

IN THE ILLINOIS INDEPENDENT TAX TRIBUNAL

FIFTH THIRD LEASING COMPANY  
(n/k/a FIFTH THIRD EQUIPMENT FINANCE  
COMPANY)

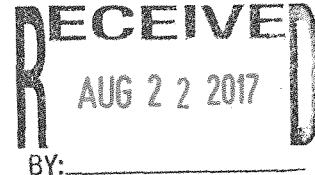
Petitioner,

v.

THE ILLINOIS DEPARTMENT OF REVENUE,

Respondent.

No. 16 TT 34



**NOTICE OF MOTION**

TO: *See Certificate of Service*

**PLEASE TAKE NOTICE** that on **August 24, 2017** at the hour of **9:30 a.m.**, or as soon thereafter as counsel may be heard, we shall appear before Chief Administrative Law Judge Conway, or any judge sitting in his place and stead, on the telephonic status conference set for that time, for **Petitioner's Motion to Schedule Hearing on Motion for Partial Summary Judgment**, a copy of which is attached hereto.

Respectfully Submitted,  
**FIFTH THIRD LEASING COMPANY**

Petitioner

By: David Ruskin  
One of Its Attorneys

Jordan M. Goodman (jgoodman@hmblaw.com)  
David S. Ruskin (druskin@hmblaw.com)  
**HORWOOD MARCUS & BERK CHARTERED**  
500 W. Madison St., Ste. 3700  
Chicago, IL 60661  
Tel: (312) 606-3200

IN THE ILLINOIS INDEPENDENT TAX TRIBUNAL

FIFTH THIRD LEASING COMPANY  
(n/k/a FIFTH THIRD EQUIPMENT FINANCE  
COMPANY)

Petitioner,

v.

THE ILLINOIS DEPARTMENT OF REVENUE,

Respondent.

No. 16 TT 34

RECEIVED  
AUG 22 2017  
BY: \_\_\_\_\_

**PETITIONER'S MOTION TO SCHEDULE HEARING ON  
MOTION FOR PARTIAL SUMMARY JUDGMENT**

The Petitioner, Fifth Third Leasing Company (n/k/a Fifth Third Equipment Finance company) ("Petitioner"), by and through its attorneys, Horwood Marcus & Berk Chartered, hereby respectfully requests that this Court schedule Petitioner's previously filed motion for partial summary judgment, pursuant to 735 ILCS 5/2-1005(a) and (d), for hearing and ruling. In support of this motion, Petitioner states as follows:

1. On February 18, 2016, Petitioner filed its Petition against the Illinois Department of Revenue. A copy of the Petition is attached as Exhibit A to Petitioner's Motion for Partial Summary Judgment, a copy of which is attached hereto as Exhibit 1.

2. On April 12, 2016, the Respondent filed its Answer to the Petition ("Answer"). A copy of Respondent's Answer is attached as Exhibit B to Petitioner's Motion for Partial Summary Judgment.

3. On August 22, 2016, Petitioner filed its Motion for Partial Summary Judgment (the "Motion"). The Motion relates to Counts I through III of the Petition and focuses solely on the issues raised regarding REIT dividends.

4. In addition to relying on the Respondent's Answer and Respondent's written discovery responses, the Motion was also filed because Respondent has taken a policy position on the same REIT issue and has agreed that there are no facts that would distinguish this matter.

5. Instead of proceeding on its Motion, Petitioner drafted a proposed settlement agreement and tendered it to Respondent on December 15, 2016. The proposed settlement includes a resolution of both the REIT issue as well as the other issue raised in the Petition regarding the unitary aspect of Petitioner and Vantiv (see, Petition, Count IV).

6. Respondent has since repeatedly requested additional time from this Court to review the settlement proposal and more recently to review underlying audit records, for both the REIT issue and the unitary issue. Since the most recent status hearing, Respondent requested a significant volume of records on just the unitary Vantiv issue alone, even though most of the records requested by Respondent had already been produced by Petitioner approximately one (1) year ago.

7. It has been understood by both parties for many months that there are no material facts in dispute regarding the REIT issue, as raised and argued by Petitioner in the Motion. Should Respondent not wish to resolve the REIT issue as proposed in Petitioner's settlement offer from December, 2016, a ruling on that issue by way of Petitioner's Motion should conclude a significant portion of this case.

8. No prejudice will result to either party by granting this motion and scheduling a hearing on Petitioner's Motion on the next available date.

**WHEREFORE,** Petitioner respectfully requests that this Tribunal grant its Motion and schedule a hearing on Petitioner's Motion for Partial Summary Judgment on the next available date, and such further relief as this Tribunal deems just and proper.

Respectfully Submitted,  
**FIFTH THIRD LEASING COMPANY**  
Petitioner

By: David Ruskin  
One of Its Attorneys

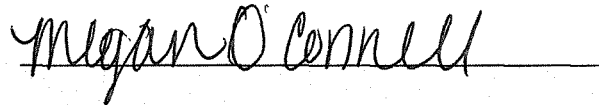
Jordan M. Goodman (jgoodman@hmblaw.com)  
David S. Ruskin (druskin@hmblaw.com)  
**HORWOOD MARCUS & BERK CHARTERED**  
500 W. Madison St., Ste. 3700  
Chicago, IL 60661  
Tel: (312) 606-3200

DATED: August 22, 2017

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that she caused a true and correct copy of the foregoing, **PETITIONER'S MOTION TO SCHEDULE HEARING ON MOTION FOR PARTIAL SUMMARY JUDGMENT**, to be served on other counsel of record by electronic mail before the hour of 5:00 p.m. on the 22<sup>nd</sup> day of August, 2017, addressed as follows:

Rebecca Kulekowskis  
Special Assistant Attorney General  
Illinois Department of Revenue  
Office of Legal Services  
100 West Randolph, 7-900  
Chicago, Illinois 60601  
Rebecca.Kulekowskis@Illinois.gov

A handwritten signature in black ink, reading "Megan O'Connell", followed by a horizontal line.

