

**ILLINOIS INDEPENDENT  
TAX TRIBUNAL**

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<b>O &amp; S CORP. D/B/A CITGO</b>	)	
<b>Petitioner,</b>	)	<b>Chief Judge James M. Conway</b>
<b>v.</b>	)	<b>No. 14-TT-151</b>
<b>THE ILLINOIS DEPARTMENT OF</b>	)	
<b>REVENUE,</b>	)	
<b>Respondent.</b>	)	

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**NOTICE OF FILING**

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PLEASE TAKE NOTICE, that on June 8, 2016, the undersigned representatives for the Illinois Department of Revenue (“Department” or “Respondent”) filed The Illinois Department Of Revenue’s Response To Petitioner’s Motion In Limine with the Illinois Independent Tax Tribunal, located at 160 North LaSalle Street, Room N506, Chicago, IL 60601, by filing its Motion via email. The Respondent requests that oral argument be scheduled on the Pre-Trial Hearing date.

Respectfully,

/s/Michael Coveny  
Michael Coveny

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<b>Petitioner,</b>	)	<b>Chief Judge James M. Conway</b>
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**THE ILLINOIS DEPARTMENT OF REVENUE’S RESPONSE TO PETITIONER’S  
MOTION IN LIMINE**

Now comes the Respondent, the Illinois Department of Revenue (the “Department” or “Illinois Department”) pursuant to order of the Tribunal, by and through its Special Assistant Attorneys General, Michael Coveny and Seth Schrifman, to respectfully request that the Tribunal deny the Motion *In Limine* filed by O&S Corp. (the “Petitioner” or “O&S”). The Department’s Hearing Exhibits 2-5<sup>1</sup> (referred to collectively as “Objected To Exhibits”) and any related testimony of the Department’s Auditor, Ray Barnes (the “Auditor”), in relation to the Illinois Department’s other tobacco products (“OTP”) audit and the use of the Indiana Department of Revenue’s MY Enterprise, Inc. (“MEI”) documentation to verify the original and current Illinois Department audit assessments, should be admitted as evidence in this matter. The Objected To Exhibits are either 1) not inadmissible hearsay under the applicable Illinois statutes, 2) if deemed hearsay, are subject to either Illinois Rule of Evidence Rule 803(8) (“public records”) or Rule 803(6) (“business records”) hearsay exceptions, or 3) if deemed hearsay, are admissible under applicable administrative statutory law and case law, since adequate books and records were not provided to the Department during the audit.

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<sup>1</sup> The Department refers the Tribunal to the Department’s Exhibits provided with the joint Pre-Trial Order draft, which were filed with this Tribunal on May 24, 2016.

**Objected To Department Exhibits**

The Objected To Exhibits are Department Exs. 2, 3, 4, and 5. All of the Department Exhibits are covered with a Certificate of the Director, because all of these exhibits were created and/or maintained by the Department in its normal course of business. Department Exhibit 1 contains the eight Notices of Tax Liability (“NTLs”) at issue, with two schedules completed by the Auditor, to show the recent modifications, which are deemed corrected NTLs.

Department Exhibit 2 (page 2) contains a Certificate of Records of the Indiana Department of Revenue which contains a seal<sup>2</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Thereafter, these documents were provided to the Illinois Department of Revenue for the Illinois Department’s use for the O&S and related audits. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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<sup>2</sup> Although the imprinted seal cannot be seen on the PDF submitted as Ex. 2, the seal states that it is the Official Seal for the Indiana Department of Revenue. The original Certificate of Records can be shown in-person at the Pre-Trial hearing to verify its authenticity.

[REDACTED]

Contrary to O&S' Motion, the other Department Exhibits do not merely contain MEI information. Department Exhibit 3 contains the audit narrative and EDC-5 (auditor notes) of the Department's Auditor. Department Exhibit 4 contains the remaining O&S original Illinois Department audit file, including schedules created by the Department's Auditor and correspondence with O&S during the original Illinois audit. Finally, Department Exhibit 5 contains schedules, created by the Department's Auditor in March of 2016 to reflect the recent

<sup>3</sup> The invoices in Ex. 2 list 10001 S. Michigan in Chicago, IL. (Ex. 2 at 199-204). This is obviously a typographical error, as O&S doing business as CITGO is located at 10007 S. Michigan in Chicago, IL

<sup>4</sup> The two sample O&S invoices themselves are located at pages 199-204 of Exhibit 2. These invoices also correspond with the schedule for April 2008 at Exhibit 2 page 14.

Illinois Department modifications to the assessments at issue (the “current assessment”), as described below. So, Department Exhibit 2 contains the actual MEI direct information received and originally maintained by the Ind. Department. The other Department Exhibits contain Illinois Department documentation, some of which has been derived from information found within the schedules contained within Ex. 2, which has since been maintained by the Illinois Department in its files.

### **Pertinent Facts**

O&S does business as a CITGO gasoline station and convenience store, which sells OTP, among other items.<sup>5</sup> (PT Stip. 3).<sup>6</sup> O&S is located at 10007 S. Michigan Avenue, Chicago, IL 60628, also known as “100<sup>th</sup> and Michigan.” (Ex. 3 at 8; PT Stip. 2).<sup>7</sup> The Auditor made an unannounced visit to O&S on August 27, 2013 to confirm that OTP was present and available for purchase. (Ex. 3 at 8). A Department OTP audit was initiated by letter on or about August 28, 2013. (PT Stip. 11). The audit period (“assessment period”) initially covered January 1, 2008 through June 30, 2013. (PT Stip. 4). Mr. Louis Najjar, an accountant, represented the Taxpayer during the original audit.<sup>8</sup> (PT Stip. 14).

