ILLINOIS INDEPENDENT TAX TRIBUNAL
CHICAGO, ILLINOIS
NOTICE OF FILING

PREMIER AUTO FINANCE, INC.	)	
	)	
	)	
Petitioner,	)	**No. 15-TT-175**
v.	)	**Chief Judge James M. Conway**
	)	
ILLINOIS DEPARTMENT OF REVENUE,	)	
	)	
Respondent.	)	

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The undersigned representative for the Illinois Department of Revenue (the "Department") certifies that, on March 21, 2017, he filed the Department's Cross Motion for Summary Judgment with the Illinois Independent Tax Tribunal.

___s/Sean P. Cullinan__________
Sean P. Cullinan
Special Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned representative for the Illinois Department of Revenue certifies that, on March 21, 2017, he served the Department's Cross Motion for Summary Judgment on the individuals identified above, at the email addresses shown above.

__s/Sean P. Cullinan___________
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DEPARTMENT'S CROSS-MOTION FOR SUMMARY JUDGMENT

Now comes the Department of Revenue of the State of Illinois, by and through its authorized representative, Special Assistant Attorney General Sean P. Cullinan and moves the Chief Administrative Law Judge pursuant to 735 ILCS 5/2-1005(a) to enter an order granting the Department's motion and in support thereof states as follows:

BACKGROUND

Aon Corporation ("Aon") is parent to an affiliated group of entities. For tax years ending ("TYE") 12/31/06 through 12/31/08 inclusive, Aon filed three Illinois unitary business group combined returns ("Illinois UBG return"): one Illinois UBG return for general corporations, one Illinois UBG return for financial organizations, and one Illinois UBG return for insurance companies. The TYE 2006-2008 Illinois UBG returns for financial organizations included Premier Auto Finance, Inc. ("Premier"); Cananwill, Inc. (PA); Cananwill, Inc. (CA), and Cananwill Corporation (DE) (hereinafter the "Cananwill entities") as well as other affiliates. In addition, due to the fact Aon filed three different Illinois UBG returns, a portion of Aon's income/loss, as parent, was included in each of the three Illinois UBG returns on a pro rata basis.

The pro rata amount of Aon's income/loss included in each of the three Illinois UBG returns was based on the total amount of gross income of the entities included in each UBG return, respectfully.

The Department's audit determined and verified Petitioner's original filing position that a unitary relationship existed in the UBG returns for the financial organizations. Premier owned 100% of the Cananwill entities as well as a number of other unitary member subsidiaries. However, it was the Cananwill entities that contributed the vast majority of income to the UBG by far.

On or about March 12, 2012, Petitioner filed amended returns for the Illinois UBG returns for the financial organizations for TYE 12/31/06 (requesting a refund of $618,358); 12/31/07 (requesting a refund of $956,200); and 12/31/08 (requesting a refund of $43,461) ("Premier Claims"). The main adjustment made in the Premier Claims was removing the Cananwill entities from the Illinois UBG financial organization returns. Petitioner argues that while the Cananwill entities are unitary they are precluded from filing with the Illinois UBG financial organization returns because they are not financial organizations, specifically, they are not sales finance companies. Simultaneous with the Premier Claims, Petitioner took the removed Cananwill entities from the Illinois UBG returns for financial organizations and placed them into Aon's Illinois UBG returns for the general corporations. On June 22, 2015, the Department issued Petitioner a notice of denial, denying the Premier Claims for TYE 2006, 2007 and 2008. On May 22, 2015, the Department issued Aon a notice of proposed deficiency for TYE 2006-2010 proposing an assessment of tax, penalties and interest of $272,116.[1]

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[1] A notice of proposed deficiency is not within the jurisdiction of the Illinois Independent Tax Tribunal. *See* 35 ILCS 1010/1-45(e) (3). Any arguments related to it should be disregarded.

Premier, a wholly owned subsidiary of Aon, is in the business of providing loans to purchase automobiles. In the Premier Claims, Petitioner stipulates that Premier is a financial organization and properly in the Illinois UBG returns for financial organizations for TYE 2006-2008. There is no issue regarding inclusion of Premier. The issue relates to including the Cananwill entities.

Founded in 1937, the Cananwill entities, owned indirectly by Aon (through Premier), are one of the largest premium finance business companies in the world. They provide financing for billions of dollars of insurance premiums on a worldwide basis. Their clients range from small businesses to Fortune 500 companies. Retail and wholesale insurance brokers and insurance companies market their products.

Insurance premium financing companies lend cash to customers that use the proceeds to finance their vital insurance premiums in one lump sum permitting the customer to spread their re-payments over the year, usually in monthly installments. Premium financing is used to cover several lines of insurance: property, general liability, auto, workers' compensation, umbrella and excess policies. Financing insurance premiums is beneficial to all parties involved. Specifically, insureds like it because it frees up funds and allows for better cash management as described more fully *infra*. The Cananwill entities like it because the insured pays a monthly finance charge and assigns them the power of attorney right to cancel the policies for nonpayment. The brokers and agents like it because it enhances their insureds' ability to pay their premiums.