# **EXHIBIT 1**

IN THE ILLINOIS INDEPENDENT TAX TRIBUNAL

FIFTH THIRD LEASING COMPANY  
(n/k/a FIFTH THIRD EQUIPMENT FINANCE  
COMPANY)

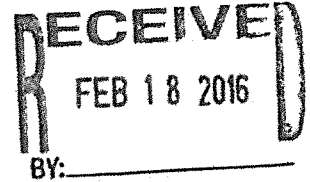
Petitioner,

v.

THE ILLINOIS DEPARTMENT OF REVENUE,

Defendant.

No.



PETITION

Petitioner, Fifth Third Leasing Company<sup>1</sup> n/k/a Fifth Third Equipment Finance Company ("Petitioner"), by and through its attorneys, Horwood Marcus & Berk Chartered, complains of the Defendant, the Illinois Department of Revenue ("Department"), and alleges as follows:

PARTIES

1. Petitioner is a Delaware corporation. Petitioner's principal business address is 38 Fountain Square Plaza MD 1090R9, Cincinnati, Ohio 45263.
2. Petitioner is represented by Jordan Goodman, David Ruskin, and Christopher Lutz of Horwood Marcus & Berk Chartered, located at 500 West Madison St., Suite 3700, Chicago, Illinois 60661, who can be reached at 312-606-3225 or jgoodman@hmblaw.com, or 312-606-3222 or clutz@hmblaw.com, or 312-606-3235 or druskin@hmblaw.com.
3. Petitioner's FEIN is 31-0829500.
4. Petitioner is in the business of financing lease transactions.

<sup>1</sup> In May 2011, Fifth Third Leasing Company changed its name to Fifth Third Equipment Finance Company. While Petitioner filed its returns, during the relevant years at issue, as Fifth Third Leasing Company, the Notice of Claim Denial was issued to Fifth Third Equipment Finance Company. With the exception of the name change, the two entities are the same.

5. The Department is an agency of the Executive Department of the State Government and is tasked with the enforcement and administration of Illinois tax laws. 20 ILCS 5/5-15.

### **NOTICE**

6. On December 23, 2015, Petitioner received a Notice of Claim Denial ("Notice") denying Petitioner's refund claims for the Tax Year Ending December 31, 2009 in the amount of \$1,790,849. A true and accurate copy of the Notice of Claim Denial is attached hereto as Exhibit A.

### **JURISDICTION**

7. Petitioner brings this action 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.

8. The Tribunal has jurisdiction over this matter pursuant to Sections 1-45, and 1-50 of the Tribunal Act and Section 909(f) of the Income Tax Act because Petitioner timely filed this petition within 60 days of receiving the Notice of Claim Denial.

### **BACKGROUND**

9. Petitioner is engaged in the business of financing lease transactions.

10. Petitioner filed Illinois combined income tax returns for the tax years ending December 31, 2008 and December 31, 2009 ("Years at Issue").

11. Fifth Third Mortgage Company ("FTMC") was a member of Petitioner's Illinois combined income tax return for the Years at Issue.

12. Fifth Third Real Estate Investment Trust, Inc. ("FTREIT") was a member in Petitioner's Illinois combined income tax return for the Years at Issue.



13. GNB Management LLC ("GNBM") was a member in Petitioner's Illinois combined income tax return for the tax year December 31, 2009.

14. GNB Realty LLC ("GNB") was a member in Petitioner's Illinois combined income tax return for the Years at Issue.

15. Fifth Third Bank ("Bank") was a member in Petitioner's Illinois combined income tax return for the Years at Issue.

16. FTPS Partners LLC ("Partners") was a member in Petitioner's Illinois combined income tax return for the tax year December 31, 2009.

17. During the Years at Issue, FTREIT met the definition of a captive real estate investment trust. 35 ILCS 1051(a)(1.5).

18. During the Years at Issue, GNB met the definition of a captive real estate investment trust. 35 ILCS 1051(a)(1.5).

19. During the Years at Issue, FTREIT made real estate investment trust ("REIT") dividend payments to FTMC as described in 26 U.S.C. §857.

20. During the Years at Issue, GNB made REIT dividend payments to Bank, GNBM, and FTREIT as described in 26 U.S.C. §857.

#### **REIT Issues**

21. In 2009, the Illinois General Assembly amended the Illinois Income Tax Act to modify the manner in which Real Estate Investment Trust ("REIT") dividend payments should be taxed in Illinois. Public Act 95-0233 as amended by PA 95-707.

22. As part of the amendments, 35 ILCS 5/203(b)(2)(O) was amended to affect tax years ending on or after December 31, 2008.

23. The amendment to 35 ILCS 5/203(b)(2)(O) requires any payments received from a captive real estate investment trust to be deducted from the combined group's income.

24. As part of the amendments, 35 ILCS 5/203(b)(2)(E-15), unlike the amendment to 35 ILCS 5/203(b)(2)(O), was amended to affect tax years beginning only after December 31, 2008.

