

**ILLINOIS INDEPENDENT TAX TRIBUNAL
CHICAGO, ILLINOIS**

RPMG INC.,)	
Petitioner,)	
)	
v.)	Case No. 14-TT-149
)	
THE ILLINOIS DEPARTMENT)	Chief Judge James M. Conway
OF REVENUE,)	
Respondent.)	

**RESPONDENT’S RESPONSE TO PETITIONER’S MOTION FOR LEAVE TO FILE
FIRST AMENDED PETITION**

Now comes Respondent, the Illinois Department of Revenue (“Department”), through its attorney, Lisa Madigan, Illinois State Attorney General, for its Response to Petitioner’s Motion for Leave to File First Amended Petition and states as follows:

BACKGROUND

RPMG, Inc. (“Petitioner”) is incorporated in Minnesota with its principal business address in Minnesota. Petition, ¶ 1. Petitioner markets ethanol, distiller’s grain, corn oil, and corn syrup. *Id.* at ¶ 4. Petitioner has nexus with Illinois and pays state and corporate income and personal property replacement income tax in Illinois. *Id.* at ¶ 14. Renewable Products Marketing Group LLC (“Parent” or “Partnership Parent”) is a Minnesota limited liability company. *Id.* at ¶ 1. Parent wholly owns Petitioner. *Id.* Parent also markets ethanol, distiller’s grain, and corn oil. Petitioner and Parent are engaged in a unitary relationship. Petition, ¶ 30. However, on its Illinois Corporate Income and Replacement Tax Returns (“Returns”) for the tax years ending September 30, 2008 and September 30, 2009 (“Years in Issue”), Petitioner calculated its income tax liability without regard to Parent’s Illinois apportionment factor or income. *Id.* at ¶ 17. These are the underlying facts and they are not in dispute.

The Department audited Petitioner's Returns for the Years in Issue and determined that Petitioner and Parent were engaged in a unitary business relationship. Because a corporation and a unitary partnership could not file a combined return, the auditor determined the income tax liability on a separate unitary basis.

The audit resulted in a deficiency for the Years in Issue. On or about June 2, 2014, the Department issued two Notices of Deficiency ("Notices") to Petitioner for the two Years in Issue, in the amounts of \$40,171.88 and \$17,339.06, respectively.

On or about August 1, 2014, Petitioner filed a four-count Petition against the Department in protest of the Notices. On September 3, 2014, the Department filed its Answer. On October 29, 2014, the Department moved for partial summary judgment against Petition Counts II, III, and IV. Petitioner filed its Response on December 12, 2014. The Department provides its Reply concurrently with this Response.

In addition to Petitioner's Response on December 12, 2014, Petitioner concurrently submitted Petitioner's Motion for Leave to File First Amended Petition.¹ If permitted to amend, the Petition would be modified substantively in three ways: (1) Petitioner seeks to add a Proposed Notice of Deficiency ("Proposed Notice") to the current Notices at issue; (2) Petitioner seeks to add a new Count II ("New Count II"), claiming that the Notices must be withdrawn because Petitioner "complied with the Schedule UB instructions", and; (3) Petitioner seeks to add a new Count IV ("New Count IV"), in which it claims the Notices must be withdrawn because the Department's determination violates the U.S. Constitution Commerce Clause.

The Tribunal does not have jurisdiction over the Proposed Notices, which therefore may not be added to the Notices at issue. Moreover, inclusion of New Counts II and IV would be

¹ Hereinafter referred to as the "Motion"; the proposed amended petition itself is hereinafter referred to as "Proposed Amended Petition."

confusing, untimely, duplicative of existing counts, do not cure a defect, add nothing of substance, allege not a single new fact, and should therefore be denied. Thus, none of Petitioner's proposed amendments should be permitted and Petitioner's Motion should be denied.

ARGUMENT

I. **The Illinois Independent Tax Tribunal does not have subject matter jurisdiction over a proposed notice of liability.**

Petitioner's Proposed Amended Petition seeks to add "a protest of an additional Notice of Proposed Deficiency for the years ending September 30, 2010 and September 30, 2011." Motion, ¶ 11. The audit period at issue is "10/2009 – 09/2011" with \$4,183 at issue. *See* Petitioner's proposed Exhibit A.

The Tax Tribunal does not have jurisdiction to review "a notice of proposed tax liability, *notice of proposed deficiency*, or any other notice of proposed assessment or notice of intent to take some action." 35 ILCS 1010/1-45(e)(3). (emphasis added). Instead, "[j]urisdiction of the Tax Tribunal is limited to Notices of Tax Liability, Notices of Deficiency, Notices of Claim Denial, and Notices of Penalty Liability where the amount at issue in a notice, or the aggregate amount at issue in multiple notices issued for the same tax year or audit period, exceeds \$15,000, exclusive of penalties and interest." 35 ILCS 1010/1-45(a).