Many commercial insurance policies are written by an insurance company on a payment plan, such as 25% down and three quarterly payments. While insurance companies at one time generally offered financed premiums in 12 equal payments, they rarely do so anymore because it does not create equity in the policy--if the insured walks away or cancels the policy, there's

nothing left to cover the premium. Even those insurers who do offer payment plans usually collect enough premium in the down payment to cover costs.

Premium financing solves this problem as well as provides a source of outside funding available to an insured beyond its normal credit lines. In particular, financing insurance premiums creates an additional line of credit that doesn't impact a business' original line of credit and customers don't need to make the large initial cash down payment. For companies whose premiums are substantial, this cash is available for other purposes and investments. Moreover, premium financing differs from an outright bank loan as premium finance lenders do not require any collateral for the loans other than the policies themselves, whereas banks typically require other assets--usually machines, inventory or accounts receivable. Given that most insureds already have loans for the operating of their business; layering on top everything else an amount to pre-pay their insurance on time would impact their borrowing capacity and ability to do business.

In Illinois, premium finance companies like the Cananwill entities, are regulated under the Premium Finance Regulation Act (215 ILCS 5/513a1, *et seq*.). That Act defines a premium finance company as:

> (d) "Premium finance company" means any person engaged in the business of financing insurance premiums, of entering into premium finance agreements with insureds, or of acquiring premium finance agreements.

See 215 ILCS 5/513a2 (d)

A premium finance agreement is:

> (c) "Premium finance agreement" means a promissory note, loan contract, or agreement by which an insured or prospective insured promises to pay to another person an amount advanced or to be advanced thereunder to an insurer in payment of premiums on an insurance contract together with a service charge and which contains an assignment of or is otherwise secured by the unearned premium payable by the insurer upon cancellation of the insurance contract;…

See 215 ILCS 5/513a2(c)

The premium finance agreement must contain the following:

> (a) A premium finance agreement must be dated and signed by or on behalf of the named insured, and the printed portion shall be in at least 8-point type. The following items must be set forth on the first page of the accepted finance agreement:
>
> (1) the total amount of the premiums;
> (2) the amount of the down payment;
> (3) the principal balance (the difference between items (1) and (2));
> (4) the amount of the finance charges expressed in dollars as an annual percentage rate;
> (5) the balance payable by the insured (sum of items (3) and (4));
> (6) the number of installments, the due dates thereof, and the amount of each installment expressed in dollars; and
> (7) the policy numbers or binder numbers.

See 215 ILCS 5/513a9 (a)

Finally, there are detailed rules regarding caps on the service fee charged in a premium finance agreement (*See* 215 ILCS 5/513a10) and on cancelling a policy for non-payment of an installment by an insured/borrower. (*See* "Not less than 10 days written notice shall be mailed to the named insured of the intent of the premium finance company to cancel the insurance contract unless the default is cured within the 10 day period."… 215 ILCS 5/513a11).

ARGUMENT

A. Standard of Review

The purpose of a motion for summary judgment is the determination of whether there exist any genuine issues of material fact. Purtill v. Hess, 111 Ill. 2d 229, 240 (1986); Colvin v. Hobart Bros., 156 Ill. 2d 166, 169, 620 N.E. 2d 375 (1993); *See also*, Gilbert v. Sycamore Mun. Hosp., 156 Ill. 2d 511, 622 N.E. 2d 788 (1993). The movant need not prove its case at the summary judgment stage, only present some evidence in support of its motion. Wiseman-Hughes Enterprises, Inc. v. Reger, 248 Ill. App. 3d. 854, 857, 617 N.E. 2d 1310 (2nd Dist. 1993).

Summary judgment should only be allowed when the right of the movant is clear and free from any doubt. Summary judgment is proper if, and only if, the pleadings, exhibits and other relevant matters on file show that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Purtill v. Hess, 111 Ill. 2d 229, 240 (1986); Smith v. Tri-R Vending, 249 Ill. App. 3d 654, 657, 619 N.E. 2d 172, *app. den.*, 154 Ill. 2d 569, 631 N.E. 2d 718 (1993). As a general rule, summary judgment is encouraged to dispose of litigation efficiently and expeditiously. Bryant v. Glen Oaks Medical Center, 272 Ill. App. 3d 640, 650 N.E. 2d 622 (1st Dist. 1995); Bolingbrook Equity I Ltd. Partnership v. Zayre of Illinois, Inc., 252 Ill. App. 3d 753, 624 N.E. 2d 1287 (1st Dist. 1993); Lavat v. Fruin Conlon Corp., 232 Ill. App. 3d 1013, 597 N.E. 2d 888 (1st Dist. 1992).