25. The amendment to 35 ILCS 5/203(b)(2)(E-15) requires taxpayers to add back to the income of a combined group any deduction for dividends paid by a captive real estate investment trust that is allowed to take such a deduction under 26 U.S.C. §857(b)(2)(B) for dividends paid.

26. On or about September 30, 2014, Petitioner filed timely amended returns for each of the Years at Issue reflecting additional changes to its Illinois net income.

27. For the Tax Year ending December 31, 2008, Petitioner reduced its income to exclude dividends received from FTREIT. The FTREIT dividend exclusion increased the Petitioner's Illinois Net Loss Deduction carryforward by \$11,881,725, resulting in a total Net Loss Deduction carryforward of \$22,846,430 for the Tax Year ending December 31, 2008.

28. On October 29, 2013, the Illinois Department issued a memorandum regarding Petitioner's treatment of the dividends FTMC received from FTREIT.

29. In the memorandum, consistent with the Petitioner's treatment of the REIT dividends, the Department concludes that for the Tax Year Ending December 31, 2008, Petitioner should have deducted the dividends received from the REIT and the REIT should have similarly deducted the dividends that were paid to FTMC. The October 29, 2013, memorandum is attached hereto as Exhibit B.

30. For the Tax Year ending December 31, 2009, Petitioner utilized the increased Illinois Net Loss Deduction carryforward, which entitled Petitioner to a \$1,617,459 refund.

31. Contrary to the Department's memorandum, the auditor disagreed that Petitioner was entitled to deduct the FTREIT dividends and disallowed Petitioner's deduction on its amended return, thus reducing Petitioner's Illinois Net Loss Deduction carryforward.

32. As a result of the amendment to 35 ILCS 5/203(b)(2)(E-15), for the Tax Year Ending December 31, 2009, Petitioner added back to its Illinois taxable income the FTREIT and GNB federal dividend paid deduction as claimed on each REITs Federal Form 1120-REIT.

33. Petitioner deducted from its Illinois taxable income dividends received by FTMC from FTREIT in the Tax Year Ending December 31, 2009.

34. Petitioner deducted from Illinois taxable income dividends received by Bank, GNB and FTREIT from GNB in the Tax Year Ending December 31, 2009.

35. The difference between the amount of federal dividend paid deduction and the amount of dividends actually received by Petitioner related to dividends from the captive REITs entitled Petitioner to a \$32,179 refund.

36. The auditor disagreed that FTREIT and GNB were required to add back the federal dividend paid deduction and that Petitioner was required to subtract dividends received from FTREIT and GNB.

#### **Unitary Issues**

37. For the Tax Year ending December 31, 2009, Bank and Partners included on line 35 of Petitioner's amended Illinois combined return income attributable to FTFS Holding LLC (now known as Vantiv Holding LLC).

38. On June 30, 2009, Petitioner sold 51% of FTPS Holding, LLC to an independent third party.

39. The June 30, 2009, sale caused a technical termination of FTPS Holding LLC.

40. Petitioner treated FTPS Holding LLC as a unitary member on its combined income tax return until June 30, 2009.

41. After June 30, 2009, Petitioner had only a 49% interest in FTPS Holding, LLC.

42. After June 30, 2009, Petitioner lacked control of the board of directors.

43. During the transition, Petitioner and FTPS Holding, LLC entered into an arm's length transition services agreement whereby Petitioner agreed to provide services to FTPS Holding, LLC that would facilitate the transfer to the independent third party 51% owner.

44. Petitioner treated FTPS Holding LLC as non-unitary for the periods after June 30, 2009 by excluding the income earned by FTPS Holding LLC from Petitioner's Illinois apportionable base income and allocating the income earned by FTPS Holding LLC that was attributable to Illinois.

45. Petitioner's treatment of FTPS Holding LLC as non-unitary entitled Petitioner to a refund of \$64,973.

46. The Department disagreed that FTPS Holding LLC should have been treated as non-unitary, and disallowed Petitioner's allocation of the FTPS Holding LLC income to Illinois.

**The Department's Notice of Claim Denial**

47. On December 23, 2015, the Department issued a Notice of Claim Denial denying Petitioner's refund claims with respect to the FTREIT and GNB dividends, including the increased Illinois Net Loss Deduction generated by the FTREIT dividend exclusion in Tax Year

Ending December 31, 2008 and Petitioner's Illinois allocation of the FTPS Holding, LLC income for the Tax Year Ending December 31, 2009.

48. The December 23, 2015 Notice includes the entire refund claim for the Tax Year Ending December 31, 2009.

49. The Notice of Claim Denial allowed \$223,670 of Petitioner's refund claim and denied \$1,790,849 of Petitioner's refund claim.

### **COUNT I**

#### **Petitioner is Entitled to a Refund of Tax That was Paid on Dividend Income Earned from a Captive Real Estate Investment Trust**

50. Petitioner realleges and incorporates by this reference the allegations made in paragraphs 1 through 49, inclusive, hereinabove.

51. FTREIT is unitary with FTMC.

52. For the Tax Year Ending December 31, 2008, FTMC received \$252,360,182 of dividend income from FTREIT.

53. Petitioner reported this dividend income on line 19 and on Schedule J line 10 as a dividend from an 80% or greater owned captive REIT.

54. On its original return, Petitioner did not deduct the FTREIT dividend from FTMC's Illinois taxable income.

55. Pursuant to 35 ILCS 5/203(b)(2)(O), for years ending on or after December 31, 2008, taxpayers are required to reduce their base income by the dividends received from a captive real estate investment trust.

