

ILLINOIS INDEPENDENT TAX TRIBUNAL

TYSON FOODS, INC. & SUBSIDIARIES,)	
Arkansas companies)	
)	
Petitioners,)	
)	
v.)	16-TT-55
)	
ILLINOIS DEPARTMENT OF)	
REVENUE,)	
)	
Respondent.)	

ANSWER

NOW COMES the Department of Revenue of the State of Illinois (“Department”), through its attorney, Lisa Madigan, Attorney General of and for the State of Illinois, and for its Answer to Taxpayer’s Petition respectfully pleads as follows:

NATURE OF ACTION

1. This is a petition requesting that the Tribunal review certain aspects of the determination of the Illinois Department of Revenue (the "Department") as to Tyson's Illinois Corporation Income and Personal Property Tax Replacement Income Tax (collectively, "Corporate Income Tax") liability for its 52-53 week taxable years ended on or about September 30, 2012 and on or about September 30, 2013 (hereinafter, FY 2012, and FY 2013) (the "Audit Period"). The Department issued a Notice of Deficiency ("NOD") to Tyson for each of FY 2012 and FY 2013 (attached hereto as Exhibit A).

ANSWER: Department admits it issued Tyson Foods Inc. and Subsidiaries (hereafter “Tyson” or “Petitioner”) Notices of Deficiency ("NOD") for Tax Year Ending (“TYE”) 2012, and TYE

2013.

2. Tyson Foods, Inc. ("TFI"), during the Audit Period, was the common parent of the members of a group of unitary corporations filing combined Illinois income tax returns on Form IL-1120 under the name Tyson Foods, Inc. and Subsidiaries (for each year, the "Tyson Unitary Business Group," or "Tyson"). The Tyson Unitary Business Group, as is pertinent here, included Tyson Sales & Distribution, Inc. ("TSD") and Tyson Fresh Meats, Inc. ("TFM"). Tyson seeks relief from this Tribunal with respect to two issues.

ANSWER: Department admits the factual allegations in Paragraph 2.

3. First, Tyson seeks relief with respect to the Department's erroneous assessment of Tyson related to the Illinois sales of its subsidiary, TSD. The Department determined that TSD had nexus in Illinois, and included TSD's Illinois sales in Tyson's numerator for Illinois sales apportionment purposes, based upon the erroneous conclusion that TSD's actions in Illinois exceeded allowable activities under 15 U.S.C. § 381 (P.L. 86-272). TSD did not have Illinois nexus during these periods and its sales were properly excluded from the numerator of Tyson's Illinois sales factor.

ANSWER: Department admits that its auditor determined that Tyson Sales and Distribution ("TSD") had nexus with Illinois. Department admits that its auditor determined that TSD's activities in Illinois exceeded activities protected by 15 U.S.C. § 381 (P.L. 86-272). Department admits that Department included TSD's Illinois sales in Tyson's Illinois sales factor numerator. Department denies the remaining allegations in Paragraph 3.

4. Second, Tyson seeks relief with respect to the Department's erroneous assessment of Tyson related to the Illinois sales of another of its subsidiaries, TFM. The

Department determined that the mere fact of TFM's use of a freight forwarding warehouse in Ottawa, Illinois to consolidate shipments originating outside Illinois and destined for delivery to customers outside Illinois constituted shipments "from" a "place of storage" in Illinois. This determination is contrary to law and the Department's own rulings. As such, TFM's sales to non-Illinois customers that originated from plants outside of Illinois were properly excluded from the numerator of Tyson's Illinois sales factor.

ANSWER: Department admits that its auditor determined that certain sales by Tyson Fresh Meats ("TFM") shipped from the Ottawa, Illinois warehouse should be included in the numerator of Tyson's Illinois sales factor because the sales met the statutory definition of sales "in this state" in Illinois Income Tax Act Section 304(a)(3)(B)(ii). 35 ILCS 5/304(a)(3)(B)(ii). Department denies the remaining factual allegations in Paragraph 4.

PARTIES

5. TFI, a Delaware corporation headquartered in Springdale, Arkansas, is the parent corporation for both TSD and TFM, also both headquartered in Springdale, Arkansas. TSD is a Delaware corporation that is engaged in the business of marketing and distributing poultry products. TFM is a Delaware corporation that is engaged in the business of manufacturing beef and pork products.

ANSWER: Upon information and belief, Department admits the allegations in Paragraph 5.

6. The Illinois Department of Revenue is the Illinois agency charged with the administration and enforcement of Illinois' Corporate Income Tax.

ANSWER: Department admits the Department is an agency of the State of Illinois and that it administers and enforces the Illinois Income Tax Act, including the Illinois

Corporate Income Tax and the Illinois Personal Property Replacement Tax. Department denies the remaining factual allegations in Paragraph 6.

JURISDICTION

7. The Tribunal has jurisdiction over Tyson and this petition pursuant to 35 ILCS 1010/1-45 and 35 ILCS 5/908, 909 and 910.

ANSWER: Paragraph 7 contains a legal conclusion. Pursuant to Illinois Independent Tax Tribunal Regulation (“Rule”) 310(b)(2) (86 Ill. Adm. Code §5000.310), allegations other than allegations of material fact do not require an answer.