Thus, the General Assembly did not grant the Tribunal subject matter jurisdiction over the Proposed Notice and the Tribunal should therefore deny Petitioner's request for leave to amend its Petition with respect to adding the Proposed Notice.

Alternatively, if the Tribunal believes generally that it may have subject matter jurisdiction over a proposed notice of deficiency, the Proposed Notice here at issue does not meet the minimum monetary threshold. If aggregating notices to meet the minimum monetary threshold, the notices must either be from the same tax year or from the same audit. *Id.*

The Notices at issue in the original Petition are for the tax years ending September 30, 2008 and September 30, 2009. The Proposed Notice is for tax years ending September 30, 2010 and September 30, 2011. Thus, the Notices and the Proposed Notice are not for the same tax years.

Nor are the Notices and Proposed Notice from the same audit. It is obvious that the Notices and the Proposed Notice are from different audit periods because the audit of the earlier tax years has been finalized as evidenced by the Notices, while the audit of the latter years has not, as evidenced by Proposed Notices. Further, when the Department audits a taxpayer, it assigns an audit ID, which encompasses all periods at it issue in the audit. The Audit ID for the 2008 and 2009 tax years is A1398577792. *See* 2008 and 2009 Notices. The Audit ID for the 2010 and 2011 tax years is A1371672576. *See* Proposed Notice, Petitioner's Motion, Exhibit A. The Notices in the original Petition and the Proposed Notice attached to the Proposed Amended Petition did not arise from the same audit. Thus, because the Proposed Notice neither exceeds \$15,000 exclusive of penalties and interest, nor is for the same tax year or audit period as the Notices currently at issue, the Tribunal lacks subject matter jurisdiction.

In sum, the Tribunal does not have subject matter jurisdiction to adjudicate a proposed notice of deficiency. Alternatively, the Tribunal does not have subject matter jurisdiction over the Proposed Notice here at issue because the amount in controversy does not exceed the monetary threshold as statutorily prescribed, and it is not from the same audit period or for the same tax year, meaning it may not be aggregated with the Notices.

Respondent therefore requests this Tribunal to deny Petitioner's Motion. Alternatively, Respondent requests this Tribunal to strike the Proposed Notice inclusion language from Proposed Amended Petition, thereby resulting in only the Notices for the 2008 and 2009 tax years here at issue.

II. Alteration of Count I and inclusion of New Counts II and IV should be denied because each adds nothing either factually or substantively to the Petition.

“Illinois is a fact pleading state in which plaintiffs are required to allege facts giving rise to their causes of action.” *Schal Bovis, Inc. v. Casualty Ins. Co.*, 314 Ill. App. 3d 562, 574 (1st Dist. 1999). “[P]laintiffs must allege facts supporting all of the elements of their claims; notice pleading, conclusions of law, and conclusions of fact are insufficient.” *Id.* “Mere allegations of legal conclusions are insufficient to set forth a cause of action on which relief may be granted, and such allegations need not be accepted by a court.” *Farns Associates, Inc. v. Sternback*, 77 Ill. App. 3d 249, 252 (1st Dist. 1979).

The right to amend a complaint is neither absolute nor unlimited. *I.C.S. Illinois, Inc. v. Waste Mgmt. of Illinois, Inc.*, 403 Ill. App. 3d 211, 219 (1st Dist. 2010). In determining whether the Tax Tribunal abused its discretion in granting or denying such leave, the appellate court “must consider (1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified.” *Id.* “The plaintiff must meet all four factors, and if the proposed amendment does not state a cognizable claim, and thus, fails the first factor, courts of review will often not proceed with further analysis.” *Id.* “When ruling on a motion to amend, the court may consider the ultimate efficacy of a claim as stated in a proposed amended pleading and it is not necessary for the plaintiff to file an amended complaint and the defendant to test the sufficiency of that complaint through a motion to dismiss.” *Id.*

Petitioner is attempting to include additional language in Count I and to add New Count II and New Count IV. However, the additional language of both Counts is duplicative of arguments already made. In fact, New Count II is in direct response to the Department’s Motion for Partial

Summary Judgment on Counts II, III, and IV and is already thoroughly discussed in Petitioner's Response to that Motion and the Department's Reply to that Response. For the reasons set forth herein, the Tax Tribunal should deny Petitioner's Motion.