56. For the tax year ending December 31, 2008, there is no Illinois mechanism to "add back" the federal dividend paid deduction entitled to captive REITs. 35 ILCS

5/203(b)(2)(E-15) (requiring add back of dividends paid by a captive REIT for the taxable years beginning after December 31, 2008).

57. Petitioner is entitled to deduct the dividends it received from a captive REIT.

58. The Department's October 29, 2013, memorandum confirms the correctness of Petitioner's treatment of the captive REIT dividends on its amended return.

59. As a result of the captive REIT dividend subtraction, Petitioner is entitled to an increased Illinois Net Loss Deduction carryforward from the Tax Year Ending December 31, 2008 and the related refund of tax erroneously paid for the Tax Year Ending December 31, 2009.

**WHEREFORE**, Petitioner prays that the Tribunal enter an order that:

- (a) finds and declares that the Petitioner is entitled to subtract from its taxable base income dividends received from FTREIT;
- (b) enters judgment in favor of Petitioner and against the Defendants and orders Defendants to issue Petitioner a refund with respect to the increased Illinois Net Loss Deduction carryforward arising from excluding dividends received from FTREIT from Illinois taxable income;
- (c) grants such further relief as the Tribunal deems appropriate under the circumstances.

## **COUNT II**

**Petitioner is Entitled to a Refund Because, After Tax Years Ending December 31, 2008, Only Dividends Claimed as a Federal Dividend Paid Deduction Should be Added Back to Fifth Third Real Estate Investment Trust's Illinois Taxable Income**

60. Petitioner realleges and incorporates by this reference the allegations made in paragraphs 1 through 59, inclusive, hereinabove.

61. In order to calculate its Federal Income tax base, FTREIT is required to deduct dividend payments that it made to its shareholders, including FTMC and other third party individual shareholders, as well as dividend payments that FTREIT declared payable in the twelve month period following the close of the taxable year. 26 U.S.C. 858(a)(2). These amounts are collectively referred to as the federal dividend paid deduction as reported on the U.S. Federal Form 1120-REIT.

62. Beginning after Tax Year Ending December 31, 2008, Illinois statute requires a captive REIT to add back to its taxable income any dividends paid that were claimed as a federal dividend paid deduction under Section 857(b)(2)(B) of the Internal Revenue Code. 35 ILCS 5/203(b)(2)(E-15).

63. Illinois statute requires Taxpayers to subtract from its taxable income dividends received from a captive REIT. 35ILCS 5/203(b)(2)(O).

64. For the Tax Year Ending December 31, 2009, FTREIT claimed as federal dividend paid deduction \$161,682,418 as reported on its Federal Form 1120-REIT.

65. For the Tax Year Ending December 31, 2009, FTMC received dividends from FTREIT in the amount \$165,129,095 which were included in FTMC's federal taxable income.

66. For the Tax Year Ending December 31, 2009, the difference between captive REIT dividends that FTREIT claimed as a federal dividend paid deduction and that FTMC actually received was \$3,446,677.

67. Hence, FTMC received \$3,446,677 more dividends than FTREIT claimed as a federal dividend paid deduction as a result of the rules described in 26 U.S.C 858(a)(2).

68. As a result of the Federal tax laws governing the timing difference between captive REIT dividends paid and captive REIT dividends received, Petitioner is entitled to a refund based on the difference for the Tax Year Ending December 31, 2009.

**WHEREFORE**, Petitioner prays that the Tribunal enter an order that:

- (a) finds and declares that Petitioner was only required to add back dividends that were actually reported as a federal dividend paid deduction by FTREIT on its Federal Form 1120-REIT and Petitioner was only required to subtract captive REIT dividends included in FTMC's federal taxable income;
- (b) enters judgment in favor of Petitioner and against the Defendants and orders Defendants to issue Petitioner a refund with respect to the FTREIT add back;
- (c) grants such further relief as the Tribunal deems appropriate under the circumstances.

### **COUNT III**

**Petitioner is Entitled to a Refund Because After Tax Years Ending December 31, 2008, Only Dividends Claimed as a Federal Dividend Paid Deduction Should be Added Back to GNB Realty, LLC's Illinois Taxable Income**

69. Petitioner realleges and incorporates by this reference the allegations made in paragraphs 1 through 68, inclusive, hereinabove.

70. GNB is unitary with Bank, GNBM and FTREIT.

71. In order to calculate its Federal Income tax base, GNB is required to deduct dividend payments that it made to its shareholders including Bank, GNBM, FTREIT and other third party individual shareholders as well as dividend payments that GNB declared payable in



the twelve month period following the close of the taxable year. 26 U.S.C. 858(a)(2). These amounts are collectively referred to as the federal dividend paid deduction as reported on the U.S. Federal Form 1120-REIT.

72. Beginning after Tax Year Ending December 31, 2008, Illinois statute requires a captive REIT to add back to its taxable income any dividends paid that were claimed as a federal dividend paid deduction under Section 857(b)(2)(B) of the Internal Revenue Code. 35 ILCS 5/203(b)(2)(E-15).

73. Illinois statute requires Taxpayers to subtract from its taxable income dividends received from a captive REIT. 35ILCS 5/203(b)(2)(O).

74. For the Tax Year Ending December 31, 2009, GNB claimed as federal dividend paid deduction \$38,352,263 as reported on its Federal Form 1120-REIT.

75. For the Tax Year Ending December 31, 2009, Bank, GNBM and FTREIT received dividends from GNB in the amount of \$480, \$21,509,308 and \$18,600,587, respectively which were included in each respective federal taxable income.