BACKGROUND

A. The Department's Audit of Tyson

8. The Department conducted an audit of Tyson's activities over FY 2012 and FY 2013 (the "Audit"). The Department completed the Audit in late 2015, and, on February 9, 2016, issued Tyson two Notices of Deficiency ("NODs"), one for FY 2012 and one for FY 2013. With relevance to the present action, the Department made two adjustments to Tyson's income in each of those NODs, one relating to TSD and one relating to TFM.

ANSWER: Department admits the factual allegations in Paragraph 8.

B. TSD's Activities in Illinois and the Department's Audit Thereof

9. TSD is headquartered in Springdale, Arkansas and conducted sales in Illinois during the Audit Period through both salespersons and independent brokers. TSD sold products to both independent distributors and end-customers in Illinois. All TSD sales were accepted at TSD's headquarters in Arkansas.

ANSWER: The Department admits that TSD is headquartered in Springdale, Arkansas and conducted sales in Illinois during the Audit Period through both salespeople and independent brokers. Whether TSD's sales were accepted at TSD's headquarters in Arkansas is a legal conclusion, and therefore the Department is not required to answer. The Department lacks sufficient information to either admit or deny the remaining factual allegations contained in Paragraph 9 and demands strict proof thereof.

10. During the Audit Period, TSD salesmen and independent representatives, subject to any potential *de minimis* exceptions, engaged solely in the solicitation of sales and ancillary activities as permitted by P.L. 86-272; TSD did not own or lease an office in Illinois; TSD did not own or lease any tangible personal property in Illinois other than computers, printers and fax machines assigned to salesmen who worked from their homes; TSD had no inventory in Illinois; and TSD shipped or delivered product from outside Illinois to customers in Illinois.

ANSWER: Whether TSD's salesmen and independent representatives engaged solely in the solicitation of sales and ancillary activities as permitted by P.L. 86-272 and whether such activities were *de minimis* are legal conclusions, and therefore the Department is not required to provide an answer. The Department lacks sufficient information to either admit or deny the factual allegations contained in Paragraph 10 and demands strict proof thereof.

11. In the "Explanation of Audit Adjustments" of each of the NODs (Exh. A), the Department stated: "We adjusted your sales factor to include in the numerator the Illinois destination sales of those companies in your unitary business group with Illinois nexus. [Public Law 86-272]."

ANSWER: Department admits the factual allegations in Paragraph 11.

12. These NODs provide no additional explanation regarding the basis for the Department's nexus determination. The Department failed to provide any formal explanation either in the NODs or otherwise as to why it believes TSD (the entity presumably responsible for this adjustment) had nexus in Illinois during FY 2012 or FY 2013.

ANSWER: The Notice speaks for itself.

13. On information and belief, the Department did not conclude that the activities of TSD's salesmen and independent representatives exceeded solicitation of sales, but rather focused on the fact that TSD had "payroll" in the state.

ANSWER: Department's auditor used the best information available and, based on that information, determined that the TSI failed to provide sufficient proof that, although TSD had property and payroll in Illinois, TSD's activities in Illinois did not go beyond the protection of P.L. 86-272. To the extent the factual allegations in Paragraph 13 contradict the above statement, the Department denies such allegations.

14. It is uncontested that TSD had salesmen who lived in Illinois and therefore were treated as Illinois payroll. The presence of salespersons in the state does not violate P.L. 86-272 so long as the salespersons were engaged in the solicitation of sales and ancillary activities. There is no indication that the auditor determined that the salespersons engaged in activities not protected by P.L. 86-272.

ANSWER: The Department admits that TSD had salesman who lived in Illinois. Whether the presence of salesmen in the state violates P.L. 86-272 so long as the salesmen are engaged only in the solicitation of sales and ancillary activities is a legal conclusion, and therefore the Department is not required to respond. The auditor could not determine whether the salesmen

actually engaged only in activities protected by P.L. 86-272 because Petitioner failed to provide all the documents the auditor requested. The Department denies all other factual allegations in Paragraph 14 and demands strict proof thereof.

15. The auditor's determination of nexus is improper because it apparently relies solely on the bare fact of payroll with no determination that the employees in question engaged in any activities not protected by PL 86-272.

ANSWER: Department denies the factual allegations in Paragraph 15.

16. Nevertheless, on February 9, 2016, the Department issued Tyson NODs for FY 2012, and FY 2013 (Exh. A), adjusting Tyson's sales factor by including an additional \$379,595,353 in the numerator for FY 2012 and an additional \$398,330,531 in the numerator for FY 2013.

ANSWER: The Notice speaks for itself.

C. TFM's Shipment of Product to Illinois Warehouse

17. TFM is headquartered in Springdale, Arkansas, and operates thirteen beef and pork processing plants in the Midwest. It operates multiple plants in each of Iowa, Kansas and Nebraska, and one plant each in Illinois and several other states.

ANSWER: The Department admits that TFM was headquartered in Springdale, Arkansas and that TFM has one or more meat processing plants in Illinois. The Department lacks sufficient information to admit or deny the other factual allegations contained in Paragraph 17 and demands strict proof thereof.

18. TFM products generally are delivered to customers in one of three ways. First, a customer may send trucks to a TFM plant to pick up its order. Second, if there is a full – or near-full – truckload of product, TFM may ship an entire order directly to a

customer. Third, if a customer does not send its own truck to the plant, and it orders less than a full truckload of product, shipment may be made from the plant through one of TFM's freight forward warehouses.

ANSWER: Upon information and belief, the Department admits the factual allegations in Paragraph 18.