The Ind. Department provided the returns and schedules [REDACTED] [REDACTED] to the Illinois Department of Revenue pursuant to a reciprocal agreement. (See Ex. 2). [REDACTED]

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<sup>5</sup> The items listed by the Auditor includes numerous forms of OTP, including cigars, cheroots, stogies, periques, granulated, plug cut, crimp cut, ready rubbed, snuff or snuff flour, Cavendish plug and twist tobacco. (Ex. 3 at 2).

<sup>6</sup> References to the Statement of Uncontested Facts in the Pretrial Order are cited as “PT Stip. #”.

<sup>7</sup> Department Trial Exhibits are cited as “Ex. # at PDF page”.

<sup>8</sup> Notably, the Pre-Trial Order indicates that O&S will be calling Mr. Najjar and another witness, Attaf Mousa, to testify. The Department is not objecting to O&S’ proposed witnesses testifying at the hearing. So, presumably, O&S will have the opportunity to address concerns it had with the audit and the underlying assessment through Mr. Najjar’s testimony as well as the testimony of Attaf Mousa. Thus, the Department will be highly prejudiced if not allowed to provide its own Auditor to testify to his auditing methods, including relevant Ind. Department MEI information, and how his specific knowledge of the information/documentation at issue impacted the original and current audit assessments.

[REDACTED]

[REDACTED]

[REDACTED] so the Auditor determined that under applicable law and auditing standards, O&S was required to register with the Department and pay the OTP Tax. (Ex. 3 at 3). O&S did not file OTP returns with the Illinois Department during the assessment period. (Ex. 3 at 2). [REDACTED]

[REDACTED] (Ex. 2).

[REDACTED] [REDACTED] (Ex. 2; Ex. 3 at 2-3). This is relevant because the current Illinois audit assessment at issue covers the 53 months from January 2008 through May 2012. (PT Stips. 6-8). During the original O&S OTP audit, for 18 months out of the original 66 months at issue, including January 2008, August through October 2010, September 2011, and June 2012 through June 2013, the Auditor used annual estimates of months for which there were MEI returns to derive his assessments for months for which there was no MEI information.<sup>10</sup> (Ex. 3 at 3). Purchase invoices from Illinois for just 10 of the 66 months, June 2012 through

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[REDACTED]

So, the September 2011 amounts were updated after this matter began so that the Department's "current assessment" could be as accurate as possible. (*Compare* Ex. 2 at 149-52; *with* Ex. 4 at 45 and Ex. 5 at 3). Notably, within the Department's current assessment period of January 2008 through May 2012, only four out of fifty-three months (January 2008 and August through October 2010) contain estimated projections. In other words, well over 90% of the current assessment period amounts are based on actual Ind. Department return schedule information, which was properly provided to the Illinois Department from the Ind. Department.

[REDACTED]

March 2013, were used to adjust these months by purchases from Illinois vendors.<sup>11</sup> (Ex. 3 at 3-4.)

It is undisputed that during the assessment period, O&S purchased and sold OTP. (PT Stip. 10). Only the amount of OTP Tax due (which corresponds to any associated interest and penalties) is in dispute.<sup>12</sup> [REDACTED]

[REDACTED] (See Ex. 3 at 8-9). Along with some purchase invoices, during the audit the Auditor was provided with some bank statements, cancelled checks, and income tax returns from O&S for review. (Ex. 3). It is also undisputed that during the audit, the Auditor reviewed several invoices from MEI, which were in O&S' possession. (PT Stip. 13). The Auditor compared the MEI schedules with the several MEI invoices O&S provided for purposes of verification and in order to determine that the O&S invoices provided were accurate, but not comprehensive of all O&S OTP purchases. (Ex. 3 at 8-9). On or about September 6, 2013, O&S' owner provided a folder and stated that the folder contained all cigarette and OTP information. (Ex. 3 at 8). He also provided an entire box of invoices to review in order to determine OTP suppliers.<sup>13</sup> (Ex. 3 at 8). The folder contained only invoices for Sam's Club and other Illinois distributors who had already paid the required tax. The Auditor pointed out that based on an informal ledger, there were other suppliers of

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<sup>11</sup> These 10 monthly assessments are no longer relevant because the assessments for June 2012 through June 2013 have been rescinded. The current assessment is based on the January 2008 through May 2012 time period.

<sup>12</sup> O&S makes a passing mention in its Motion that there is no party admission for its sale of MEI OTP. To the extent this is in dispute, first, this fact has been stipulated to within the executed draft Pre-Trial Order. So, this fact is deemed correct and accurate as it was agreed upon by both parties. Second, it has been stipulated that there were several MEI invoices which were available and reviewed by the Auditor during the original audit. (PT Stip. 13.) Third, the statements previously made regarding the several MEI invoices would clearly be non-hearsay opposing party statements under Illinois Rule of Evidence 801(d)(2). Therefore, any prior statements or information given by O&S or its agents regarding the MEI invoices, which were reviewed by the Auditor during the Audit, and information derived therefrom, are admissible.