B. Illinois Law Treats the Sale of Insurance as the Sale of a Service

The issue presented in this case is whether the Cananwill entities, as premium finance companies, are sales finance companies as defined in the Illinois Income Tax Act ("IITA") and related regulations found in the Illinois Administrative Code ("Ill. Adm. Code") such that it was required to file as members of Aon's Illinois UBG returns for financial organizations for TYE 12/31/06 through 12/31/08. Section 1501(a)(8)(c)(i) of IITA, 35 ILCS 5/1501(a)(8)(c)(i), defines a "sales finance company" as:

> (C) For purposes of subparagraph (A) of this paragraph, the term "sales finance company" has the meaning provided in the following item (i) or (ii): (i) A person primarily engaged in ***one or more*** of the following businesses: the business of purchasing customer receivables, the business of making loans upon the security of customer receivables, ***the business of making loans for the express purpose of funding purchases of*** tangible personal property or ***services by the borrower***, or the business of finance leasing. (Emphasis Added)

35 ILCS 5/1501(a)(8)(c)(i).

The Department's regulations, specifically, 86 Ill. Adm. Code, Ch. I, Section 100.9710(d)(10) states, in relevant part, that:

> 10) Entities engaged in the business of a "sales finance company". The term "sales finance company" has the meaning provided in subsection (d)(10)(A) or (B):
>
> A) Under IITA Section 1501(a)(8)(C)(i), the term "sales finance company "means an entity primarily engaged in one or more of the following businesses: the business of purchasing customer receivables, the business of making loans upon the security of customer receivables, ***the business of making loans for the express purpose of*** *funding* purchases of tangible personal property or ***services by the borrower,*** or the business of finance leasing. For purposes of this subsection (d)(10)(A), a "customer receivable" means:…
>
> iv) ***A loan, or balance under a loan, made by a lender for the express purpose of funding purchases of*** tangible personal property or ***services by the borrower***.
>
> A customer receivable need not provide for payment of interest on deferred payments. A sales finance company may purchase a customer receivable from, or make a loan secured by a customer receivable to, the seller or lender in the original transaction or from or to a person who purchased the customer receivable directly or indirectly from that seller or lender.
>
> ****************************
>
> C) Characteristic Services. A "sales finance company" is defined by its characteristic services in subsections (d)(10)(A) and (B) of this Section. A company satisfies the primary test of subsection (d)(10)(A) of this Section if more than 50% of its gross income is from its characteristic services.
>
> D) Regulation. There is no requirement that a sales finance company that meets the definition provided in subsection (d)(10)(A) or (B) of this Section be subject to license or regulation by any state or federal authority. (Emphasis added)

See 86 Ill. Adm. Code, Ch. I, Section 100.9710(d)(10)(A); 86 Ill. Adm. Code, Ch. I, Section 100.9710(C); 86 Ill. Adm. Code, Ch. I, Section 100.9710(D). Therefore, under the IITA and Ill. Adm. Code, it is quite clear that if 50% or more of the gross income of an entity derives from a loan, or balance of a loan, for the express purpose of funding purchases of services by the borrower that entity qualifies as a sales finance company necessitating the filing of an Illinois UBG return under the rules for financial organizations.

Petitioner frames its argument as follows: that the purchase of insurance is the purchase of an intangible, therefore, because it is not the purchase of tangible personal property it cannot qualify as a sales finance company. However, this argument fails to take into account that a company that loans money for the purchase of services is also eligible to be a sales finance company. More importantly, Petitioner clouds the distinction between intangible and service. The two terms are not mutually exclusive. As an example, borrowing money from a bank to purchase a home is a service that is evidenced by a mortgage, which is a contract. If the bank sells the mortgage to a third party, the bank has sold intangible personal property. The sale of the mortgage does not alter the fact that the underlying subject of the contract, i.e., loaning money, is a service. Illinois courts have held that a service is an intangible. "What plaintiff is asking defendant to return is a funeral **service**, an **intangible** which is incapable of being returned." (Emphasis added) Terrace Co. v. Calhoun, 37 Ill. App 3d 757 (1976): "Clearly, it is the performance of this service and not the delivery of a physical document which constitutes the dominant nature of the transaction between CT&T and its customers. Compare Tri-State Broadcasting, *supra* note 10. Since **services** are **intangible**, see Baum, *supra* note 3, at 875, even plaintiffs' characterization of title insurance's principal purpose is insufficient to invoke § 2(c)." (Emphasis added) Freeman v. Chicago Title and Trust, 505 F. 2d 527 (7th Cir. 1974). Another case, Baum v. Investors Diversified Services, 409 F. 2d 872 (7th Cir. 1969) held that mutual fund shares are an intangible services:

> A mutual fund share represents a fractional ownership in a large investment account. It is, in essence a service contract between an investor and the investment company whereby the investor places his money in the hands of the investment company in expectation of realizing a financial gain…
>
> In determining this issue we feel compelled to look at the dominant nature of a mutual fund share. It is not merely a piece of paper which happens to be a tangible thing. It is a representation of a fractional ownership in a large investment account. The rights which

> are owned- investment services and redemption rights – are intangible, and are not commodities.

See Baum v. Investors Diversified Services, 409 F. 2d 872, 875. Petitioner fails to admit that a service is a type of intangible.