19. With relevance to the present dispute, one of TFM's freight forward warehouses is located in Ottawa, Illinois (the "Ottawa FWH"). All goods arriving at the Ottawa FWH have already been sold to customers and are, as is pertinent here, in transit to customers in interstate commerce. No uncommitted goods were sent to the Ottawa FWH.

ANSWER: Whether goods are in transit in interstate commerce and were uncommitted are legal conclusions, not material allegations of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). Upon information and belief, the Department admits the remaining factual allegations in Paragraph 19.

20. The primary purpose of shipping orders through the Ottawa FWH was to allow products produced by multiple plants destined for a single customer or the same geographic area to be consolidated on a single truck and shipped more economically than if they were shipped separately direct from each of the various plants. TFM shipped the products through the Ottawa FWH to accommodate further shipping to a predetermined destination. The work TFM performed at the Ottawa FWH involved consolidating shipments from TFM's various plants to the same customer or geographic area. In many instances, it took less than a day for the product to be consolidated with other shipments and to continue on to the customer. No modifications, changes or alterations were made

to any of the product while at the Ottawa FWH, and all goods at the Ottawa FWH already were committed to customers - they were not held at the Ottawa FWH for some indeterminate future sale, use or distribution. These goods were therefore in transit from the time they left the respective plants until delivery to TSD's customers.

ANSWER: Whether the goods were in transit from the time they left their respective plants until delivery to TSD's customer is a legal conclusion, not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). The Department lacks sufficient information to either admit or deny the factual allegations contained in Paragraph 20 and demands strict proof thereof.

21. During the Department's prior audits and ICB review of this same issue, the ICB issued an Action Decision in January 2015 (Exh. B), finding that "No change is warranted to the Tyson Fresh Meats, Inc. (TFM) throwback sales adjustment with respect to sales shipped from the Ottawa Illinois freight forwarding warehouse because under *Filterek, Inc. v. Department of Revenue*, 186 Ill. App. 3d 208, 541 N.E. 2d 1385, any storage, regardless of immediate shipment, was sufficient to meet the statutory requirement of shipment from an Illinois place of storage."

ANSWER: Although not relevant, the Informal Conference Board Action Decision speaks for itself.

22. On information and belief, the Department relied on this same reasoning in determining that those TFM sales flowing through the Ottawa FWH during FY 2012 and FY 2013 should have been thrown back to Illinois. As a result, in the NODs issued to Tyson for FY 2012 and FY 2013, the Department stated: "We adjusted your sales by including in the numerator sales of tangible personal property originating in Illinois and

delivered to customers in states in which you are not taxable." As a result, the Department adjusted Tyson's sales factor by including an additional \$633,377,450 in the numerator for FY 2012 and an additional \$600,404,576 in the numerator for FY 2013.

ANSWER: The phrase "this same reasoning" is not defined and the allegation is therefore, ambiguous. The Notice speaks for itself.

COUNT I

23. Tyson incorporates in this Count I the allegations of paragraphs 1-22 of this Petition.

ANSWER: The Department incorporates and repeats its answers to Paragraphs 1 through 22 as if fully set forth herein.

24. The State of Illinois is prohibited, pursuant to PL 86-272 from imposing a net income tax on a nonresident taxpayer who operates primarily in interstate commerce and whose activity within Illinois is limited to the solicitation of orders that are approved outside Illinois and filled by shipment or delivery from outside Illinois. 86 Ill. Adm.

Code § 100.9720(c)(1)(C) further provides:

For the purposes of subsection (c)(1)(A) of this Section, a person shall not be considered to have engaged in business activities within a state during any taxable year merely by reason of sales in such state, or the solicitation of orders for sales in such state, of tangible personal property on behalf of such person by one or more independent contractors whose activities on behalf of such person in such state consist solely of making sales, or soliciting orders for sales, of tangible personal property.

ANSWER: Paragraph 24 contains legal conclusions, not material allegations of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). The Department admits the existence, force and effect of the public act and regulation cited in Paragraph 35 and states that such public act and regulation speak for themselves.

25. Further, the regulations define "solicitation of orders" to mean "speech or conduct that explicitly or implicitly invites an order and activity ancillary to invitations for an order," 86 Ill. Adm. Code § 100.9720(c)(2)(C), and states that in order to "be ancillary to invitations for orders, an activity must serve no independent business function for the seller apart from its connection to the solicitation of orders." 86 Ill. Adm. Code § 100.9720(c)(2)(C)(i).

ANSWER: Paragraph 36 contains legal conclusions, not material allegations of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). The Department admits the existence, force and effect of the regulation cited in Paragraph 25 and states that such regulation speaks for itself.

26. The Department's determination that TSD had nexus in Illinois during the Audit Period based on the bare fact that TSD had payroll in the state is erroneous and contrary to the facts.

ANSWER: Department denies the factual allegations in Paragraph 26.

27. Payroll in Illinois does not cause Petitioner to become subject to tax in Illinois, as the activities of TSD's employees, as described in the Background section *supra*, comprised the solicitation of sales and ancillary activities.

ANSWER: Paragraph 27 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b)(2).

28. The Department has not identified, and is unable to identify, any activity engaged in by TSD personnel in Illinois that is not protected by PL 86-272.

ANSWER: The Department denies the factual allegations in Paragraph 28. The Department requires discovery to fully probe this issue.