76. For the Tax Year Ending December 31, 2009, the difference between captive REIT dividends that GNB claimed as a federal dividend paid deduction and dividends from a captive REIT that Bank, GNBM and FTREIT actually received was \$1,758,112.

77. Hence, GNBM received \$1,758,112 more dividends than GNB claimed as a federal dividend paid deduction as a result of the rules described in 26 U.S.C 858(a)(2).

78. As a result of Federal tax laws governing the timing difference between captive REIT dividends paid and captive REIT dividends received, Petitioner is entitled to a refund based on the difference for the Tax Year Ending December 31, 2009.

**WHEREFORE**, Petitioner prays that the Tribunal enter an order that:

- (a) finds and declares that Petitioner was only required to add back dividends that were actually reported as a federal dividend paid deduction by GNB on its Federal Form 1120-REIT and Petitioner was only required to subtract captive REIT dividends included in Bank's, GNB's and FTREIT's respective federal taxable income.;
- (b) enters judgment in favor of Petitioner and against the Defendants and orders Defendants to issue Petitioner a refund with respect to the GNB add back;
- (c) grants such further relief as the Tribunal deems appropriate under the circumstances.

#### **COUNT IV**

##### **Petitioner is Entitled to a Refund as a Result of the Illinois Allocated Income from its Investment in a Non-Unitary Partnership**

79. Petitioner realleges and incorporates by this reference the allegations made in paragraphs 1 through 78, inclusive, hereinabove.

80. Under Illinois law, all income that may be treated as apportionable business income under the Constitution of the United States will be treated as such. 86 Ill. Admin. Code 100.3010(a)(2).

81. Before a state may tax a portion of a taxpayer's multistate business activities, a "unitary business" relationship must exist among the activities producing the income which the state taxing authority wishes to tax. *See Hunt-Wesson, Inc. v. Franchise Tax Bd. of Cal.*, 528 U.S. 458, 460.

82. A state is permitted to “tax a corporation on an apportionable share of the multistate business carried out in part in the taxing state.” *Allied-Signal, Inc. v. Director, Division of Taxation*, 504 U.S. 768 (1992).

83. In determining whether a unitary business exists states should look to the exchange or transfer of value, which may be evidenced by functional integration, centralization of management, and economies of scale. *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159 (1983); *see also* 86 Ill. Admin. Code 100.3380(b)(3)(A) – (C).

84. For Illinois Corporate Net Income Tax purposes, a “unitary business group” is defined as “a group of persons related through common ownership whose business activities are integrated with, dependent upon and contribute to each other . . . Common ownership in the case of corporations is the direct or indirect control or ownership of more than 50% of the outstanding voting stock of the persons carrying on unitary business activity. Unitary business activity can ordinarily be illustrated where the activities of the members are: (1) in the same general line (such as manufacturing, wholesaling, retailing of tangible personal property, insurance, transportation or finance); or (2) are steps in a vertically structured enterprise or process (such as the steps involved in the production of natural resources, which might include exploration, mining, refining, and marketing); and, in either instance, the members are functionally integrated through the exercise of strong centralized management (where, for example, authority over such matters as purchasing, financing, tax compliance, product line, personnel, marketing and capital investment is not left to each member).” 35 ILCS 5/1501(a)(27).

85. After the sale of 51% of Petitioner’s interest in FTPS Holding LLC, on June 30, 2009 Petitioner ceased to be unitary with FTPS Holding LLC.

86. Petitioner was not unitary with FTPS Holding LLC because the entities did not have common ownership. See 35 ILCS 5/1501(a)(27).

87. Although Petitioner provided transition services to FTPS Holding LLC, these services were provided pursuant to an arm's length agreement for which FTPS Holding LLC made arm's length payments to Petitioner.

88. After the sale to the independent third party, Petitioner and FTPS Holding LLC did not contribute to one another nor did they depend on one another outside of the arm's length transition services agreement.

89. Petitioner could not exercise control over FTPS Holding LLC.

90. Because Petitioner and FTPS Holding LLC were not unitary after June 30, 2009, Petitioner was entitled to reduce its Illinois pre-apportioned income based on the federal distributive share income of \$38,729,462 earned by FTPS Holding LLC for the Tax Year Ending December 31, 2009. Additionally, Petitioner was required to allocate \$2,390,112 of the non-unitary partnership income attributable to Illinois as reported on its IL-K-1 reported by FTPS Holding LLC.

91. Petitioner is entitled to a refund of tax erroneously paid as a result of its failure to include the Illinois allocated loss on its original return.

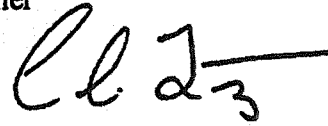
**WHEREFORE**, Petitioner prays that the Tribunal enter an order that:

- (a) finds and declares that Petitioner is entitled to reduce its Illinois pre-apportioned income based on the federal distributive share income from its non-unitary investment in FTPS Holding LLC;
- (b) finds and declares that Petitioner is entitled to include the Illinois allocated income from its non-unitary investment in FTPS Holding LLC;

- (c) enters judgment in favor of Petitioner and against the Defendants and orders Defendants to issue Petitioner a refund with respect to the Illinois allocated income;
- (d) grants such further relief as the Tribunal deems appropriate under the circumstances.

Respectfully submitted,

**FIFTH THIRD LEASING COMPANY**  
Petitioner

A handwritten signature in black ink, appearing to read "Cl. Lutz", with a horizontal line extending from the end of the signature.