For at least thirty six years, Illinois courts have held that the sale of insurance is a sale of services. A seminal Illinois case holding that insurance is a service is Fox v. Industrial Casualty Insurance Co., 98 Ill. App. 3d 543, 424 N.E. 2d 839 (1981). In Fox, plaintiffs filed a class action against Northwest Insurance Brokers, Inc. ("Northwest") and Industrial Casualty Insurance Company ("Industrial") alleging violations of the Illinois Consumer Fraud and Deceptive Practices Act ("Illinois Consumer Fraud Act"). Northwest engaged in the sale of "credit automobile insurance." When a plaintiff purchased the automobile insurance, Northwest sold and charged the plaintiff for accidental death policies issued by Industrial which the plaintiffs alleged they neither requested nor ordered. In addition, Northwest failed to advise plaintiffs of the additional cost of said accidental death insurance. The automobile policies provided coverage for six months—whereas the accidental death policies provided coverage for one year. When some plaintiffs renewed the automobile policies, Northwest, without their knowledge or consent, renewed and charged for overlapping one-year accidental death policies. Plaintiffs alleged that Northwest and Industrial violated the Illinois Consumer Fraud Act in various ways. Northwest and Industrial argued the Illinois Consumer Fraud Act was inapplicable. Rejecting their argument, the court in Fox held that:

> [T]he Illinois Consumer Fraud Act is designed to protect consumers from unfair or deceptive acts and practices and the Act itself defines a consumer as "any person who purchases or contracts for the purchase of merchandise***The Act defines merchandise as including "any objects, wares, goods, commodities, intangibles, real estate situated outside the state of Illinois, or *services. The sale of*

> *insurance is clearly a service* and insureds are thus consumers within the protection of the [Illinois] Consumer Fraud Act. (Emphasis added.)

Fox, 89 Ill. App. 3d at 546. Petitioner's argument that the sale of insurance is not a service cannot be reconciled with the holding in this case and its progeny, and therefore such argument should be rejected.

Similarly, the court in McCarter v. State Farm Mutual Automobile Insurance Company, 130 Ill. App. 3d 97, 101, 473 N.E.2d 1015 (3rd Dist. 1985) held that the sale of insurance was the sale of a service. (*Citing* Fox, *supra*.). However, the court in McCarter refused to apply the Illinois Consumer Fraud Act to its facts as it involved the plaintiff's third-party claim against an at fault driver. A motorcycle hit the plaintiff, and both the plaintiff and the motorcycle driver had insurance with the defendant, State Farm. Plaintiff failed to file a lawsuit within the two-year statute of limitations. Plaintiff alleged that State Farm's refusal to pay the maximum allowed under the policy violated the Illinois Consumer Fraud Act. The court held that the transaction did not involve a sale of insurance, rather a third-party claim alleging fault on behalf of its insured, and held the Consumer Fraud Act didn't apply.

Contrast this to the case of P.I.A. Michigan City v. National Porges Radiator, 789 F. Supp. 1421 (N.D. Ill. 1992), wherein plaintiff P.I.A. Michigan City, Inc. d/b/a Kingwood Hospital ("PIA") provided medical services to Earl Wilson from May 12th through June 11th, 1990. Wilson was employed by National Porges Radiator Corporation ("National Porges"). National Porges provided health insurance for its employees through a medical plan. At the time Wilson was first admitted to PIA on May 12, 1990, the hospital obtained approval from the insurance for his medical treatment. There were follow up approvals for care up and through June 9th. On June 8th, the insurance carrier

informed PIA that National Porges failed to pay its May premium and National Porges withdrew from the medical plan. National Porges informed the insurance carrier they would not pay the May premium and instead obtained insurance through another carrier. PIA called the new carrier who informed them that Mr. Wilson's treatment was not covered under the new policy. Mr. Wilson had no knowledge that his employer switched insurance coverage. National Porges informed PIA it had no intention of paying for Wilson's treatment.

PIA brought suit and alleged in one count that the denial of the insurance claim violated the Illinois Consumer Fraud Act. Defendant argued the Illinois Consumer Fraud Act only applied to *sales* of insurance not to *adjustments* to claims citing McCarter. The court distinguished McCarter as a third-party claim injury by their insured, whereas P.I.A. involved a claim against the insurance company by its own insured. In its decision in favor of PIA, the court unequivocally concluded that insurance was a service, holding, in relevant part, that:

> As to Count III, Principal Mutual argues that denial of an insurance claim by an insurer is not the type of transaction to which the Consumer Fraud Act applies. It is well-settled that *the sale of insurance is a service* to which the protections of the Consumer Fraud Act apply. Peterson v. Allstate Insurance Co., 171 Ill. App. 3d 900, (1st Dist.) *appeal denied* 122 Ill.2d 593 (1988) (quoting Fox v. Industrial Casualty Insurance Co., 98 Ill. App. 3d 543, 424 N.E. 2d 839 (1981)). Citing McCarter v. State Farm Mutual Automobile Insurance Company, 130 Ill. App. 3d 97, 473 N.E.2d 1015 (3rd Dist. 1985). (Emphasis added).

P.I.A. Michigan City, 789 F. Supp. at 1426.

Inasmuch as the sale of insurance is a service, an entity that borrows funds from one of the Cananwill entities to purchase insurance is purchasing a service. Accordingly, the Canawill entities (as premium finance companies) are lending funds to purchase a service, and therefore

clearly falls within the meaning of a "sales finance company" as defined in IITA Section 1501(a)(8)(c)(i). *See also* 86 Ill. Adm. Code Section 100.9710(d) (10).