<sup>13</sup> Of note, it is not typical for an auditor to schedule every invoice, especially when hundreds of invoices are provided in a disorganized fashion in a box.

cigarettes and other tobacco-related products. (Ex. 3 at 8.) Additionally, the Auditor would testify at hearing that O&S did not have a formalized general ledger, which would have included purchase information, cash and check disbursements, and the like. The Auditor found the internal controls of O&S to be inadequate because O&S did not maintain required purchase invoices and complete and adequate books and records as required by law. (*See* Ex. 3 at 2-5; *see also* 35 ILCS 143/10-1, *et. seq.* and 86 Ill.Admin.Code 660.5, *et. seq.*). During the original audit, the Auditor created schedules and made calculations to derive the amount of the original OTP assessment. (Ex. 4). The Auditor gave the Taxpayer's representative several chances to provide additional invoices during the audit. (Ex. 3).

The audit originally resulted in the issuance of eight OTP NTLs, which were initially disputed in this action. (*See* PT Stip. 5). Although the actual audit was conducted from approximately August 27, 2013 through May 1, 2014 (PT Stip. 15), after the commencement of this Tribunal matter the Department agreed to rescind the assessments for the period of June 2012 through June 2013. (PT Stip. 6). Also, the Auditor used the information provided in Ex. 2 to make and verify the adjustments for the January 2008 through May 2012 time period in this audit re-assessment (considered the "current assessment" period). This resulted in the Department's rescission of six of the NTLs and the modification of two of the NTLs at issue. (PT Stip. 6-7). Department Exhibit 1, which has not been objected to by the Petitioner, contains the eight original NTLs along with schedules created by the Auditor for the two "corrected" NTLs, which assessed tax, interest, and penalties. (PT Stip. 7; Ex. 1). The new schedules created by the Auditor to calculate the adjustment of the assessments are contained within Ex. 5. These new assessments are the amounts currently at issue in this matter as of March 3, 2016, when the updated current assessment calculations were made. (PT Stips. 7-8).

## Legal Analysis

### **1. The Objected To Exhibits Are Not Inadmissible Hearsay**

The Objected To Exhibits are not inadmissible hearsay. The applicable statute is the Tobacco Products Tax Act of 1995 (“OTP Act”). (PT Statement of Law 1). Section 10-45 of the OTP Act provides:

Incorporation by reference. All of the provisions of Sections 4, 5, 5a, 5b, 5c, 5d, 5e, 5f, 5g, 5h, 5i, 5j, 6, 6a, 6b, 6c, 8, 9, 10, 11, 11a, and 12 of the Retailers' Occupation Tax Act, and all applicable provisions of the Uniform Penalty and Interest Act that are not inconsistent with this Act, apply to distributors of tobacco products to the same extent as if those provisions were included in this Act. References in the incorporated Sections of the Retailers' Occupation Tax Act to retailers, to sellers, or to persons engaged in the business of selling tangible personal property mean distributors when used in this Act. References in the incorporated Sections to sales of tangible personal property mean sales of tobacco products when used in this Act. 35 ILCS 143/10-45.<sup>14</sup>

Because O&S did not file required OTP returns with the Department (Ex. 3 at 2), Sections 5 and 8 of the Retailers' Occupation Tax Act (“ROTA”) apply. Section 5 of ROTA states, in pertinent part:

In case any person engaged in the business of selling tangible personal property at retail fails to file a return, the Department shall determine the amount of tax due from him according to its best judgment and information, which amount so fixed by the Department shall be prima facie correct and shall be prima facie evidence of the correctness of the amount of tax due, as shown in such determination... Proof of such determination by the Department may be made at any hearing before the Department or in any legal proceeding by a reproduced copy or computer print-out of the Department's record relating thereto in the name of the Department under the certificate of the Director of Revenue. If reproduced copies of the Department's records are offered as proof of such determination, the Director must certify that those copies are true and exact copies of records on file with the Department. If computer print-outs of the Department's records are offered as proof of such determination, the Director must certify that those computer print-outs are true and exact representations of records properly entered into standard electronic computing equipment, in the regular course of the Department's business, at or

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<sup>14</sup> The OTP Act defines a “Distributor” as, among other things: “Any retailer who receives tobacco products on which the tax has not or will not be paid by another distributor.” 35 ILCS 143/10-5. “Retailer” means: “any person in this State engaged in the business of selling tobacco products to consumers in this State, regardless of quantity or number of sales.” 35 ILCS 143/10-5. The definition of “Tobacco Products” includes many of those items found by the Auditor at the O&S location. 35 ILCS 143/10-5; *see* Ex. 3 at 2.

reasonably near the time of the occurrence of the facts recorded, from trustworthy and reliable information. Such certified reproduced copy or certified computer print-out shall, without further proof, be admitted into evidence before the Department or in any legal proceeding and shall be prima facie proof of the correctness of the amount of tax due, as shown therein... 35 ILCS 120/5 (emphasis added).<sup>15</sup>