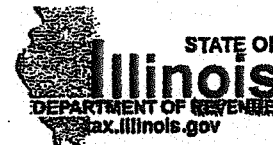
By: \_\_\_\_\_  
One of Petitioner's Attorneys

Jordan M. Goodman (jgoodman@hmblaw.com)  
David S. Ruskin (druskin@hmblaw.com)  
Christopher T. Lutz (clutz@hmblaw.com)  
Horwood Marcus & Berk Chartered  
500 W. Madison Street, Suite 3700  
Chicago, IL 60661  
(312) 606-3200

# **EXHIBIT A**

# Notice of Claim Denial

for Form IL-1120, Corporation Income and Replacement Tax Return



December 23, 2015

#BWNKMGV  
#CNXX X13X 2568 X8X0#  
FIFTH THIRD EQUIPMENT FINANCE CO  
38 FOUNTAIN SQUARE PLZ  
CINCINNATI OH 45202-3102



Letter ID: CNXXX13X2568X8X0

Taxpayer ID: 31-0829500  
Account ID: 01666-24768  
Audit ID: A572485632  
Reporting period: December 2009

We have audited your account for the claim for refund filed for the reporting period listed above. The proposed adjustment and net claim allowed are shown on the back page of this notice. Also, attached is the EDA-27-BI, Explanation of Adjustments, which details the reason. (35 ILCS 5/909(e)).

If you agree and your account is in balance, no action is required. You will receive a full refund if your account is overpaid and no other liabilities exist. If your account has a balance due, you will receive a bill.

If you do not agree, you may contest this notice by following the instructions listed below.

- If the amount of tax at issue, exclusive of penalty and interest is more than \$15,000, or if you are not claiming an overpayment of tax but the total penalties and interest are more than \$15,000, file a petition with the Illinois Independent Tax Tribunal within 60 days of this notice. Your petition must be in accordance with the rules of practice and procedure provided by the Tribunal (35 ILCS 1010/1-1, et seq.).
- In all other cases that do not fall within the jurisdiction of the Illinois Independent Tax Tribunal, file a protest with us, the Illinois Department of Revenue within 60 days of this notice. If you file a protest on time, we must reconsider our denial of claim (35 ILCS 5/910(a)), and if requested, grant you or your authorized representative an administrative hearing (35 ILCS 5/914). An administrative hearing is a formal legal proceeding conducted pursuant to the rules adopted by the Department and is presided over by an administrative hearing judge. Submit your protest on Form EAR-14, Format for Filing a Protest for Income Tax, (available on our website at [tax.illinois.gov](http://tax.illinois.gov)). If we do not receive your protest within 60 days, this denial will become final. A protest of this notice does not preserve your rights under any other notice.

If you do not protest this notice, the denial of your claim shall become final.

If a balance due is created on a subsequent tax year because of this denial, that amount will be shown on a Notice of Deficiency.

If you have questions, call us at the telephone number shown below.

Sincerely,

Constance Beard  
Director

ILLINOIS DEPARTMENT OF REVENUE  
AUDIT BUREAU  
PO BOX 19012  
SPRINGFIELD IL 62794-9012  
(217) 785-6711

## Statement

Date: December 23, 2015  
Letter ID: CNXXX13X2568X8X0  
Name: FIFTH THIRD EQUIPMENT FINANCE CO  
Taxpayer ID: 31-0829500  
Account ID: 01666-24768  
Audit ID: A572485632  
Reporting period: December 2009

### Computation of claim denial

Reporting period ending:	12/31/2009
Claim receive date:	09/30/2014
Amount of original claim:	\$2,014,519.00
Amount of proposed adjustment:	(\$1,790,849.00)
Net claim allowed:	\$223,670.00

## Bankruptcy Information

If you are currently under the protection of the Federal Bankruptcy Court, contact us and provide the bankruptcy number and the bankruptcy court. The bankruptcy automatic stay does not change the fact you are required to file tax returns.

## Taxpayer Bill of Rights

- You have the right to call the Department of Revenue for help in resolving tax problems.
- You have the right to privacy and confidentiality under most tax laws.
- You have the right to respond, within specified time periods, to Department notices by asking questions, paying the amount due, or providing proof to refute the Department's findings.
- You have the right to appeal Department decisions, in many instances, within specified time periods, by asking for Department review, by filing a petition with the Illinois Independent Tax Tribunal, or by filing a complaint in circuit court.
- If you have overpaid your taxes, you have the right, within specified time periods, to file for a credit (or, in some cases, a refund) of that overpayment.

The full text of the Taxpayers' Bill of Rights is contained in the Illinois Compiled Statutes, 20 ILCS 2520/1 et seq.



# Explanation of Audit Adjustments

## Income Tax



December 23, 2015

#BWNKMGV  
#CNXX XX99 953X 64X9#  
FIFTH THIRD EQUIPMENT FINANCE CO  
38 FOUNTAIN SQUARE PLZ  
CINCINNATI OH 45202-3102



Letter ID: CNXXXX99953X64X9

Taxpayer ID: 31-0829500  
Account ID: 01666-24768  
Audit ID: A572485632  
Reporting period: December 2009