C. **Most States Treat the Sale of Insurance as the Sale of a Service**

Relying on a common sense meaning of the term "service," courts in other states, like the Illinois courts, have concluded that insurance is a service under their consumer protection statutes. Showpiece Homes Corp. v. Assur. Co. of America, 38 P.3d 47, 58 (2001) ("…[T]he sale of insurance can be classified as a sale of goods, services or property and is thus subject to the provisions of the [Colorado Consumer Protection Act]."); Doyle v. St. Paul Fire & Marine Ins. Co., 583 F. Supp. 554, 556 (D. Conn. 1984) ("…insurance is a service under Connecticut's consumer protection act and is subject to that act…"); McCrann v. Klaneckey, 667 S.W.2d 924, 926, 927 (Tex. App. 1984) ("… 'services' include the purchase of insurance policies" "…consumer protection legislation applies to insurance."); Deetz v. Nationwide Mutual Insurance Co., 20 D.&C.3d 499 (Dauphin, 1981) (Pennsylvania) ("no one could argue that ... insurance coverage is not a service or a product which can be subjected to consumer fraud."); Beernink v. Rodwell, *455* N.W.2d 87 (Ct. App. Minn. 1987) ("…insurance is a service under statute in which term was undefined.").

Concluding that insurance is a service and falls under Kentucky's Consumer Protection Act, the Supreme Court of Kentucky noted that only four states -- Montana, Louisiana, Michigan, and Vermont -- had ruled to the contrary, however it pointed out that except for Vermont, all of these states did so on the basis of an explicit statutory exemption for the insurance industry. Stevens v. Motorists Mutual Insurance Co., 759 S.W.2d 819, 821 (Ky. 1988). The Vermont decision, meanwhile, provided no explanation or analysis at all. Wilder v. Aetna Life & Casualty Insurance Co., 433 A.2d at 309 (1981). The Colorado Supreme Court took note

of the Vermont decision, and found it unpersuasive in light of the contrary reasoning of the majority of decisions. Showpiece Homes*, supra,* 38 P.3d at 58. Although courts in many other states have held that insurance is a service subject to their consumer protection statutes, only one (Vermont) has concluded that insurance is not a service, and it provided no reason for doing so.

D. **In Numerous Instances Illinois Statutes and Case Law, as well as Other State's Statutes and Case Law Treat the Sale of Insurance as the Sale of a Service**

Outside the context of the Illinois Consumer Fraud Act, the Illinois statutes make numerous references to insurance as a "service." For example, 30 ILCS 575/4f, Award of State Contracts states: ("(1) It is hereby declared to be the public policy of the State of Illinois…to use businesses owned by minorities, females, and persons with disabilities in the area of goods and services, including, but not limited to, **insurance services**, investment management services… (a) When a State agency…awards a contract for **insurance services**, for each State agency… (d) When a community college awards a contract for **insurance services**,…(4)(A) For **insurance services**:…); 415 ILCS 135/45, Insurance Account ("(e-5) If an insurer sends a second notice to an owner or operator demanding immediate payment of a past-due premium for **insurance services** provided pursuant to this Act…"); 205 ILCS 5/48.2 Prohibition against certain activities ("(a) Any bank, subsidiary, affiliate, officer or employee of such bank subject to this Act shall not: (1) grant any loan on the prior condition, agreement or understanding that the borrower contract with any specific person or organization for the following: (A) **insurance services**…(2) require that **insurance services**, legal services, real estate services or property management services …")

Illinois courts have also held that insurance is a service outside the context of the Illinois Consumer Fraud Act. For instance, in the context of the Fair Housing Act, the 7th Circuit upheld insurance as being included in the definitions of services: "Plaintiffs also submit that property

insurance is a "**service**" rendered "in connection" with the sale of the dwelling. If the world of commerce is divided between "goods" and "services," then insurers supply a "service." (Emphasis added) N.A.A.C.P. v. American Family Mutual Insurance, 978 F. 2d 287 (7th Cir. 1992); "The terms "manufacture," "produce," "import," and "distribute" are identifiable with tangible, manufactured goods, not with intangible items or **services** such as insurance." (Emphasis added) Kenebrew v. Connecticut General Life Insurance Company, 882 F. 2d 749 (1995).

Many other state statutes have recognized insurance as a sale of a service. For instance, California statutes refer to insurance as a "service." *E.g.,* Gov. Code Sec. 6599.06(b) ("providing ... insurance services to a city"); Health & Safety Code Sec. 123210(b)(2) ("catastrophic health insurance services"); Cal. Ins. Code Sec. 12156 ("Insurance service is the getting or giving, with a service contract or as a result of membership in or affiliation with a motor club, or a policy of insurance ...."); Pub. Contracts Code Sec. 20111(c) ("section shall not apply to ... insurance services ..."); 10 CCR 107.601(e) [insurance regulation] ("rendering the insurance services"); 10 CCR 260.140.113.10(c)(4) [insurance regulation] ("[flees for insurance services"); 10 CCR 23689.4 (d)(3)) [insurance regulation] ("[t]he consumer ... no longer obtains insurance services with or through the licensee").