In this matter, the Department's Auditor determined the amount of tax due according to his best judgment and information, which determination of tax assessed is *prima facie* correct and *prima facie* evidence when covered by signed Certificate of the Director. All 5 Department Exhibits are covered with an executed Certificate of the Director with the required language pursuant to ROTA Section 5. Exhibit 1, which is not being objected to, contains the NTLs and corrected NTLs at issue, so this exhibit shows that the original and current tax assessments are *prima facie* correct. As for Exhibit 2, at least the portion which includes the Ind. Department's returns and schedules from MEI from the assessment period, were used by the Illinois Auditor in conducting the original audit. (See Ex. 3). After this Tribunal proceeding began, the Department reduced the assessment period and amount to the current assessment, and the Auditor was provided with Ex. 2 in its currently submitted form in order to make the current assessment calculations. (See also Exs. 1 and 5 for updated schedules and assessments). Thus, accompanied by the director's certification, Ex. 2 contains the true and complete copies of records on file with the Department relating to the assessment determination. Exhibits 3, 4, and 5 contain audit file documents from the original audit and from the current assessment. Only some of the information contained within Exs. 3 through 5 is related to Ex. 2. These are true and exact copies of records maintained by the Department, covered by a required Certificate of the Director, which should be admitted into evidence on this basis alone.

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<sup>15</sup> In its Motion, O&S cites 35 ILCS 5/904(a). This Section is inapplicable, as it involves the Illinois Income Tax Act deficiencies and overpayments, which is not at issue or relevant for this matter.

Under Section 5 of ROTA, in a case where there was no return filed, proof of the determination of the assessment can be made at “any legal proceeding” by a reproduced copy or computer print-out of the Department’s “record relating thereto,” once covered by a Certificate of the Director meeting Section 5’s requirements, and should be admitted into evidence “at any legal proceeding.” Notably, there is no limitation that the allowed record be only documents made by the auditor, or the NTLs themselves. The requirement is only that the record consist of “Department” files. *See* 35 ILCS 120/5. Further, the use of the term “record relating thereto” clearly means that not only are the NTLs *prima facie* admissible, but the record relating to the NTLs is admissible. Thus, this related record includes Exs. 2, 3, 4, and 5, which all directly relate to how the original and updated current assessments were derived.

It is a fundamental rule of Illinois statutory construction to give effect to the intention of the legislature. When interpreting a statute, a court’s analysis begins with the language of the statute, which is the best indication of legislative intent. “Where the statutory language is clear and unambiguous, the court must give it effect without resorts to other tools of interpretation.” *Exelon Corp. v. Dep’t. of Revenue*, 234 Ill.2d 266, 275 (2009); *see also United Airlines, Inc. v. Dep’t. of Revenue*, 367 Ill.App.3d 42, 46-47 (1<sup>st</sup> Dist. 2006). Here the statute is clear that the allowable record is meant to be all-encompassing. Otherwise, for example, if only the NTLs themselves were to be admitted the statute would state the “notices related thereto,” as opposed to the “record relating thereto.”

The statute’s language is clear and unambiguous. However, even if the language is determined to be ambiguous, this Tribunal should not arrive at a result which would render any portion of the ROTA (as applied to the OTP Act) as meaningless nor should the statute be interpreted to create an absurd result. *See, e.g., Kraft, Inc. v. Edgar*, 138 Ill.2d 178, 189 (1990)

(in determining a statute's intent based on legislative intent, the Illinois Supreme Court held that: "A statute should be construed so that no word or phrase is rendered superfluous or meaningless.") Using this analysis, the record relating to the original assessment and current assessment on file with the Department should be admitted into evidence.

Similarly, Section 8 of the ROTA, which is incorporated into the OTP Act, provides in pertinent part:

The books, papers, records and memoranda of the Department, or parts thereof, may be proved in any hearing, investigation, or legal proceeding by a reproduced copy thereof under the certificate of the Director of Revenue. Such reproduced copy shall, without further proof, be admitted into evidence before the Department or in any legal proceeding. 35 ILCS 120/8.

Again, Section 8 provides unambiguous language that shows the broad nature of what documentation, including the specific examples of "books, papers, records, and memoranda of the Department," shall "without further proof, be admitted into evidence... in any legal proceeding." For the reasons just stated, the plain and ordinary meaning of the statutory language clearly shows the legislative intent underlying this statute - All of the Department Exhibits, which are covered with a proper Certificate of the Director, should be admitted in this proceeding.

Finally, it is black-letter Illinois tax law that before the Department's *prima facie* presumption for its issuance of the NTLs is overcome (as indicated in Section 5 of the ROTA), the Taxpayer must provide evidence which is identified with its books and records. *See, e.g., Fillichio v. Dep't. of Revenue*, 15 Ill. 2d 327, 333 (1959); *A.R. Barnes & Co. v. Dep't. of Revenue*, 173 Ill. App. 3d 826, 833-834 (1st Dist. 1988). In this regard, the Illinois Supreme Court has held that: "statutory record-keeping provisions are mandatory and that 'before the presumption attached to (the corrected) returns should be declared to have been overcome, there

should be some evidence introduced which is identified with books or records as kept by the taxpayer...” *Copilevitz v. Dep’t. of Revenue*, 41 Ill. 2d 154, 157-58 (1968) (citing *DuPage Liquor Store, Inc. v. McKibbin*, 383 Ill. 276, 279 (1943)).