### Explanation of adjustments for tax period ending 12/31/2009

	<u>Income change</u>	<u>Tax impact</u>
We adjusted your addition modifications to reflect the correct amount as allowed by Illinois law. [35 ILCS 5/203(h)]	\$0.00	\$0.00
We adjusted your subtraction modifications for foreign dividends on Schedule J, Foreign Dividends, to reflect the correct amount as allowed by Illinois law. [35 ILCS 5/203(b)(2)(G), (b)(2)(O), (h)]	\$0.00	\$0.00
We adjusted the amount of your trust, estate, and non-unitary partnership income allocable to Illinois to reflect the apportionment of that income by the trust, estate, or partnership. [35 ILCS 5/305, 306]	\$0.00	\$0.00
We adjusted your business income and apportionment factors to include the income and apportionment factors of partnerships that are unitary with your business operations. [86 IL Adm. Code 100.3380(d)]	\$0.00	\$0.00
We adjusted your Illinois net loss deduction to the amount allowable under Illinois law. [35 ILCS 5/207]		

# **EXHIBIT B**



**Illinois Department of Revenue**

Income Tax Technical Support Section  
101 West Jefferson Street - Mail Code 3-327  
Springfield, Illinois 62702

**MEMORANDUM**

**TO:** Dale Blanchard, RAS  
Mike Frederick, RA II

**FROM:** Laurie Evans  
Revenue Auditor Supervisor  
IT Technical Support  
By: Kathy Capps, RA

**DATE:** October 29, 2013

**SUBJECT:** TR# IT-374 Fifth Third Equipment Finance Company – REIT Subtraction  
Modification  
#A1856144384

**Facts**

You are auditing Fifth Third Equipment Finance Company (Fifth Third) (31-0829500) for TYE 12/31/2008 and 12/31/2009. Fifth Third is a subsidiary of Fifth Third Bank (FITB) but is the Designated Agent for Illinois Income Tax filing purposes. Fifth Third was originally known as Fifth Third Leasing Company and officially changed its name on 5/23/2011. The taxpayer has one REIT (Fifth Third Real Estate Investment Trust Inc.) that is 100% owned by Fifth Third Mortgage Company (FTMC), another subsidiary of FITB. Fifth Third is a leading provider of lease and loan products for many different industries. Fifth Third Bancorp is a diversified financial services company headquartered in Cincinnati, Ohio and as of December 31, 2012 operated 15 affiliates with 1,325 full-service Banking Centers, 106 Bank Mart® locations and 2,415 ATMs in Ohio, Kentucky, Indiana, Michigan, Illinois, Florida, Tennessee, West Virginia, Pennsylvania, Missouri, Georgia and North Carolina. Fifth Third Bancorp operates four main businesses: Commercial Banking, Branch Banking, Consumer Lending and Investment Advisors.

Taxpayer apportions its business income as a financial organization under IITA Sec. 304(c).

In calendar year 12/31/2008, taxpayer took advantage of a one-time modification for their REIT dividends.

## TR# IT-374 Fifth Third Equipment Finance Company – REIT Subtraction Modification

Fifth Third filed amended tax returns for TYE 12/31/2008 and 12/31/2009 to report changes to federal taxable income due to an RAR completed 3/19/2012.

Fifth Third believes (and auditor concurs) that the dividend income earned from the REIT of \$252,360,180 should be subtracted out of their base income for Illinois purposes. They state, "In accordance with 35 ILCS 5/203(b)(2)(O) for taxable years ending on or after December 31, 2008 base income is reduced by dividends received from a captive real estate investment trust". The supervisor's concern is this: the REIT, which is a member of the unitary group, received a special dividend deduction that is only reserved for REITs. So the income of the REIT has already been reduced to zero for federal income and Illinois base income. This dividend then ends up in the taxable income of the REIT's 100% owner, FTMC, which also is a member of the unitary group. However, if the taxpayer is allowed the subtraction modification as they interpret the IITA Section 203(b)(2)(O), then none of the income from the REIT would ever be subject to Illinois Income Tax.

### Issue

Is the Legislative intent of the subtraction modification under IITA Section 203(b)(2)(O) to ensure that a Unitary Business Group that includes a REIT has no Illinois Income Tax stemming from the REIT?

### Discussion and Analysis

To fully understand the effect on Illinois base income (base income) of the subtraction modification as it relates to REITs, we also need to discuss the addition modification.

PA 95-0233 as amended by PA 95-707, created a new addition modification (IITA Section 203(b)(2)(E15)) for corporations effective for taxable years beginning after December 31, 2008 relating to a captive real estate investment trust (REIT). The subtraction modification for foreign dividends (IITA Section 203(b)(2)(O)) was also amended concurrently to include dividends received from a captive REIT for tax years ending on or after December 31, 2008.

Note that a legislative error created different start dates for the addition and subtraction modifications.

IITA Section 1051(a)(1.5) defines a captive real estate investment trust (REIT) as a corporation, trust or association:

- 1) That is considered a real estate investment trust for the taxable year under IRC Sec. 856;
- 2) That is not regularly traded on an established securities market; and
- 3) Of which more than 50% of the voting power or value of the beneficial interest or shares, at any time during the last half of the taxable year, is owned or controlled, directly or indirectly, by a single person.

**TR# IT-374 Fifth Third Equipment Finance Company – REIT Subtraction Modification**

To determine the “more than 50%”, IITA Section 1501(a)(1.5)(C) applies the constructive ownership rule prescribed under IRC Section 318(a) as modified by IRC Section 856(d)(5).

The subtraction modification allows a dividends-received deduction for dividends received by a corporation from a captive REIT. The following sentence was added to the foreign dividends-received subtraction modification in IITA Section 203(b)(2)(O):

... and including, for taxable years ending on or after December 31, 2008, dividends received from a captive real estate investment trust...

Language was added to the Schedule J to allow dividends from a captive REIT to be included in the subtraction modification for tax years ending on or after December 31, 2008.