California court opinions also contain various references to insurers as service providers. *E.g.,* Occidental Life Ins. Co. v. State Board of Equalization, 139 Cal. App. 2d 468, 472 (1956) ("Furnishing that *service,* that insurance against loss, it makes a proper charge to cover the cost of the *service* which it renders .... It is simply payment for the valuable *service* it renders. Whether that *service* be paid for on the spot where the *service* is rendered ....") (Emphasis added); White v. Western Title, 40 Cal. 3d 870, 881 (1985) ("court ... must also consider the

reasonable expectations ... as to the type of service which the insurance entity [offers].").

The California Supreme Court has long recognized that insurance is a service to insureds and to the public:

> [Insurers are] public purveyors of a vital *service* labeled quasi-public in nature. Suppliers of *services* affected with a public interest must take the public's interest seriously, necessarily placing it before their interest in maximizing gains and limiting disbursements.... As a supplier of a public service rather than a manufactured product, the obligations of the insurers go beyond meeting reasonable expectations of coverage.

Egan vs. Mutual of Omaha Insurance Company, 24 Cal.3d 809, 820 (1979).

Based on the foregoing, statutes and courts in various other jurisdictions have adopted the same position with respect to insurance as have the statutes and courts in Illinois, namely that insurance is a service. Therefore, in the instant matter, this Tribunal should conclude that the entities that borrowed funds from the Canawill entities used such funds to purchase services.

E. **Federal Law Treats the Sale of Insurance as the Sale of a Service**

Federal law refers to insurance as a service. The federal law of intellectual property places insurance in the category of "services." See e*.g.,* American International Group v. American International Bank, 926 F. 2d 829, 830 (9th Cir. 1991) ("a service mark is a distinctive mark used in connection with the sale or advertising of services, such as insurance ...."); Title 12 U.S.C. Sec. 2211 refers to "insurance services." 12 U.S.C. 2211 ("a corporation so organized shall have no authority ... to ... provide insurance services ...."); Section 3604(b) of the Fair Housing Act (U.S.C. Title 42) prohibits discrimination "in the provision of services ... in connection" with the sale or rental of housing. Regulations issued by the Secretary of Housing define services to include "[r]efusing to provide ... property or hazard insurance for dwellings or

providing such ... insurance differently because of race." C.F.R. Sec. 100.70 (d) (4). Case law, moreover, has affirmed this interpretation. *See, e.g.,* Nevels v. Western World Ins., 359 Scup. 2d 1110 (W.D.WA. 2004) ("liability insurance ... constitutes a service in connection with a dwelling."). Insurance is clearly understood to be a "service" in the broader legal culture.

F. The Statutes, Regulations and Cases Cited by Petitioner Do Not Support Petitioner's Argument that the Sale of Insurance is Not a Service

The holding in Wendy's International, Inc. v. Brian Hamer, 996 N.E.2d 1259 (2013), does not support Petitioner's position that insurance is not a service. In Wendy's, the taxpayer filed a motion for summary judgment that claimed it was not required to include its wholly owned captive insurance company, Scioto, in its Illinois combined tax returns as it was a *bona fide* insurance company required to apportion its business income under the insurance company rules of the IITA. Wendy's argued Scioto met the definition of an insurance company under federal law, and further claimed Scioto was engaged in the insurance business because it effectuates both risk shifting and risk distribution.

The court held in favor of Wendy's by recognizing that under federal income tax law, Scioto's insurance arrangements with its affiliates met the requirements of risk shifting and risk distribution. The case, however, had nothing whatsoever to do with whether the sale of insurance is the sale of a service. Also, contrary to Petitioner's assertion, the Wendy's court did not "cite approvingly" to the U.S. Supreme Court decision in Helvering v. Le Grierse, 312 U.S. 531 (1941). Instead, the court in Wendy's merely cited Helvering for the proposition that "under federal law, insurance involves both risk shifting and risk distribution," which is completely unrelated to the issue in the case at bar. Wendy's, Ill App (4th) 110678, ¶32. Further, the court in Wendy's did not refer to insurance as an "intangible" asset as Petitioner insinuates in its brief.

(*See* Petitioner's Motion for Summary Judgment, p.7). In fact, the Wendy's decision does not even contemplate the term "intangible." Therefore, Petitioner's citation to Helvering in the Wendy's decision was not related, in any manner, to whether insurance was a service. It, therefore, is not relevant in determining the present matter.

Next, the Petitioner cites to the Internal Revenue Code contending it demonstrates that insurance is an intangible and not a service. 26 USCA § 197 is entitled "Amortization of goodwill and certain other intangibles." The specific provision cited in Petitioner's brief, 26 USCA § 197(f) (5), deals with "reinsurance" and reads as follows:

> (5) Treatment of certain reinsurance transactions. In the case of any amortizable section 197 intangible resulting from an assumption reinsurance transaction, the amount taken into account as the adjusted basis of such intangible under this section shall be the excess of—
> (A) the amount paid or incurred by the acquirer under the assumption reinsurance transaction, over
> (B) the amount required to be capitalized under section 848 in connection with such transaction. Subsection (b) shall not apply to any amount required to be capitalized under section 848.

