

IN THE ILLINOIS INDEPENDENT TAX TRIBUNAL

PEPSICO, INC. & AFFILIATES,)	
)	
Petitioner,)	
)	
v.)	Case Nos. 16 TT 82
)	17 TT 16
ILLINOIS DEPARTMENT OF REVENUE,)	
)	Chief Judge James Conway
Respondent.)	

**ILLINOIS DEPARTMENT OF REVENUE’S RESPONSE TO PEPSICO, INC. &
AFFILIATES’ MOTION FOR CORRECTION**

Respondent, Illinois Department of Revenue (“Department”), responds to PepsiCo, Inc. and Affiliates’ (“PepsiCo”) Motion for Correction as follows:

I. The Tribunal’s April 13, 2021 Order

1. The Tribunal issued its decision on the parties’ cross-motions for Summary Judgment on April 13, 2021.
2. PepsiCo alleges that the Order is not a final Order, and further states that the Order must be interlocutory. The Department will respond to both of PepsiCo’s assertions in this section, as they are closely tied together.
3. Judge Conway ruled that the “Department’s Notices of Deficiency, as they pertain to the 80/20 issue, are upheld. For the reasons stated above, PepsiCo’s Motion for Summary Judgment is DENIED.”
4. The Department acknowledges that there are multiple counts in both Petitions that are not yet resolved. Therefore, the Tribunal’s Order relating to the 80/20 issue should not be final

and appealable. The Department requests that the Tribunal schedule a case management conference on the remaining counts.

5. Additionally, the Department also requests that the Tribunal clarify its grant of judgment in favor of the Department.
6. While the Tribunal denied PepsiCo's Motion for Summary Judgment, and also upheld the Department's Notices of Deficiency, the Order should clearly state that the Department has correctly determined that FLNA is not entitled to the 80/20 classification, as well as granting the Department's Cross Motion for Summary Judgment.
7. It is clear that this result was the intention of the Tribunal. The Department's Notices of Deficiency were explicitly upheld, and the 80/20 issue was decided in favor of the Department. In order to make the ruling perfectly clear, the Department requests that language be added specifically granting its Cross Motion for Summary Judgment.

II. Parties Filed Cross-Motions for Summary Judgment as to Count I of the Petition – the 80/20 Issue

A. The Department's September 1, 2020, filing was a Cross Motion for Summary Judgment

1. PepsiCo terms the Department's pleading an "unfiled, but deemed" cross-motion. (Par.31 of Motion for Correction) PepsiCo's characterization is not accurate.
2. Both the parties and the Tribunal were aware of the parties' intention to fully resolve the 80/20 issue with cross motions, based upon the painstakingly negotiated Joint Stipulations that covered a complete set of facts, allowing the Tribunal to make its decision. It was the intent of both parties that these motions would be in lieu of a full-blown hearing on the 80/20 issue.

3. The type, order and number of briefs filed by the parties was decided by the Tribunal. The Tribunal's scheduling Order of February 2, 2020 is attached as Ex A. In that Order the Tribunal ordered as follows:
 2. Petitioner will file its summary judgment motion by April 17, 2020;
 3. Department will file its response/summary judgment motion by June 11, 2020;
 4. Petitioner will file its reply/response by July 23, 2020;
4. Additionally, the Tribunal in its November 13, 2019 Order states that the "schedule for summary judgment motions" will be set at the next status conference. The November 13, 2019 Order is attached as Ex B.
5. Based upon the language in the Orders, above, it is clear that the Tribunal intended that the Department's filing was a cross motion for summary judgment.
6. By looking to PepsiCo's own Reply Brief, it is abundantly clear that the parties intended their motions to fully resolve the 80/20 issue before the Tribunal. This can be most clearly illustrated by looking to PepsiCo's own words:
 - a. The Department cannot work with taxpayers for years conducting discovery and negotiating a fully stipulated record and then, in court, suggest that there remain unknown and yet to be defined facts which are required to overturn the Department's assessment. P.6, PepsiCo Reply; and
 - b. The parties continued to repeatedly represent to the Tax Tribunal their agreement to resolve Count I on cross-motions for summary judgment, as reflected in the numerous court orders. P.4, PepsiCo Reply
7. In the Department's "prayers for relief" it sought judgment to be entered in its favor:

