

ending September 30, 2010 and September 30, 2011. The Department filed a response opposing the Petition on January 9, 2015. There is no final judgment in this action.

DISCUSSION

A. Amendments to Pleadings Should be Freely Allowed

In Respondent's Response to Petitioner's Motion for Leave to Amend, the Department contends that this Tribunal should reject Petitioner's Motion because new Counts II and IV "would be 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." Respondent's Response, p. 3. The Department goes on to cite a number of cases which accurately explain that Illinois is a fact pleading state. The Department's contention, however, that the new counts do not add anything to Petitioner's original Petition misses the mark. Indeed, the Department appears to want to have it both ways, contending that the Amended Petition alleges nothing new, and therefore should not be granted, while at the same time arguing the Amended Petition would supposedly frustrate the Department's pending Motion for Partial Summary Judgment. The Amended Petition adds two substantive claims, that Petitioner properly followed the appropriate instructions in filing its return and that the Department's treatment of its income is distortive, which are undoubtedly distinct from the arguments raised in Petitioner's original Petition. If the Department disagrees with the substance of Petitioner's Amended Petition, the appropriate means of asserting its disagreement is by answering the Amended Petition, not objecting to Petitioner's Motion to Amend. In this way, the Tribunal would effectuate the statutory mandate that consent to amend a petition shall be freely granted. 35 ILCS 1010/1-50(c).

“At any time before final judgment amendments may be allowed on just and reasonable terms . . . adding new causes of action . . . which may enable the plaintiff to sustain the claim for which it was intended to be brought[.]” 735 ILCS 5/2-616(a). The Illinois Tax Tribunal Act of 2012 provides that a pleading may be amended with the written consent of the adverse party or with the permission of the Tribunal. 35 ILCS 1010/1-50(c). “The Tax Tribunal shall freely grant consent to amend upon such terms as may be just.” *Id.*

In considering whether to grant a motion to amend, courts consider four factors: (1) whether the proposed amendment would cure the defective pleading; (2) whether the other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely filed; and, (4) whether previous opportunities to amend can be identified. *Sheth v. SAB Tool Supply Co.*, 2013 IL App (1st) 110156, P101 (Ill. App. Ct. 1st Dist. 2013). Because the Amended Petition satisfies all four factors, this Tribunal should grant Petitioner’s Motion.

The Amended Petition Cures Petitioner’s Original Petition

Petitioner corrects its original petition by adding two separate and distinct causes of action, and by clarifying an original cause of action. Without amending its Petition, Petitioner could potentially lose the ability to argue that it actually followed the relevant instructions with respect to calculating its Illinois income and apportionment. Although Petitioner’s original Petition addresses the Department’s obligation to provide and adhere to instructions under the Taxpayer Bill of Rights, the Amended Petition adds the more basic claim that such instructions did in fact exist and Petitioner followed them. Additionally, Petitioner’s added distortion argument elaborates on Petitioner’s claim for alternative apportionment, and requests separate relief. Indeed, if the Department’s contention in its Motion for Partial Summary Judgment is

correct, and that taxpayers are statutorily barred from petitioning for alternative apportionment before this Tribunal, a taxpayer would ostensibly have no recourse in the event that the Department's treatment of its income was distortive. While Petitioner maintains that it is permitted to pursue a petition for alternative apportionment before this Tribunal, adding the distortion count preserves Petitioner's rights in the event that the Department's treatment of Petitioner's income is distortive but this Tribunal concludes that it may not pursue alternative apportionment. Contrary to the Department's claims, the inquiry of whether treatment is distortive is distinct from Petitioner's Count I, which alleges unconstitutional double taxation. Indeed, treatment of a taxpayer's income may be distortive while not necessarily unconstitutional. Here, it is both.

Moreover, Petitioner's amendment to Count I is necessary. In Count I of its amended Petition, Petitioner alleges specifically that the Department subjected Renewable Products to income tax twice, once at the entity level, and again at the partner level, constituting double taxation. The forced combination of a corporation with its partnership parent results in a guaranteed double taxation on the partnership's income, which, as Petitioner argues, violates the United States Constitution's Commerce Clause. Petitioner's inclusion of the "additional nine words" are not an unnecessary duplication, but constitute further explanation of a serious claim to which the Department has yet to respond. Notably, the Department makes no serious claim that it will be prejudiced by the Amended Petition.

The Department Fails to Sustain its Burden of Showing Prejudice

"The most important of [the four] factors is the prejudice to the opposing party, such as where an amendment leaves the party unprepared to respond to a new theory at trial." *Sheth*, 2013 IL App (1st) 110156, at P101. The party opposing an amendment to pleadings has the

burden of showing surprise or prejudice resulting from the amendment such that the opposing party would be hindered in its ability to present its case on the merits. *Id.* at P104. The Department claims that Petitioner's proposed amendments are "not necessary[.]" Respondent's Response, p. 6. However, Petitioner need not prove necessity; the Department must show prejudice. Absent prejudice, a circuit court's power to allow amendments should be freely exercised so that litigants may fully present their causes of actions. *Sheth*, 2013 IL App (1st) 110156, at P104. In exercising its discretion, the court should be mindful that it is preferred to decide a case on the merits rather than on pleading technicalities. *Savage v. Mui Pho*, 312 Ill. App. 3d 553, 556-57 (Ill. App. Ct. 5th Dist. 2000). Any doubts should be decided in favor of allowing the amendment. *Id.* at 557.