29. As such, the Department's increase in Tyson's Illinois sales factor attributable to TSD's sales to Illinois customers by \$379,595,353 FY 2012, and \$398,330,531 for FY 2013, is in error.

ANSWER: The Department denies the factual allegations in Paragraph 29.

WHEREFORE, Department prays this Tribunal enter an Order:

- a) Finding that TSD's activities in Illinois during the Audit Period exceeded the protection of P.L. 86-272;
- b) Finding that TSD established nexus in Illinois during FY 2012 and FY 2013;
- c) Upholding the Department's inclusion of \$379,595,353 for FY 2012 and \$398,330,531 for FY 2013 in the numerator of Tyson's Illinois sales factor;
- d) Affirming the Notice of Deficiency in its entirety; and
- e) Granting all other relief as is just, reasonable and proper.

COUNT II

30. Tyson incorporates in this Count II the allegations of paragraphs 1-22 of this Petition.

ANSWER: Department incorporates and repeats its answers to Paragraphs 1 through 22 as if fully set forth herein.

31. The Department's apportionment regulations provide that "sales of tangible

property are considered in Illinois if the property is delivered or shipped to a purchaser within this state regardless of the f.o.b. point or other conditions of sale, or if property is shipped from an office, store, warehouse, factory or other place of storage in this state to a state where the taxpayer is not subject to income tax." 86 Ill. Adm. Code § 100.3370(c)(1).

ANSWER: Paragraph 31 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). Department admits the existence, force and effect of the regulation cited in Paragraph 31 and states that such regulation speaks for itself.

32. The express language of the regulation makes clear that there are two instances when a sale of tangible personal property is considered to be an Illinois sale. First, if the property is delivered to the customer at a location in Illinois, and second, "if the tangible personal property is shipped from an office, store, warehouse, factory or other place of storage" in Illinois to a state where the taxpayer is not subject to tax.

ANSWER: Paragraph 32 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). Department admits the existence, force and effect of the regulation cited in Paragraph 31 and states that such regulation speaks for itself.

33. With respect to the first test, products shipped through the Ottawa FWH to customers in other states are neither delivered nor shipped to customers in Illinois; nor do customers take possession of the products in Illinois, as the Ottawa FWH is a TFM location, not a location associated with the customer. The Department has not asserted any disagreement with that conclusion.

ANSWER: For TFM sales where the goods originated outside of Illinois, were shipped to the Ottawa FWH, were shipped from the Ottawa FWH, and terminated at a customer outside of Illinois, the Department admits that those goods were neither delivered nor shipped to customers in Illinois and that, for those sales, the customer does not take physical possession of the goods in Illinois. The Department denies the remaining factual allegations in Paragraph 33.

34. With respect to the second test, sales flowing through the Ottawa FWH are not "shipped from" the Ottawa FWH, they are shipped "through" it. When a TFM plant ships product to a customer through a FWH, that shipment should be considered to be in the uninterrupted stream of commerce until it is delivered to the customer to whom it was destined when it left the plant. As a result, the products should be considered to have been shipped from the respective plants and to have remained in interstate commerce until delivered to the customer outside Illinois.

ANSWER: Department denies the factual allegations in Paragraph 34.

35. The Ottawa FWH also cannot reasonably be considered "a place of storage" under the regulation. Storage is defined as "non-transitory, semi-permanent or long-term, containment, holding, leaving, or placement of goods or materials, usually with the intention of retrieving them at a later time. It does not include the interim accumulation of a limited amount during processing, maintenance, or repair." (*See* <http://www.businessdictionary.com/definition/storage.html>). This definition bears no resemblance whatsoever to the activity of the Ottawa FWH. Indeed, in all respects the activities at the Ottawa FWH are the opposite of this definition – as they are entirely

transitory in nature, and designed not to "store" the products in question but to move them on to their destinations as quickly as possible.

ANSWER: Department denies the factual allegations in Paragraph 35.

36. The Department contends otherwise, concluding as follows in its ICB Action Decision regarding prior audit periods (which, on information and belief, form the basis for the Department's assessment during this Audit Period): "No change is warranted to the Tyson Fresh Meats, Inc. (TFM) throwback sales adjustment with respect to sales shipped from the Ottawa Illinois freight forwarding warehouse because under *Filterek, Inc. v. Department of Revenue*, 186 Ill. App. 3d 208, 541 N.E. 2d 1385, any storage, regardless of immediate shipment, was sufficient to meet the statutory requirement of shipment from an Illinois place of storage." (ICB Action Decision, Exh. B hereto.)

ANSWER: Although not relevant, the Informal Conference Board Action Decision speaks for itself.

37. The Department's reliance – much less its singular reliance – upon *Filterek* is misplaced. The facts of *Filterek* are readily distinguishable from TFM's situation. Indeed, *Filterek* actually supports *Tyson's* position.

ANSWER: Paragraph 37 contains a legal conclusion, not a material allegation of fact, and therefore, does not require an answer pursuant to Rule 310(b)(2).

38. In *Filterek*, the taxpayer, *Filterek, Inc.*, purchased products from an affiliate, *Filterek de Puerto Rico*, which manufactured products in Puerto Rico and delivered them to *Filterek, Inc.* in Illinois. 186 Ill. App. 3d at 216. *Filterek, Inc.* then sold those products to out-of- state customers. *Id.* While *Filterek* attempted to characterize the sales as sales from Puerto Rico to non-Illinois customers that were merely "transshipped" through

Illinois, the court specifically held that "the hearing officer's findings do not support this characterization." *Id.* Rather, the court found that "Filterek purchased and held title to the products from Puerto Rico [and] Filterek was also responsible for reselling the product to out-of-State customers and for storing the product until delivery to the customers." *Id.*

ANSWER: Paragraph 38 contains legal conclusions, not material allegations of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). Further, the Department admits the existence, force and effect of the judicial decision cited in Paragraph 38 and states that such judicial decision speaks for itself.