- a. The Department requests that this Tribunal rule in favor of the Department and uphold the Notices of Deficiency issued to PepsiCo as they pertain to the inclusion of FLNA in the PepsiCo unitary group. P. 77, Department’s Response / Cross-Motion
 - b. For the reasons stated in the Department’s Response Brief and Sur-Reply, summary judgment should be granted in its favor. P. 52, Department’s Sur-Reply
8. Finally, legal authority makes clear that it is the substance of the filing that controls whether it is a motion for summary judgment, as opposed to how a filing is titled. *People, Dept. of Professional Regulation v. Manos*, 326 Ill.App.3d 698 (Il App., 1st Dist. 2001). In *Manos*, the Court found that a cross-motion for summary judgment was contained in the Defendant’s response brief, stating:
- [I]f it reads like a cross-motion for summary judgment, sounds like a cross-motion for summary judgment and seeks cross-relief of summary **213 ***369 judgment as a matter of law, it can come as no surprise to defendants that this court, after reviewing all the filings in this case, section 2–1005 of the Code (735 ILCS 5/2–1005 (West 2000)) and Illinois Supreme Court Rules 191 and 192 (134 Ill.2d Rs. 191, 192), concludes that defendants presented a cross-motion for summary judgment. *Id* at 703.
9. The simple fact that the Tribunal granted a final judgment in this matter, in favor of the Department, illustrates that the Department’s filing was a cross-motion for summary judgment.

B. There are no material questions of fact that remain unresolved

10. PepsiCo’s Motion for Correction is disingenuous, at best. It was universally understood that the parties were mutually moving for summary judgment on the 80/20 issue. Both sides intended that cross-motions would fully resolve that matter.

11. Now that PepsiCo has lost its motion for summary judgment, it seeks to reopen discovery on the 80/20 issue, despite the parties and Tribunal's explicit understanding that filed briefs would fully and finally determine this issue.
12. PepsiCo's assertion that material questions of fact are outstanding is nothing more than a "red herring," obfuscating the fact that the Tribunal ruled in favor of the Department on its cross-motion for summary judgment. The Tribunal's decision was clear. It found that PepsiCo Global Mobility, LLC ("PGM") was a shell company with no business purpose, denying PepsiCo's Motion for Summary Judgment. April 13, 2021 Order on Petitioner's Motion for Summary Judgment, page 35.
13. In seeking to reopen discovery to resolve the alleged "material questions of fact," PepsiCo appears to be seeking reconsideration, with no basis, of the final decision on the 80/20 issue by the Tribunal.
14. The purpose of a motion to reconsider is to bring to a court's attention (1) newly discovered evidence, (2) changes in the law, or (3) errors in the court's previous application of existing law. *Jones v. Live Nation Entertainment, Inc.*, 63 N.E.3d 959 (Ill. App., 1st Dist. 2016). A reconsideration motion is not the place "to raise a new legal theory or factual argument." *Jones*, at 969. Trial courts should not allow litigants to stand mute, lose a motion, and then frantically gather evidentiary material to show that the court erred in its ruling. *Id.* As a result, legal theories and factual arguments not previously made are waived. *Id.*
15. In this matter, reconsideration is clearly inappropriate. Nothing was brought to the Court's attention that would satisfy the legal requirements allowing reconsideration. PepsiCo is simply seeking another bite of the apple after the Tribunal's decision.