O&S only has one exhibit it proposes to use as evidence, which contains its own documents. O&S’ sole exhibit only contains OTP invoices from April through October 2013. (See O&S Ex. 1). None of these invoices are MEI invoices. Since the Department has recalculated the current assessment and abated the amounts from June 2012 through June 2013 (Ex. 1; PT Stip. 6-7), these OTP invoices are irrelevant (although not being objected to by the Department). Further, there were several MEI invoices which were reviewed and verified during the audit by the Auditor, which O&S is now unable to find. (PT Stip. 13 and proposed Najjar testimony). Thus, notwithstanding the admissibility of Departments Exs. 2 through 5, without any books and records to contradict the Department’s corrected NTLs, O&S will not be able to rebut the Department’s *prima facie* case.

**2. The Objected To Exhibits Are Admissible Under The Rule 803(8) (“Public Records”) Hearsay Exception**

If the Tribunal determines that Exs. 2 through 5 are hearsay, Illinois Rule of Evidence 803(8) (“Rule 803(8)”), entitled “Public Records and Reports,” would apply to allow the admission of all of the Objected To Exhibits. Notably, the O&S Motion makes absolutely no reference to the Rule 803(8) hearsay exception. Rule 803(8) provides:

**(8) Public Records and Reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, police accident reports and in criminal cases medical records and matters observed by police officers and other law enforcement personnel, unless the sources of information or other circumstances indicate lack of trustworthiness. Ill.R.Evid. 803(8) (emphasis added).

Rule 803(8) is contained among hearsay exceptions in which the documents are admitted even if the declarant is available as a witness. Ill.R.Evid. 803.<sup>16</sup> Rule 803(8) has been upheld under Illinois law in various similar cases. In the matter of *Village of Arlington Heights v. Anderson*, 2011 IL App (1<sup>st</sup>) 110748 (2011), the First District dealt with a matter involving confidential sales tax information from the Department of Revenue. *Id.* at ¶14. The Court believed that this information was reliable. *Id.* The First District Court further stated:

[P]ublic documents kept in the ordinary course of business are generally admissible as exceptions to the hearsay rule due to “the inconvenience to the public official in requiring him to testify, the trustworthiness of one charged with a public duty, and the fact that there is no motive for falsifying or misrepresenting.” *Steward v. Crissell*, 289 Ill.App.3d 66, 69, 224 Ill.Dec. 419, 681 N.E.2d 1040 (1997) (quoting *People v. Fair*, 61 Ill.App.2d 360, 366, 210 N.E.2d 593 (1965)). The Illinois Rules of Evidence also provides for the admission of reports which must be compiled in performance of a public agency's duties. Ill. R. Evid. 803(8) (eff. Jan. 1, 2011). Such “documents reflecting regularly conducted governmental activities are made reliable ‘by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record.’ ” *Steward*, 289 Ill.App.3d at 69, 224 Ill.Dec. 419, 681 N.E.2d 1040 (quoting Fed.R.Evid. 803 advisory committee notes). *Id.* at ¶13.

See also *Dep't. of Public Aid v. Wall's Estate*, 81 Ill. App.3d 394, 397-99 (5<sup>th</sup> Dist. 1980) (the Court discussed the admissibility of documentation admitted under Rule 803(8) and the “wide latitude” utilized by courts in ruling upon public documents under the similar federal rule – Fed.R.Evid. 803(8) – and the Court held that Rule 803(8) is at least as broad as the federal equivalent); *People ex rel. Wenzel v. Chicago & N.W. Ry. Co.*, 28 Ill.2d 205, 211-13 (1963) (the Illinois Supreme Court upheld the admissibility of ratio studies under Rule 803(8) based on the reliability of the studies, which were based on Department of Revenue records, and also stated

that the ratio studies at issue were official records of the Department of Revenue, so they were required to be maintained and recorded properly, and therefore the documents were trustworthy).

Under Rule 803(8), there is no legitimate dispute that Ex. 2 contains records, reports, statements, or data compilations “in any form” of a public agency (the Ind. Department) setting forth the activities of the agency and matters observed pursuant to duty imposed by law. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Thus, the Ind. Department records fall squarely within Rule 803(8).

Further, Exs. 3 through 5 were made by the Illinois Department, with only some information based upon Ex. 2. These documents are admissible as they set forth the activities of the Illinois Department and matters observed pursuant to Illinois law. Additionally, under Illinois law, public records such as all of the Objected To Exhibits should be admitted under the wide latitude of Rule 803(8) because these documents are trustworthy. In summary: 1) the purpose underlying Rule 803(8) is to remove inconvenience to a public official requiring him to testify because the person charged with the public duty should be deemed as trustworthy and there is no motive for falsifying or misrepresenting information and 2) these records of the Ind. Department and the Illinois Department are made reliable by systematic checking and by the duty of both Departments to make and to keep an accurate record.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (*See* Ex. 2). Again, this shows the best judgment and information by the Auditor, which also meets the applicable minimum standard of reasonableness.

Additionally, the inclusion of the term “unless the sources of information or other circumstances indicate lack of trustworthiness” within Rule 803(8) shows that the Rule is meant to allow a court to have wide discretion to permit a document to be admitted. As the trier of fact, once such documents and related testimony are admitted, the Tribunal can determine how much probative weight to give a particular document or related testimony. In any matter, the Tribunal also has the opportunity to base its final substantive decision on how trustworthy or probative the documentation is once the Tribunal hears any corresponding and opposing testimony. In this case, the Department would like to provide the Auditor’s testimony to corroborate the Department’s documentation and O&S has indicated that it will provide witnesses to oppose the Department’s documentation. (*See* PT Order Witness List). Therefore, admitting the Objected To Exhibits into evidence will not result in prejudice to either party because each party will have an opportunity to address the reliability and use of this information for the record.