39. By contrast, title to the TFM product at issue did not change hands from the time it left the out-of-state plant until it was delivered to the out-of-state customer. There is also no dispute in this case that the TFM product at issue was merely transshipped through the Ottawa FWH. This is a critical distinction. Indeed, the court in *Filterek* took pains to make clear that the findings of the hearing officer did "not support" the characterization of the *Filterek* sales as having been transshipped through Illinois. 186 Ill. App. 3d at 216. Had the court found Filterek's characterization to have been accurate – that the sales merely had been transshipped through Illinois – it appears the court would have reached the opposite result. Indeed, there would be no other reason to expressly reject Filterek's characterization of the facts.

ANSWER: Paragraph 39 contains legal conclusions, not material allegations of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). Further, the Department admits the existence, force and effect of the judicial decision cited in Paragraph 39 and states that such judicial decision speaks for itself.

40. Providing further support for this conclusion are the Department's own letter

rulings, and analogous cases that the Department has looked to for guidance from other states adopting the Uniform Division for Income Tax Purposes Act ("UDITPA"). In 2014, the Department issued IT 14-0002 PLR (4/24/2014). There, the taxpayer (Company 3), an out-of- state retailer, sold product to its customer (Company 4) outside the state (indeed, outside the country). *Id.* at 3. Company 4 normally used an affiliate (Company 5) to effectuate shipment. *Id.* Company 5 also acted as a freight forwarder. *Id.* All product that was picked up by Company 5 was destined for delivery outside the country, but all shipments initially were shipped from Company 3's facilities to Company 5's facilities in Illinois to be consolidated with other products to be shipped to Company 4 outside the country. *Id.* Occasionally, Company 3 used a third party to ship the product from its facilities to Company 5's freight forwarding warehouse in Illinois. *Id.* No modifications, product changes or alterations were made to the product after it left Company 3's facilities. *Id.* Based upon these facts, the Department ruled:

In the instant case, the destination of Company 3's sales to Company 4 is Country. Your letter indicates that all products either picked up by Company 5, or delivered by third party carrier to Company 5 Illinois facilities, are destined for Company 4 or an affiliate's manufacturing facilities in Country. You also represent that neither Company 5 nor another person makes any modifications, product changes, or alterations to the property. Rather, the property is merely stored in Illinois by Company 5 for short periods of time, less than 2 days or perhaps only a few hours, in order to be consolidated with other products to be shipped to Country. Assuming these facts are true, shipment of the property does not terminate in Illinois. The products are shipped to Illinois merely to accommodate further shipping to a predetermined destination in Country, and the taxpayer is not engaged in a warehouse function in Illinois. Accordingly, the sales to TEMA are not sales within this State under the provisions of IITA Section 304(a)(3)(B)(i). See Matter of the Appeal of

Mazda Motors of America (Central), Inc., 1994 WL 776168 (Cal. St. Bd. Eq. 1994) and Visiocorp USA, Inc. v. Mich. Dep't of Treas., 2011 WL 1938386 (Mich. Tax Tribunal 2011).

ANSWER: Paragraph 40 contains legal conclusions, not material allegations of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). Department admits the existence, force and effect of the PLR cited in Paragraph 40 and states that such PLR speaks for itself. However, PLR IT 14-0002 was not issued to Petitioner or any of its subsidiaries. Pursuant to 2 Ill. Admin. Code § 1200.110(a), private letter rulings are binding on the Department only as to the taxpayer who is the subject of the request for ruling.

41. The same result should apply here. The shipment of TFM product to non-Illinois customers "does not terminate in Illinois." Rather, TFM's "products are shipped to Illinois merely to accommodate further shipping to a predetermined destination." TFM's products also are destined for delivery out-of-state before they ever enter Illinois, are in Illinois, typically, only "for short periods of time, less than 2 days or perhaps only a few hours, in order to be consolidated with other products to be shipped," to the same customer or geographic area, and no one makes any modifications, product changes, or alterations to the product from the time it leaves the plant to the time it is delivered to the out-of-state customer. As such, TFM - through its use of the Ottawa FWH - similarly "is not engaged in a warehouse function in Illinois," but is engaged in a shipping function in Illinois.

ANSWER: Paragraph 41 contains legal conclusions, not material allegations of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). Department admits the existence, force and effect of the PLR cited in Paragraph 40 and states that such PLR speaks for itself. However, PLR IT 14-0002 was not issued to Petitioner or any of its subsidiaries and therefore is not binding on the Department. 2 Ill. Admin. Code § 1200.110(a).

