

By: 
One of Petitioner’s Attorneys

Fred O. Marcus
David A. Hughes
David S. Ruskin
Samantha K. Breslow
HORWOOD MARCUS & BERK CHARTERED
500 West Madison Street
Suite 3700
Chicago, Illinois 60661
(312) 606-3200

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he caused a copy of the foregoing **NOTICE OF MOTION** to be served on the other counsel of record by electronic mail before the hour of 5:00 p.m. this 25th day of November, 2015 addressed as follows:

Ronald Forman
ronald.forman@illinois.gov
Illinois Department of Revenue
100 W Randolph Street
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Jonathan M. Pope
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A handwritten signature in black ink, reading "David C. Hughes", is written over a horizontal line.