Under Illinois Rule of Evidence 902 (“Rule 902”), Ex. 2 does not require extrinsic evidence of authenticity: Rule 902(1) states:

**(1) Domestic Public Documents Under Seal.** A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution. Ill.R.Evid. 902(1).

Exhibit 2 contains a Certificate of Records of the Indiana Department of Revenue, which is sealed and is signed under penalty of perjury by the Ind. Department's Custodian of Records. (Ex. 2 at 2.) Ex. 2 is therefore self-authenticating. *See also People ex rel. Madigan v. Kole*, 2012 IL App (2d) 110245, ¶¶ 48-49 (2012) (describing the nature of Rule 902(1) authentication of documents).

The Department may also authenticate the Objected To Exhibits under Illinois Rule of Evidence 901 ("Rule 901"), which provides that: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Ill.R.Evid. 901(a). Rule 901(b)(1) and (7) provide illustrations of what meets the Rule 901 requirements:

**(1) Testimony of Witness With Knowledge.** Testimony that a matter is what it is claimed to be.

**(7) Public Records or Reports.** Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept. Ill.R.Evid. 901(b)(1) and (7).

Under Rule 901(b)(1), the Department has stated that it intends to call the Auditor regarding this audit. (*See* PT Order.) Thus, the Auditor can authenticate all of the Objected To Exhibits (including Ex. 2, to the extent the Auditor has personal knowledge to testify regarding his obtaining and use of Ex. 2 for the original and current audit assessment) at the hearing. Moreover, under Rule 901(b)(7), all of the Objected To Exhibits were recorded and/or filed in a public office (the Illinois Department), and are the types of documents which the Department typically keeps, maintains, or records, in the ordinary course of business in conducting its duties.

**3. The Objected To Exhibits Are Admissible Under The Rule 803(6) (“Business Records”) Hearsay Exception**

If the Tribunal determines that Exs. 2 through 5 are hearsay, Illinois Rule of Evidence 803(6) (“Rule 803(6)”), entitled “Records of Regularly Conducted Activity,” would allow the admission of all of the Objected To Exhibits. Rule 803(6) provides:

**(6) Records of Regularly Conducted Activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness, but not including in criminal cases medical records. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. Ill.R.Evid. 803(6) (emphasis added).

Notably, Supreme Court Rule 236 contains similar language for the Admission of Business Records in Evidence:

**(a)** Any writing or record, whether in the form of any entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of the act, transaction, occurrence, or event, if made in the regular course of any business, and if it was the regular course of the business to make such a memorandum or record at the time of such an act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but shall not affect its admissibility. The term “business,” as used in this rule, includes business, profession, occupation, and calling of every kind. Ill. S. Ct. R. 236(a) (emphasis added).<sup>17</sup>

As referenced in Rule 803(6), a certification that complies with Illinois Rule of Evidence 902(11) (“Rule 902(11)”) can be a method used to authenticate evidence attempting to be

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<sup>17</sup> This separate provision from Rule 803(6) has been recognized in civil cases (*see, e.g.,* O&S’ cited case of *Land and Lakes Co. v. Industrial Com’n*, 359 Ill.App.3d 582 (2d Dist. 2005)), and it shows that the intention of both Rule 803(6) and the similar Supreme Court Rule both show the breadth in which such documentation should be admissible. Prior to the adoption of Rules 803(6) and (8), Supreme Court Rule 236 recognized both business records and public records as exceptions to the hearsay rule in civil cases. *Village of Arlington Heights*, 2011 IL App (1<sup>st</sup>) 110748, ¶17.

admitted under Rule 803(6). Rule 902(11), which deals with self-authenticating documents, provides in pertinent part:

**(11) Certified Records of Regularly Conducted Activity.** The original or a duplicate of a record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written certification of its custodian or other qualified person that the record

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of these matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

The word “certification” as used in this subsection means with respect to a domestic record, a written declaration under oath subject to the penalty of perjury...

Ill.R.Evid. 902(11)

Exhibit 2 meets the requirements of both Rules 803(6) and 902(11). The Rule 803(6) standards are met because the Ind. Department MEI returns and schedules, and the MEI audit documentation is data “in any form” of acts and events made at or near the time by, “**or from information transmitted by,**” a person with knowledge as shown by a “certification that complies with Rule 902(11).” Notably, in its Motion O&S does not include Rule 803(6)’s language, which specifically addresses how documentation in any form, made at or near the time by or from information transmitted by, a person with knowledge as shown by a Rule 902(11) certification will be admissible. In other words, [REDACTED]

[REDACTED] these documents fall under the standard of being information transmitted to the Ind. Department in the course of its regular business, by a person with knowledge, [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] As

for the other Objected To Exhibits, Exs. 3, 4, and 5 are admissible because they are Illinois Department records created and maintained directly by the Auditor at or near the time at issue. The Auditor can testify to these documents and related facts at the hearing. As stated *supra*, Exs. 3, 4, and 5 also meet the authentication requirements under Rule 901(b)(1) and (7). Therefore, all of the Objected To Exhibits should be admitted into evidence.