COUNT I

Petitioner in Count I generally alleges that combining a subsidiary corporation with its partnership parent guarantees that the partnership's income will be taxed twice (future tense) which constitutes unconstitutional double taxation. In its proposed amendment, Petitioner seeks to amend Count I by adding an additional nine words. Specifically, Petitioner seeks to add to Petition paragraph 25 (or Proposed Amended Petition paragraph 27) that double taxation is unconstitutional as "violating the Commerce Clause of the United States Constitution." Proposed Amended Petition ¶ 27.

If true (which the Department denies), unconstitutional is unconstitutional. Petitioner's amendment is not necessary and does not cure a defect. Moreover, Petitioner has not added any facts or anything not previously known when filing its Petition. Instead, after giving the matter additional thought, Petitioner is attempting to add a conclusory thought to buttress its conclusory allegation. The Department has already timely filed its Answer; Petitioner should not now be granted leave to amend its Petition.

NEW COUNT II

Count II of the Proposed Amended Petition alleges that the Notices must be withdrawn because Petitioner correctly followed tax schedule instructions (2008 Schedule UB and 2008 Schedule K-1-P). *See* Proposed Amended Petition ¶¶ 30-34. New Count II does not cure a defect nor constitute a new or distinct cause of action (i.e., a separate count). Petitioner has already made the exact same argument in Count II of its Petition. In other words, Petitioner is attempting to add an entirely new count in an effort to improve upon the argument it has already made elsewhere in

the original Petition. Indeed, the duplicative information would remain in what would be New Count III (or old Count II). Inclusion of New Count II would be confusing, untimely, duplicative of an existing count, would not cure a defect, add nothing of substance, and should therefore be denied.

Moreover, permitting Petitioner to include New Count II is prejudicial to the Department. The Department has already filed a Motion for Partial Summary Judgment against Count II of the Petition. The Petitioner raised this precise issue in its Response to the Department's Motion, and the Department has submitted a detailed Reply concurrently with this Response. Besides requiring the Department to now duplicate its work, the Department would have included this new count in its original Motion for Partial Summary Judgment on Counts II, III, and IV.

If the Department is not successful with its Summary Judgment Motion with respect to Count II, the Department would have to address two Counts that ultimately argue the same thing. If however the Department is successful with its Summary Judgment Motion with respect to Count II, then the Count (old Count II) has merely been replaced with a new-and-improved version (New Count II). Either way, the Department loses. Permitting inclusion of New Count II is prejudicial to the Department and, in addition to other reasons described supra, should therefore be denied.

NEW COUNT V

Inclusion of New Count V of the Proposed Amended Petition should also be denied. As explained supra, Count I already alleges that the Department's Notices must be withdrawn because combining Petitioner with Parent is unconstitutional in violation of the Commerce Clause. New Count V also alleges that the Department's Notices must be withdrawn because combining Petitioner with Parent is unconstitutional in violation of the Commerce Clause. The addition of New Count V would not cure a defect in Count I: unconstitutionality based on the Commerce

Clause (i.e., Count I) equals unconstitutionality based on the Commerce Clause (i.e., New Count V). In sum, inclusion of New Count V would be confusing, untimely, duplicative of an existing count, would not cure a defect, add nothing of substance, and should therefore be denied.

Respondent therefore requests this Tribunal to deny Petitioner's Motion for Leave to File First Amended Petition. Alternatively, Respondent requests this Tribunal to deny the inclusion of new Counts II and/or V to the Proposed Amended Petition.

Respectfully Submitted,

LISA MADIGAN
State of Illinois Attorney General

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Dated: January 9, 2015

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NOTICE OF FILING

TO: Mr. Fred O. Marcus
Mr. Christopher T. Lutz
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PLEASE TAKE NOTICE that on January 9, 2015, Respondent filed, by electronic-mail, with the Illinois Independent Tax Tribunal, located at 160 N. LaSalle Street Room N506, Chicago, Illinois 60601, **RESPONDENT'S RESPONSE TO PETITIONER'S MOTION FOR LEAVE TO FILE FIRST AMENDED PETITION** in the above captioned matter.

/s/ Jonathan M. Pope
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CERTIFICATE OF SERVICE

Jonathan M. Pope certifies that he is a Special Assistant Attorney General of the State of Illinois duly appointed by Lisa Madigan, Attorney General of the State of Illinois; that he is authorized to make this certificate; that on January 9, 2015, before the hour of 5:00 p.m. (C.S.T.) he served a true and exact copy of the foregoing instrument entitled **RESPONDENT'S RESPONSE TO PETITIONER'S MOTION FOR LEAVE TO FILE FIRST AMENDED PETITION** on the above Taxpayer/Petitioner by sending the same as an attachment to an electronic mail message addressed to Taxpayer/Petitioner at his designated email address:

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