42. The Michigan Tax Tribunal case cited by the Department in the PLR also supports the same result. In *Visiocorp USA, Inc. v. Mich. Dep't of Treas.*, 2011 WL 1938386 (Mich. Tax Tribunal 2011), the Tribunal held:

[T]he Tribunal determines that Petitioner's sales are not in the State of Michigan and are therefore not subject to SBT. First, when Petitioner ships products to the purchaser the shipping is completed in two distinct steps. Initially, Petitioner ships the product to a cross dock facility in Michigan where they are held before shipment to the final destination outside of Michigan. Respondent would like the Tribunal to believe that when the product is first shipped to the cross dock facility the shipment is complete and the sale was therefore in Michigan. However, the product is ultimately shipped to the purchaser, an out-of-state entity. The mere fact that the product is first transported to a cross dock facility in Michigan for consolidation of shipment does not render the sale of the property within Michigan and thus subject to SBT. The sale of the product was made to a purchaser outside of Michigan and the property and was ultimately shipped to the out-of-state purchaser.

ANSWER: Paragraph 42 contains legal conclusions, not material allegations of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). Department admits the existence, force and effect of the judicial decision cited in Paragraph 42 and states that such judicial decision speaks for itself.

43. The United States Supreme Court determined decades ago that when products leave a plant destined for a customer, the shipment is considered to be in transit (interstate commerce) until the property is delivered to the customer, even where those products pause during shipment at a freight warehouse or while awaiting other transportation logistics. *See, e.g., Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 567 (1943); *Dahnke-Walker Co. v. Bondurant*, 257 U.S. 282 (1921); *Joy Oil C. v. State Tax Commission*, 337 U.S. 286, 290-91

(1949).

ANSWER: Paragraph 43 contains legal conclusions, not material allegations of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). Department admits the existence, force and effect of the judicial decisions cited in Paragraph 43 and states that such judicial decisions speak for themselves.

44. In *Jacksonville Paper Co.*, the question was whether certain forwarding warehouses of Jacksonville Paper Co. were engaged in interstate commerce, and thus subject to the Fair Labor Standards Act. 317 U.S. at 565. The shipments in question originated outside the state, were transshipped through the warehouses in question, and delivered within the State to the customer. *Id.* at 567. The activities of the warehouses were described as follows: "goods were unloaded from the trucks, brought into the warehouse, checked, reloaded, and sent on to the customer during the same day or as early as was convenient." *Id.* The Administrator of the Wage and Hour Division of the U.S. Department of Labor urged that "any pause at the warehouse is sufficient to deprive the remainder of the journey of its interstate status." *Id.* at 567. In rejecting that position, the Court held:

The entry of the goods into the warehouse interrupts but does not necessarily terminate their interstate journey. A temporary pause in their transit does not mean that they are no longer 'in commerce' within the meaning of the Act. As in the case of an agency (cf. *De Loach v. Crowley's Inc.*, 128 F 2d 378) if the halt in the movement of the goods is a convenient intermediate step in the process of getting them to their final destinations, they remain 'in commerce' until they reach those points. Then there is a practical continuity of movement of the goods until they reach the customers for whom they are intended. That is sufficient. Any other test would allow formalities to conceal the continuous nature of the interstate transit which constitutes commerce... If there is a practical continuity of movement from the

manufacturers or suppliers without the state, through respondent's warehouse and on to customers whose prior orders or contracts are being filled, the interstate journey is not ended by reason of a temporary holding of the goods at the warehouse. [*Id.*, at 568-69].

ANSWER: Paragraph 44 contains legal conclusions, not material allegations of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). Department admits the existence, force and effect of the judicial decision cited in Paragraph 44 and states that such judicial decision speaks for itself.

45. Each of these authorities supports the conclusion that the Department's NODs adjusting Tyson's sales factor for FY 2012 and FY 2013, were in error.

ANSWER: Paragraph 45 contains legal conclusions, not material allegations of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). Department denies any factual allegations in Paragraph 45.

WHEREFORE, the Department prays this Tribunal enter an Order:

- a) Finding that TFM's use of the Ottawa FWH constitutes the shipment of property "from an office, store, warehouse, factory or other place of storage" in Illinois;
- b) Upholding the Department's inclusion of additional sales of \$633,377,450 for FY 2012 and \$600,404,576 for FY 2013 in the numerator of Petitioner's Illinois sales factor for those fiscal years;
- c) Upholding the Department's Notices of Deficiency; and
- d) Granting any other relief as just, reasonable and proper.

COUNT III

46. Tyson incorporates in this Count III the allegations of paragraphs 1-22 and

30-45 of this Petition.

ANSWER: The Department incorporates and repeats its answers to Paragraphs 1 through 22 and Paragraphs 30 through 45 as if fully set forth herein.

47. A state tax affecting interstate commerce must meet a four-pronged test to survive a commerce clause challenge: (1) the tax must be applied to an activity that has a "substantial nexus" with the taxing state; (2) the tax must be "fairly apportioned" to activities carried on by the taxpayer in the taxing state; (3) the tax must not discriminate against interstate commerce; and (4) the tax must be "fairly related" to services provided by the taxing state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 277-279, 287 (1977).

ANSWER: Paragraph 47 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). The Department admits the existence, force and effect of the judicial decision cited in Paragraph 47 and states that such judicial decision speaks for itself.

48. As applied to TFM's sales shipped through the Ottawa FWH, the Department's determination that income earned from the sale of products originating from plants outside Illinois and delivered to customers outside Illinois should be thrown back to Illinois merely because those products were consolidated, mid-shipment, at the Ottawa FWH, violates *Complete Auto's* fair apportionment requirement.

ANSWER: The Department denies the factual allegations in Paragraph 48.