Additionally, the inclusion of the term “unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness” within Rule 803(6) shows that (like Rule 803(8), discussed *supra*) Rule 803(6) is meant to allow a court to have wide discretion to permit a document to be admitted and, as the trier of fact, this Tribunal can determine how much probative weight to give a particular admitted document or related testimony. Similarly, Illinois Supreme Court Rule 236(a), which is purposefully similar to Rule 803(6) states: “All other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but shall not affect its admissibility.” This specific language shows that documentation such as that which is included within the Objected To Exhibits and any related testimony should just go to the weight that information receives by the Tribunal. *See, e.g., Troyan v. Reyes*, 367 Ill.App.3d 729, 733-38 (3d Dist. 2006) (holding that business records are an exception to the hearsay rule because of their inherent trustworthiness and reliability, and how it is not necessary that the author or creator of the record

testify or be cross-examined about the contents of the record since a custodian can meet the foundational requirements; medical reports containing diagnosis are regularly permitted under Rule 803(6) as long as the information is not too complex for the trier of fact to be helpful without corresponding testimony). In sum, admitting the Objected To Exhibits and related testimony into evidence will not result in prejudice to either party since the Tribunal, as the trier of fact, will determine the weight to be given such documentation and related testimony.

Finally, the Department is compelled to address O&S' two primary arguments made in its Motion as to why the business records exception to the hearsay rule does not apply to allow the Objected To Exhibits and related testimony to be admitted. O&S' first argument is that, with only citing the sole precedent of *Land and Lakes Co. v. Industrial Com'n*, 359 Ill.App.3d 582 (2d Dist. 2005), "a proponent who seeks to admit documents under the business records exception to the hearsay rule must lay an adequate foundation through the testimony of the custodian of records or another person familiar with the business and its mode of operation." O&S' second argument cites the sole case of *Northern Illinois Gas Co. v. Vincent DiVito Const.*, 214 Ill.App.3d 203 (2d Dist. 1991) for the argument that "[u]nder the business records exception to the hearsay rule, only business records are admissible, and not testimony of [a] witness who makes reference to business records." Both of these arguments are incorrect and misplaced.

First, *Land and Lakes* provides that under Illinois Supreme Court Rule 236(a), adequate foundation of the documents at issue could not be provided by a person who did not have personal knowledge of the business practices or the reasonableness of those practices. *Land and Lakes*, 359 Ill.App.3d at 591. To be clear, the Department is not attempting to call its Auditor to testify to matters of which he has no personal knowledge. [REDACTED]

[REDACTED]

██████████ The Illinois Department intends to call the Auditor to testify to the personal knowledge he has regarding how the Illinois Audit was conducted and how the Ind. Department documentation provided to the Illinois Department was evaluated and used by him in order to determine the original and current Illinois Department assessments using his best judgment and information. In other words, in its Motion O&S is confusing the evidentiary requirement of foundation with the requirement of witness competence under Illinois Rule of Evidence 602 (“Rule 602”). Rule 602, entitled “Lack of Personal Knowledge,” provides in pertinent part:

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness’ own testimony... Ill.R.Evid. 602.

Again, the Department intends to introduce only competent and personal knowledge from the Auditor. However, under Rule 803(6), Rule 901(b)(1) and (7), and Rule 902(11), as explained *supra*, this does not mean that there is no adequate foundation for the Objected To Exhibits or the proposed testimony of the Auditor.

Second, and similarly to what was stated for the *Land and Lakes* matter, *Northern Illinois Gas* provides that under Supreme Court Rule 236(a) a witness can only testify to events that were witnessed by them, even if a business record partially made by them is entered into evidence under the Rule 236 hearsay exception. *Northern Illinois Gas Co.*, 214 Ill.App.3d at 215. Again, in its Motion O&S is confusing the required competency of a witness under Rule 602 with the requirement to establish an adequate foundation. As stated, the Department has no intention of calling its Auditor to testify regarding information of which he does not have personal knowledge. This does not mean that the Auditor does not have valuable personal knowledge regarding how the Ind. Department returns and schedules were maintained, or

specifically how this information was used, as the Auditor created the original and current audit assessments. Further, under Rule 803(6), Rule 901(b)(1) and (7), and Rule 902(11), as explained above, there is an adequate foundation for the Objected To Exhibits and the proposed testimony of the Auditor regarding how the audit was conducted. Thus, under these standards, the Objected To Exhibits and related Auditor testimony should be permitted under the Rule 803(6) hearsay exception.

**4. The Objected To Exhibits Are Admissible Under Applicable Administrative Procedure And Other Law Due To Inadequate Books And Records**

Under applicable law, the Objected To Exhibits should be admitted even if not admissible under the rules of evidence given the particular facts and circumstances of this case. Section 10-45 of the OTP Act incorporates many sections of the ROTA, including ROTA Section 11a. 35 ILCS 143/10-45. Section 11a of the ROTA provides: “The Illinois Administrative Procedure Act is hereby expressly adopted and shall apply to all administrative rules and procedures of the Department of Revenue under this Act, [with inapplicable exceptions]...” 35 ILCS 120/11a. Section 100/10-40 of the Illinois Administrative Procedures Act (“IAPA”) states, in pertinent part:

The rules of evidence and privilege as applied in civil cases in the circuit courts of this State shall be followed. Evidence not admissible under those rules of evidence may be admitted, however, (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs... 5 ILCS 100/10-40 (emphasis added).