See 26 USCA § 197(f) (5). This section is clearly inapplicable as we are not dealing with reinsurance, but the financing of insurance purchased by the borrower.

In addition, the federal regulations that Petitioner cited in its brief are equally inapposite:

> (4)*Information base.* Section 197 intangibles include any information base, including a customer-related information base. For this purpose, an information base includes business books and records, operating systems, and any other information base (regardless of the method of recording the information) and a customer-related information base is any information base that includes lists or other information with respect to current or prospective customers. Thus, the amount paid or incurred for information base includes, for example, any portion of the purchase price of an acquired trade or business attributable to the intangible value of technical manuals, training manuals or programs, data files, and accounting or inventory control systems. Other examples include the cost of acquiring customer lists, subscription lists, insurance expirations, patient or client files, or lists of newspaper, magazine, radio, or television advertisers.

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> (6)*Customer-based intangibles.* Section 197 intangibles include any customer-based intangible. A customer-based intangible is any composition of market, market share, or other value resulting from the future provision of goods or services pursuant to contractual or other relationships in the ordinary course of business with customers. Thus, the amount paid or incurred for customer-based intangibles includes, for example, any portion of the purchase price of an acquired trade or business attributable to the existence of a customer base, a circulation base, an undeveloped market or market growth, insurance in force, the existence of a qualification to supply goods or services to a particular customer, a mortgage servicing contract (as defined in paragraph (c)(11) of this section), an investment management contract, or other relationship with customers involving the future provision of goods or services. (See, however, the exceptions in paragraph (c) of this section.) In addition, customer-based intangibles include the deposit base and any similar asset of a financial institution. Thus, the amount paid or incurred for customer-based intangibles also includes any portion of the purchase price of an acquired financial institution attributable to the value represented by existing checking accounts, savings accounts, escrow accounts, and other similar items of the financial institution. However, any portion of the purchase price of an acquired trade or business attributable to accounts receivable or other similar rights to income for goods or services provided to customers prior to the acquisition of a trade or business is not an amount paid or incurred for a customer-based intangible.
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> ***********************************
>
> 5) *Treatment of certain insurance contracts acquired in an assumption reinsurance transaction* -
>
> (i)*In general.* Section 197 generally applies to insurance and annuity contracts acquired from another person through an assumption reinsurance transaction. *See* § 1.809-5(a)(7)(ii) for the definition of assumption reinsurance. The transfer of insurance or annuity contracts and the assumption of related liabilities deemed to occur by reason of a section 338 election for a target insurance company is treated as an assumption reinsurance transaction. The transfer of a reinsurance contract by a reinsurer (transferor) to another reinsurer (acquirer) is treated as an assumption reinsurance transaction if the transferor's obligations are extinguished as a result of the transaction…

See 26 C.F.R. 1.197-2(b) (4); 26 C.F.R. 1.197-2(b) (4) & (6); 26 C.F.R. 1.197-2(g) (5).

First, with regard to 26 C.F.R. 1.197-2(b) (4), the information base regarding insurance expirations in no way addresses the issue of whether insurance is the sale of a service. Second, 26 C.F.R. 1.197-2(b)(4) defines customer based intangibles as: "any composition of market, market share, or other value resulting from the future provision of goods ***or services*** pursuant to contractual or other relationships in the ordinary course of business with customers…"

(Emphasis added). This definition encompasses services, therefore, it supports the Respondent's position that insurance is a service. Finally, 26 C.F.R. 1.197-2(g) (5) deals with reinsurance and is not relevant to the operation of a premium finance company.

Petitioner next cites to a case wholly unrelated to our present matter. In the case of Griffin Systems v. Washburn, 153 Ill. App. 3d 113 (1987) the issue was whether there was a sale of an insurance policy or whether there was a sale of a warranty or a service contract. If it was the sale of an insurance policy, then plaintiff violated the Insurance Act by not having an insurance license. The Court found that the agreement constituted an insurance policy as it indemnified the customer; it agreed to reimburse the customer for a possible future loss to a specified piece of property caused by a specified peril, namely, mechanical failure of a covered automobile part. More specifically, it distinguished this from warranties and service contracts when it held:

> This differed from a warranty or service contract in that the respective companies *manufacture or sell the products which they agreed to repair or replace.* No third parties are involved, nor is there a risk accepted which the company, because of its expertise, is unaware of. Through a warranty or service contract, a company simply guarantees that its own product will perform adequately for a period of time. (Emphasis added)

Griffin Systems, 153 Ill. App. 3d at 117-118.

This holding distinguishes an insurance policy from a warranty or service contract based on the fact that the former does not involve guaranteeing its *own* product. In the present matter, no such distinction is necessary. It is undisputed there was the sale of insurance through a licensed insurance company whose premium was financed by the Cananwill entities. Petitioner seems to *infer* this case stands for the proposition that because an insurance policy may coordinate with a third party for repair/replacement/services in satisfying a claim, as opposed to repairing its *own* product, insurance is unlike a "service" contract. However, this issue was not

before the court in Griffin nor was it addressed. Instead, the Griffin court distinguished an insurance policy from a warranty and service contract; the issue of insurance being a service was never raised or decided.