49. In order to meet the fair apportionment prong of *Complete Auto*, the tax must meet both an "internal consistency" and an "external consistency" test. *Container Corp. of Am. v. Franchise Tax Bd*, 463 U.S. 159, 169 (1983). Under the "internal consistency" test,

the tax must not result in multiple taxation if every state were to impose the same tax. Under the "external consistency" test, a state is precluded from taxing value attributable to income earned outside of the state. Put differently, states are precluded from extraterritorial taxation. Here, requiring the entirety of all sales flowing through the Ottawa FWH to be thrown back to Illinois when the production occurred, and the customer was located, outside Illinois would permit Illinois to tax value that is attributable to activity occurring almost entirely outside its borders.

ANSWER: Paragraph 49 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). The Department admits the existence, force and effect of the judicial decision cited in Paragraph 49 and states that such judicial decision speaks for itself.

50. FY 2012 is illustrative. In that year, the taxpayer threw back \$486,809,851 to Illinois based on sales shipped from TFM's Illinois manufacturing facility. However, the Department's assessment that the taxpayer throw back to Illinois all TFM sales from the Ottawa FWH, increased throwback sales by \$633,377,450 – a 130% increase.

ANSWER: Department admits the factual allegations in Paragraph 50.

51. Thus, as applied here to sales neither originating nor delivered to customers in Illinois, the application of 86 Ill. Adm. Code § 100.3370(c)(1) to require TFM to throw back all sales flowing through the Ottawa FWH is invalid under the Commerce Clause. *See Hans Rees' Sons, Inc. v. North Carolina, ex rel. Maxwell*, 283 U.S. 123, 51 S. Ct. 385 (1931) (holding that "the statutory method, as applied to the appellant's business for the years in question operated unreasonably and arbitrarily, in attributing to North Carolina a

percentage of income out of all appropriate proportion to the business transacted by the appellant in that State. In this view, the taxes as laid were beyond the State's authority.").

ANSWER: The Department denies the factual allegations in Paragraph 51.

WHEREFORE, the Department prays this Tribunal enter and Order:

- (a) Finding that the Department's application of 86 Ill. Admin. Code § 100.3370(c)(1), which requires TFM to throw back all sales flowing through the Ottawa FWH, does not violate the Commerce Clause of the United States Constitution;
- (b) Upholding the Department's inclusion of sales of \$633,377,450 for FY 2012 and \$600,404,576 for FY 2013 in the numerator of Tyson's Illinois sales factor;
- (c) Upholding the Department's Notices of Deficiency; and
- (d) Granting any other relief as is reasonable and just.

COUNT IV

This Tribunal has no jurisdiction to grant Tyson alternative apportionment under Section 304(f) of the Illinois Income Tax Act.

52. Tyson incorporates in this Count IV the factual allegations of paragraphs 1-22 and 30-51 of this Petition.

ANSWER: The Department incorporates and repeats its answers to Paragraphs 1 through 22 and Paragraphs 30 through 51 as if fully set forth herein.

53. In the alternative to the relief sought in Counts II and III, Tyson is entitled, pursuant to IITA Section 304(f), to an alternate method of allocation of its business income in order to achieve an equitable apportionment thereof.

ANSWER: The Department denies the factual allegations in Paragraph 53. Only the Director

of Revenue is authorized to grant alternative apportionment pursuant to IITA Section 304(f). 86 Ill. Admin. Code Section 100.3390(b).

54. Under the Department's regulations, "IITA Section 304(f) provides that if the allocation and apportionment provisions of subsections (a) through (e) do not fairly represent the extent of a person's business activity in this State, the person's may petition for or the Director of Revenue may require, in respect of all or any part of the person's business activity, if reasonable: (1) separate accounting; (2) the exclusion of any one or more factors; (3) the inclusion of one or more additional factors which will fairly represent the person's business activities in this State; or (4) the employment of any other method to effectuate an equitable allocation and apportionment of the person's business income." 86 Ill. Adm. Code, § 100.3390(a).

ANSWER: Paragraph 54 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). The Department admits the existence, force and effect of the regulation cited in Paragraph 54 and states that such regulation speaks for itself.

55. As above, Tyson's apportionment calculations as filed with the Department for FY 2012, for example, demonstrate that throwing back sales from the Ottawa FWH results in more the doubling TFM's throwback sales for the year, leading to a significant increase in the taxpayer's sales factor.

ANSWER: The Department denies the factual allegations in Paragraph 55.

56. Such a result is distortive. An alternative methodology, specific to allocating Illinois throwback sales related to the transactions traveling through the Ottawa FWH

should be applied. An allocation providing for throwback based on the plant from which the products were originally shipped would more fairly and equitably reflect the business conducted in Illinois.

ANSWER: The Department denies the factual allegations in Paragraph 56.

WHEREFORE, the Department prays this Tribunal enter an Order:

- (a) Holding that the Tribunal does not have jurisdiction to hear Petitioner’s request for alternative apportionment pursuant to Section 304(f) of the Illinois Income Tax Act because an alternative apportionment “determination[] of the Department” is not “reflected on” the Notices of Deficiency protested in Petitioner’s Petition over which this Tribunal has jurisdiction (35 ILCS 1010/1-45); and
- (b) Finding that the Tribunal does not have jurisdiction to hear Petitioner’s request for alternative apportionment pursuant to Section 304(f) of the Illinois Income Tax Act because “the Director has sole and exclusive authority to grant a petition for an alternative apportionment formula,” (86 Ill. Admin. Code Section 100.3390) and because Petitioner did not follow the procedure set forth in 86 Ill. Admin. Code Section 100.3390, which is the “exclusive means by which a taxpayer may petition for an alternative apportionment formula” under IITA Section 304(f) (86 Ill. Admin. Code Section 100.3390).