16. In paragraphs 27 and 29 of its Motion for Correction, PepsiCo now offers to “build out” new, potential facts, in order to develop what they deem material questions of fact in this matter.
17. PepsiCo had years to “build out” material facts in this case. PepsiCo and the Department worked on a Joint Stipulation of Facts for almost two years. This was certainly enough time for PepsiCo to put forth all the facts salient to their position into the Joint Stipulation of Facts. PepsiCo now, conveniently, wants to proceed with discovery after the hearing on cross-motions for summary judgment was decided, which fully resolved the primary issue in the case – an issue that had been litigated for years to get to the point of cross-motions.
18. PepsiCo confuses potential facts in dispute with material facts in dispute that would preclude summary judgment in favor of the Department. The facts the Tribunal asked about in the oral argument were not material. If the Tribunal had determined there were material facts remaining in dispute, it would have been unable to uphold the Department’s Notices of Deficiency and enter judgment in the Department’s favor on the 80/20 issue.
19. This matter is nothing like the factual scenario in the IBM case that was before the Tribunal. *IBM v. IDOR*, 14 TT 229. In that matter, when deciding against IBM on its Motion for Summary Judgment, the Tribunal stated that it was abundantly clear that there were material factual issues left to be resolved in the case based on a reading of the Petition and the Department’s denial of many of IBM’s allegations in its Answer. *Id* at p. 4.
20. In the current case, the Tribunal made its decision with a fully agreed upon factual record, as evidenced by the detailed Joint Stipulations entered into between the parties. In the

decision denying PepsiCo's Motion for Summary Judgment and granting judgment in favor of the Department, the Tribunal found no unresolved material issues of fact.

21. In its Motion for Correction, PepsiCo cites, as an example of a potential material question of fact, to an exchange with the Tribunal whether a PepsiCo HR person had any authority to control an expatriate (paragraphs 27 and 28, motion for correction).
22. The example offered by PepsiCo as its basis to reopen discovery and vacate the grant of summary judgment in the Department's favor is irrelevant and misleading. Even if the answer was in the affirmative, that the PepsiCo HR person had some level of authority, that fact had nothing to do with PGM, as the HR executives were employees of PepsiCo, not PGM. The Tribunal clearly held that PGM was a shell company with no supervisory personnel, assets, office, or business activity.
23. Based on the foregoing, it is clear that PepsiCo's Motion for Correction is without merit, and the grant of judgment in favor of the Department must stand.

For the reasons stated in the Illinois Department of Revenue's Response to PepsiCo's Motion for Correction, the Department respectfully requests that the Tribunal enter an Order as follows:

1. Clarifying its April 13, 2021 Order to state that the Department has correctly determined that FLNA is not entitled to the 80/20 classification, and granting summary judgment in its favor;
2. Finding that the April 13, 2021 Order was not a final and appealable order;
3. Denying the remainder of PepsiCo's Motion for Correction; and
4. Any further relief this Tribunal finds fair and just.

Respectfully submitted,

Illinois Department of Revenue

By: */s/ Joseph T. Kasiak*
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ILLINOIS DEPARTMENT)	
OF REVENUE,)	
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ORDER

The parties having appeared before the Tribunal today for a status conference, it is hereby ORDERED:

1. This order applies to 17 TT 16—Pepsico Inc. and Affiliates v. IDOR, as well;
2. Petitioner will file its summary judgment motion by April 17, 2020;
3. Department will file its response/summary judgment motion by June 11, 2020;
4. Petitioner will file its reply/response by July 23, 2020; and
5. The next status conference will be held on July 30, 2020 at 9:30 (CST) a.m. by telephone. A date for arguments on the motions will be set at that time.

 /s/ James Conway
JAMES M. CONWAY
Chief Administrative
Law Judge

Date: February 28, 2020

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ORDER

1. This order applies to 17 TT 16—Pepsico Inc. and Affiliates v. IDOR, as well;
2. The parties are to submit finalized stipulations by December 20, 2019; and
3. A status conference will be held on January 3, 2020 at 9:30 a.m. by telephone. A schedule for summary judgment motions and oral argument will be set at that time.

/s/ James Conway
JAMES M. CONWAY
Chief Administrative
Law Judge

Date: November 13, 2019