The Objected To Exhibits show and the Auditor would be able to testify that the MEI information contained within the Department’s Exhibits were reasonably relied upon by him in the O&S audit. Thus under the IAPA, which has been incorporated into the OTP Act, the Objected To Exhibits should be admitted. Exhibit 2 should be admitted because it contains the type of best information reasonably relied upon by the Auditor in exercising his best judgment in

his original and current assessments. Exhibits 3, 4, and 5 should be admitted because they contain calculations and schedules, some of which is based on the MEI information contained within Ex. 2, which was used to determine the original and current assessments.

Further, under standard Illinois law, hearsay is admissible by the Department in situations in which the taxpayer does not have any or adequate documentation to refute the Department's *prima facie* case. For example, in *DuPage Liquor Store*, the Illinois Supreme Court discussed how the taxpayer needed to provide evidence identified with its books and records. 383 Ill. at 278-79. In the *DuPage* audit, the Department's auditor testified that the figures shown in corrected returns were the result of information obtained from purchasing invoices, copies of bills of lading, and other data furnished by various supply houses and wholesalers who sold liquor to the taxpayer. *Id.* at 279. In sum, because the taxpayer had not furnished the auditor with any books and records from which an audit could be made and the gross amount of retail sales determined, the Court held that the Department had met the "best judgment and information" standard and that the Department was not restricted in such a situation to facts that can only be otherwise introduced into evidence when the matter came to a hearing. *Id.* at 280; *see also Puleo v. Dep't. of Revenue*, 117 Ill.App.3d 260, 267 (4<sup>th</sup> Dist. 1983) (re-enforcing the rule that if the taxpayer does not produce records from which an audit can be made, the Department may use its best judgment and information, including what would otherwise be objectionable as hearsay, in producing its corrected return, and that a general denial by a taxpayer is not sufficient to rebut the Department's *prima facie* case); *Illini Motor Co. v. Illinois Dep't. of Revenue*, 139 Ill.App.3d 411, 414-15 (4<sup>th</sup> Dist. 1985) (stating that the results of audits based partly on hearsay have been deemed worthy of consideration when the taxpayer has no books or records or where the taxpayer's records are inadequate.) In other words, the

Department often uses “indirect methods” such as circularizing vendors and reaching out to other third party contacts, when a taxpayer’s books and records are inadequate. Such methods, if minimally reasonable, have been upheld as worthy of court review. *See, e.g., Smith v. Dep’t. of Revenue*, 143 Ill.App.3d 607, 611-12 (5<sup>th</sup> Dist. 1986) (even when some material might be considered hearsay, such Department reliance was permissible given the plaintiffs’ failure to provide adequate documentation); *DuPage Liquor Store*, 383 Ill. at 279.

Applying these principles, it is undisputed that at the time of the original audit O&S had several MEI invoices. (PT Stip. 13; Ex. 3). Since that time, it is agreed that these invoices have been misplaced. Also, O&S only proposes to submit as its own exhibit OTP invoices from Illinois vendors for the April 2013 through October 2013 time period. (*See* O&S Ex. 1). None of the invoices to be admitted into the record by O&S in this hearing are either MEI invoices or general OTP invoices from the current assessment period of January 2008 through May of 2012. There are also no formal documents from the current assessment period being offered by O&S into evidence. Indeed, O&S does not intend to provide documents to account for any of its OTP inventory acquired during the current assessment period. Such evidence could include a formal general ledger to show purchases and disbursements. The Auditor would testify that O&S’ books and records here are inadequate to conduct a proper audit, but enough information from third parties (i.e. MEI) was present during the original audit to show that the audit assessments were both reasonable and based on the Auditor’s best judgment and information. Therefore, because O&S has not provided any (or at most, very limited) books and records to justify its previous and current assessments, the Department may support its audit findings with the use of documents which could otherwise be considered hearsay.

In sum, as discussed at length herein, the Objected To Exhibits and related Auditor testimony should be admitted under the OTP Act and/or hearsay exception(s). However, even if the Tribunal holds otherwise, the Objected To Exhibits would be admissible under Illinois law because Ex. 2 was needed since there was not enough other O&S documentation to complete a reasonable assessment for the audit and Ex. 2 directly supports the audit findings in a matter with limited books and records. Further, Exs. 3, 4, and 5 are merely the Illinois Department's audit file, which to some extent used the information from Ex. 2, to derive the original and current audit assessment based on a minimal standard of reasonableness and the Auditor's best judgment and information.

**Conclusion**

Consequently, the Department respectfully requests that the Petitioner's Motion *In Limine* be denied for the reasons stated above, and for any other relief that is just.

Dated: June 8, 2016

Respectfully submitted,

/s/ Michael Coveny

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**CERTIFICATE OF SERVICE**

We, Michael Coveny and Seth Schriftman, attorneys for the Illinois Department of Revenue, state that we served a copy of the attached **THE ILLINOIS DEPARTMENT OF REVENUE'S RESPONSE TO PETITIONER'S MOTION IN LIMINE** upon:

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By email to zanayedlaw@gmail.com on June 8, 2016.

/s/ Michael Coveny  
/s/ Seth Schriftman