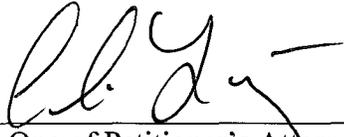
The amended petition will not prejudice the Department. This is Petitioner's first request for leave to amend its petition for the tax years ending September 30, 2008, September 30, 2009, September 30, 2010, and September 30, 2011 (the "Years at Issue"). The amendments Petitioner seeks to add arose out of the same Years at Issue as set forth in the original petition, filed pursuant to the Illinois Independent Tax Tribunal Act ("Tribunal Act"), 35 ILCS 1010/1-1 to 35 ILCS 1010/1-100 and the Illinois Income Tax Act, ("Income Tax Act"), 35 ILCS 5/101 et. seq. The Department has not engaged in any discovery with respect to Petitioner's original Petition.

The Department makes no attempt to show that it will be prejudiced, other than to indicate that its strategy in pursuing a motion for partially summary judgment may be frustrated. However, "a defendant is not prejudiced if his attention was directed, within the time prescribed or limited, to the facts that form the basis of the claim asserted against him." *Powell v. Dean Foods Co.*, 2013 IL App (1st) 082513-B, P231 (Ill. App. Ct. 1st Dist. 2013). The Department has made no contention that such is the case.

The real purpose of the Department's objection to Petitioner's Motion to Amend has nothing to do with any possible prejudice to the Department. The Department's objection is instead geared toward deflecting attention from the core issues in this case, which are that the Department's treatment of Petitioner's income is unconstitutional and that Petitioner in fact followed the appropriate instructions in filing its returns. Rather than substantively answer Petitioner's arguments, the Department is attempting to undermine Petitioner's constitutional rights based on a flawed characterization of technical pleading requirements. In doing so, The Department improperly uses motion practice to oppose Petitioner's Motion for Leave to Amend where an Answer to the Amended Petition would be the appropriate procedural vehicle to address substantive issues. Should this Tribunal correctly decide to grant Petitioner's Motion, the Department will still have every opportunity to answer each alleged "conclusory allegation" based on supposed "duplicative information." Respondent's Response pp. 6-7. The interest of justice would be better served by granting the leave to amend. *See Merrill v. Drazek*, 455, 459 (Ill. App. Ct. 1st Dist. 1978) ("There being no showing that the granting of leave to amend would prejudice defendants, we conclude that the interest of justice would be better served by granting leave to amend.")

WHEREFORE, Petitioner respectfully requests this Tribunal grant its Motion for Leave to File First Amended Petition allowing the inclusion of Counts II and IV to the Proposed Amended Petition.

Respectfully Submitted,
RPMG Inc.
Petitioner

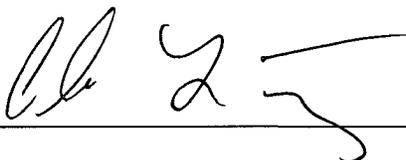
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CERTIFICATE OF SERVICE

Undersigned counsel of record hereby certifies that she caused a copy of the foregoing present PETITIONER'S REPLY TO RESPONDENT'S RESPONSE TO PETITIONER'S MOTION FOR LEAVE TO FILE FIRST AMENDED PETITION to be served on other counsel of record by electronic mail and also by enclosing the same in an envelope, properly addressed, first-class postage prepaid and deposited in the U.S. Mail at 500 W. Madison Street, Chicago, Illinois 60661, before the hour of 5:00 p.m. on the 23rd day of January, 2015, addressed as follows:

Jonathan Pope, Esq. (jonathan.pope@Illinois.gov)
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Illinois Department of Revenue
Office of Legal Services
100 W. Randolph St., 7-900
Chicago, IL 60601



IN THE ILLINOIS INDEPENDENT TAX TRIBUNAL

RPMG INC.)	
)	
Petitioner,)	
)	
v.)	No. 14 TT 149
)	
THE ILLINOIS DEPARTMENT OF REVENUE,)	
)	
Defendant.)	

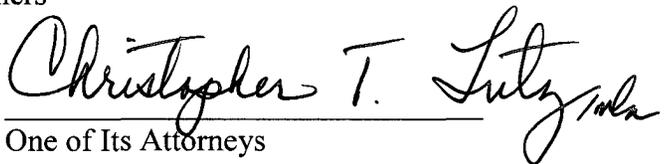
NOTICE OF FILING

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 100 W. Randolph Street, Suite 7-900
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PLEASE TAKE NOTICE that on the 23rd day of January, 2015, we filed with the Illinois Independent Tax Tribunal, 160 N. LaSalle Street, Room N506, Chicago, IL 60601, **RPMG, Inc.’s Petitioner’s Reply to Respondent’s Response to Petitioner’s Motion for Leave to File First Amended Petition**, a copy of which accompanies this notice and is served on you herewith.

Respectfully submitted,

RPMG, INC.,
Petitioners

By: 
 One of Its Attorneys

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