For TYE 12/31/2008 only the subtraction modification was available for Fifth Third to apply. The result of applying the subtraction modification would be to reduce FTMC's base income by the amount of the REIT dividend received. REIT's base income would remain unchanged (zero, barring any other adjustments) since the subtraction modification does not apply to the REIT. Therefore no Illinois income tax is being assessed on the \$252,360,180 REIT dividend for TYE 12/31/2008.

The captive REIT addition modification is only for corporations. It states in IITA Section 203(b)(2)(E-15):

For taxable years beginning after December 31, 2008, any deduction for dividends paid by a captive real estate investment trust that is allowed to a real estate investment trust under Section 857(b)(2)(B) of the Internal Revenue Code for dividends paid...

The addition modification is reported in Step 2 of Schedule M.

The purpose of the addition modification is to close a tax loophole where the captive REIT, which is a member of the unitary group, pays a dividend to a corporation, usually a REIT holding company (RHC) that is not a member of the unitary group, either because it meets the 80/20 test, or because the REIT and the holding company apportion their income under different subsections of Section 304. When the REIT pays a dividend, it claims a federal dividends-paid deduction on Form 1120-REIT that reduces federal taxable income. This reduces federal taxable income reported by the REIT on its IL-1120 or the unitary group's Schedule UB (see note), but the corresponding dividend income received by the REIT holding company is received outside the unitary group. The new addition modification reverses the federal dividends-paid deduction in the computation of Illinois base income.

Note: IITA Section 203(e)(2)(D) defines REIT taxable income as “real estate investment trust taxable income” which is line 22 of Form 1120-REIT (line reference based on 2012 federal form).

## TR# IT-374 Fifth Third Equipment Finance Company – REIT Subtraction Modification

The above scenario does not apply to Fifth Third's situation, since FTMC (the RHC) is domiciled in the United States and is a member of the unitary group. However, the addition modification is still available as an adjustment to FTI.

The result of applying the addition modification to TYE 12/31/2009, the first year the modification is available, along with the subtraction modification for Fifth Third would be to reduce FTMC's base income by the amount of the REIT dividend received. REIT's base income would be increased by the amount of the REIT dividend paid. Therefore, Illinois income tax would now be assessed on the \$252,360,180 dividend paid by the REIT and no Illinois income tax would be paid by FTMC on the dividend received.

For simplicity, let's assume that Fifth Third had no FTI and the only income was the REIT dividend paid to FTMC. The following example shows the effect of the REIT dividend modifications when applied in the order that they became effective:

### TYE 12/31/2008

Per IL-1120	Fifth Third	FTMC	REIT	Unitary Group
FTI	0	252,360,180	0	252,360,180
New REIT Sub-Mod	0	-252,360,180	0	-252,360,180
New REIT Add-Mod	N/A	N/A	N/A	N/A
<b>Base Income</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>

### TYE 12/31/2009

Per IL-1120	Fifth Third	FTMC	REIT	Unitary Group
FTI	0	252,360,180	0	252,360,180
REIT Sub-Mod	0	-252,360,180	0	-252,360,180
New REIT Add-Mod	0	0	252,360,180	252,360,180
<b>Base Income</b>	<b>0</b>	<b>0</b>	<b>252,360,180</b>	<b>252,360,180</b>

### Conclusion

It was clearly not the intent of the Illinois legislature to create a situation where REIT dividend income sourced to Illinois is not taxed, rather that is exactly what was sought to be avoided. As stated in the discussion of the addition modification, the purpose of the addition modification was to close a tax loophole where the captive REIT, which is a member of a unitary group, pays a dividend to a corporation that is not a member of the unitary group. However, due to the lapse between the start date of the IITA Section 203(b)(2)(O) subtraction modification and Section 203(b)(2)(E-15) addition modification, the income received by the RHC was excluded from base income and thereby not taxed even though the REIT dividend paid deduction was not reversed, thereby excluding it from taxation also, at least for the 2008 tax year.

**TR# IT-374 Fifth Third Equipment Finance Company – REIT Subtraction Modification**

Unfortunately, it appears that for TYE 12/31/2008 the results of the audit are correct in that no Illinois income tax is collected on the REIT dividend, either at the REIT level or RHC level. The situation is corrected for TYE 12/31/2009.

**CERTIFICATE OF SERVICE**

Undersigned counsel of record hereby certifies that he caused a copy of the foregoing **Petition** to be served upon other counsel of record herein by causing the same to be delivered by messenger before the hour of 5:00 p.m. on the 18th day of February, 2016.

Illinois Department of Revenue  
Office of Legal Services  
100 W. Randolph St., 7-900  
Chicago, IL 60601

*Cl. 23*

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IN THE ILLINOIS INDEPENDENT TAX TRIBUNAL

FIFTH THIRD LEASING COMPANY

Petitioner,

v.

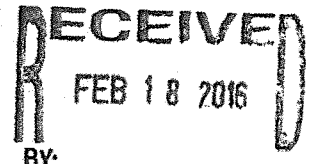
THE ILLINOIS DEPARTMENT OF REVENUE,

Defendant.

No.

NOTICE OF FILING

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



PLEASE TAKE NOTICE that on the 18th day of February 2016, we filed with the Illinois Independent Tax Tribunal, 160 N. LaSalle Street, Room N506, Chicago, IL 60601 **Fifth Third Leasing Company**, a copy of which accompanies this notice and is served on you herewith.

Respectfully submitted,

**FIFTH THIRD LEASING COMPANY**  
Petitioner

By:   
One of Petitioner's Attorneys

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