COUNT V

57. Tyson incorporates in this Count V the allegations of paragraphs 1-56 of this Petition.

ANSWER: The Department incorporates and repeats its answers to Paragraphs 1 through 56 as if fully set forth herein.

58. For the reasons articulated in Counts I-IV, the Department should withdraw those portions of its NOD's to Tyson based upon its erroneous findings that TSD had nexus in Illinois and that TFM's sales flowing through the Ottawa FWH should be thrown back to Illinois. If, however, TSD is determined by this Tribunal to have nexus in Illinois, Tyson pleads in the alternative that – for all of the reasons set forth in Counts I-IV above – it had more than a reasonable basis for excluding TSD's sales to Illinois customers from the numerator of its Illinois sales factor. Similarly, if TFM's sales flowing through the Ottawa FWH are determined to have shipped from a place of storage in Illinois, Tyson pleads in the alternative that – for all of the reasons set forth in Counts I-IV above – it had more than a reasonable basis for determining that sales flowing through TFM's Ottawa FWH should not be thrown back to Illinois. Accordingly, Tyson is entitled to abatement of the late-payment penalties and amnesty interest assessed by the Department.

ANSWER: The Department denies the factual allegations in Paragraph 58.

59. Section 3-8 of the Uniform Penalty and Interest Act (35 ILCS 735/3-8), entitled "No penalties if reasonable cause exists," provides in relevant part that: "The penalties imposed under the provisions of Sections 3-3, 3-4, 3-5, and 3-7.5 of this Act shall not apply if the taxpayer shows that his failure to file a return or pay tax at the required time was due to reasonable cause. Reasonable cause shall be determined in each situation in accordance with the rules and regulations promulgated by the Department." While not specifically included in 35 ILCS 735/3-8, amnesty interest (i.e., the doubling of the otherwise appropriate interest rate) is effectively an additional penalty upon Tyson,

which is in excess of the cost of the use of funds and thus not properly characterized as "interest."

ANSWER: Paragraph 59 contains legal conclusions, not material allegations of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). The Department admits the existence, force and effect of the statute cited in paragraph 72 and states that such statute speaks for itself. Further, pursuant to Section 1502 of the IITA, "No inference, implication, or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular Section or provision of this Act, *nor shall any caption be given any legal effect.*" 35 ILCS 5/1502 (emphasis added). The Department denies that amnesty interest is "effectively an additional penalty" "not properly characterized as 'interest,'" and denies that amnesty interest can be abated for reasonable cause.

60. For the reasons set forth in Counts I-IV, Tyson had *at a minimum* reasonable cause to believe that it was properly excluding TSD's sales to Illinois customers from its Illinois sales factor, and that sales flowing through TFM's Ottawa FWH should not be thrown back to Illinois. If it is ultimately determined that TSD's and TFM's income tax reporting was erroneous, however, Tyson should not be made to pay late-payment penalties or amnesty interest with respect thereto.

ANSWER: The Department denies the factual allegations in Paragraph 60.

WHEREFORE, the Department respectfully requests this Tribunal to:

- (a) Find that Petitioner did not have reasonable cause to justify abatement of the late payment penalties;
- (b) Hold that amnesty interest cannot be abated for reasonable cause;

- (c) Find that it was unreasonable for Petitioner to believe that it was excluding only the sales made to Illinois customers from its Illinois sales factors;
- (d) Find that it was not reasonable for Petitioner to believe that the sales flowing through the TFM Ottawa FWH should not be thrown back to Illinois, and thereafter included in the numerator of its sales factor;
- (e) Uphold the Department's Notices including imposition of penalties and interest; and
- (f) Grant any other relief as is reasonable and just.

Respectfully Submitted,

LISA MADIGAN
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State of Illinois

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ILLINOIS INDEPENDENT TAX TRIBUNAL

TYSON FOODS, INC. & SUBSIDIARIES,)	
)	
Petitioner,)	
)	
v.)	No. 16-TT-55
)	Chief Judge James Conway
ILLINOIS DEPARTMENT OF REVENUE,)	
)	
Respondent.)	

AFFIDAVIT OF HAVEN WILLIS
PURSUANT TO TRIBUNAL RULE 5000.310(b)(3)

STATE OF OKLAHOMA

COUNTY OF TULSA

Under penalties as provided by Section 1-109 of the Code of Civil Procedure, 735 ILCS §5/1-109, I, Haven Willis, being first duly sworn on oath, depose, and state as follows:

1. I am currently employed by the Illinois Department of Revenue.
2. My current title is Revenue Auditor III, in Income Tax Field Audit.
3. I audited Petitioner, Tyson Foods, Inc. and Subsidiaries for the tax years ending September 30, 2005 through September 30, 2011.
4. I lack the requisite knowledge to either admit or deny the allegations alleged in Taxpayer's Petition paragraphs 9, 10, 17, and 20.
5. I am an adult resident of the State of Oklahoma and can truthfully and competently testify to the matters contained herein based upon my own personal knowledge.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

Haven Willis
 Haven Willis
 Revenue Auditor III
 Illinois Department of Revenue

Date: 4/13/16