Similarly, in Homebound Services v. Illinois Department of Insurance, 365 Ill. App. 3d 267 (2006), the Department of Insurance issued a cease and desist order stating that the contract being sold was insurance and that it was being sold without the entity being properly licensed. Homeward Bound operates as "The Nursing Home Alternative" for elderly persons, providing in-home assistance with daily tasks. The contract between Homeward Bound and its customers lasts one year and excludes coverage for medical treatment or hospital care. Persons currently hospitalized, residing in a nursing home, or terminally ill are not eligible for Homeward Bound's services. The contract had a fee structure based partly on each customer's medical history for the previous three years. A customer's fee is determined by their classification and age. Each contract includes a six- or twelve-month waiting period during which the customer cannot receive services for a health problem that existed at the time of contracting. The length of the waiting period depends partly on the customer's classification.

When a customer seeks assistance under his or her contract, they must first create a "Plan of Service" with a local home care agency and Homeward Bound. This procedure is designed to ensure that the required waiting period has been met, and that Homeward Bound is contractually obligated to provide the type of assistance sought. Customers could purchase a contract in advance of an injury as security against the possibility of the injury happening. Homeward Bound's business involves a transfer of risk because customers who face the possibility of needing future care transfer the economic risk of that possibility by purchasing a contract. Homeward Bound spreads the transferred risk by signing up multiple customers from whom fees

are collected under a graduated schedule. A customer's rate is directly proportionate to the likelihood that he or she will use the service. This is attributed to actuarial estimations regarding the probability of usage.

The Court held that the contract was insurance. However, like Griffin Systems, this holding does not pertain to the issue in the present case. The issue of whether something is an insurance policy does not answer the question as to whether the sale of insurance is a sale of a service or not. Moreover, both decisions in Griffin Systems and Homeward Bound *support* the argument insurance is a service as both cases, in analyzing the facts presented, recited numerous examples of services agreed to be provided by both the Griffin Systems and Homeward Bound Service companies.

G. **The Letter Rulings Cited by Petitioner Do Not Stand for the Proposition that Sales of Insurance are Not a Service**

It is important to note at the outset the relevant statutory language setting forth the use and limitations of general information letters ("GILs"). Specifically, 2 Ill. Adm. Code Section 1200.120 states, in relevant part, that:

> General Information letters do not constitute statements of agency policy that apply, interpret or prescribe the tax laws administered by the Department. Information letters are not binding on the Department, may not be relied upon by taxpayers in taking positions with reference to tax issues and create no rights for taxpayers under the Taxpayers' Bill of Rights Act.

See 2 Ill. Adm. Code Section 1200.120. Pursuant to this section, Respondent requests this Tribunal to disregard all arguments Petitioner made based on GILs. The Respondent will nonetheless still address Petitioner's arguments.

The Petitioner argues that in ST 91-0431, the Department declared the sale of a contract as the sale of an intangible. However, the letter ruling specifically stated that for the *Retailers*

Occupation Tax only the sale of leased equipment and not the sale of a lease contract is subject to the tax. It advised that the sale of the lease contract was the sale of an intangible in the context of the Retailers Occupation Act that taxes only the sale of tangible personal property. Moreover, it dealt with the *sale of a contract*, not the contract itself. As such it is once removed from the fact scenario in the present case that deals with the contract itself and not the sale of an insurance policy. In the instant matter, the insurance policy obligates the insurer to render services should a covered event occur, in other words, the insurance contract provides services for covered risks of the insured. This letter ruling did not address issue of whether a service is being provided.

Petitioner then contends that IT 01-0070 GIL furthers supports its contention that insurance is not a service. First, it must be noted that this letter ruling never even addressed the issue of whether a contract is an intangible or a service. Rather, it involved the proper amounts to be included in the numerator of the apportionment factor for an insurance company not domiciled in Illinois. The ruling concluded that the company must include the amount of total direct premiums (gross premiums less returns premiums) from its annual statement in its factor. Other than the fact this ruling dealt with insurance and mentioned the word "contract" it is completely unrelated to this matter.

Finally, Petitioner argues that IT 12-0029 "cements" the letter ruling triumvirate classifying insurance as an intangible. However, like ST 91-043, taxpayer specifically requests application of a particular statute, in this case, Public Law 86-272. Taxpayer desired a ruling on whether it had nexus requiring an income tax filing in Illinois. It was an out of state insurance company that marketed, underwrote and administered medical stop loss insurance. It had sales people that worked out of their home in Illinois. The letter ruling noted that only sales of tangible personal property qualified under P.L. 86-272. Therefore, an insurance policy, which is

not tangible personal property, is not protected under P.L. 86-272. This ruling, however, never addressed whether insurance is a service as services are not protected under P.L. 86-272, and logically would never enter into the analysis. It is therefore irrelevant.

WHEREFORE, the Department of Revenue respectfully requests that the Chief Administrative Law Judge enter an order granting summary judgment to the Respondent and for such other relief it deems just and proper for the reasons argued above.

Dated: March 21, 2017

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