ILLINOIS INDEPENDENT TAX TRIBUNAL
CHICAGO, ILLLINOIS

VODAFONE USA PARTNERS &	)	
AFFILIATES and VODAFONE AMERICAS	)	
HOLDINGS INC. & AFFILIATES,	)	
v.	)	**14-TT-0023**
	)	
STATE OF ILLINOIS	)	
DEPARTMENT OF REVENUE	)	

CERTIFICATE OF SERVICE

Rebecca L. Kulekowskis certifies that she is a Special Assistant Attorney General of the State of Illinois duly appointed by Lisa Madigan, Attorney General of the State of Illinois; that she is authorized to make this certificate; that on **April 10, 2015**, before the hour of 5:00 p.m. (C.S.T) she served a true and exact copy of the foregoing instrument entitled **DEPARTMENT'S ANSWER TO PETITIONERS' FIRST AMENDED PETITION** on the above Taxpayer/Petitioner by sending same as an attachment to an electronic mail message addressed to the following individuals at their designated email addresses:

Marilyn A. Wethekam : MWetheka@hmblaw.com

David Ruskin: DRuskin@hmblaw.com

Breen M. Schiller : BSchiller@hmblaw.com

Rebecca L. Kulekowskis

Rebecca L. Kulekowskis
Special Assistant Attorney General
Illinois Department of Revenue
Office of Legal Services
100 W. Randolph St., 7-900
Chicago, IL 60601

Telephone: (312) 814-3318
Facsimile: (312) 814-4344
Email: Rebecca.Kulekowskis@Illinois.gov

ILLINOIS INDEPENDENT TAX TRIBUNAL
CHICAGO, ILLLINOIS

VODAFONE USA PARTNERS & AFFILIATES	)	
and VODAFONE AMERICAS HOLDINGS	)	
INC. & AFFILIATES	)	
v.	)	**14-TT-0023**
	)	
ILLINOIS DEPARTMENT OF REVENUE,	)	
Department	)	

ANSWER TO FIRST AMENDED PETITION

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 First Amended Petition respectfully pleads as follows:

PARTIES

1. Petitioner is headquartered at Denver Place South Tower, 999 18th Street, Suite 1750, Denver, Colorado, 80202-2404.

ANSWER: The information contained in Paragraph 1 is required by Illinois Independent Tax Tribunal Regulation ("Rule") 310(a) (1) (A) (86 Ill. Adm. Code §5000.310) and is not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b) (2).

2. Petitioner is represented by Horwood Marcus & Berk Chartered attorneys Marilyn A. Wethekam and Breen M. Schiller located at 500 West Madison St., Suite 3700, Chicago, Illinois 60661, and can be reached at 312-606-3240 or mwetheka@hmblaw.com; and 312-606-3220 or bschiller@hmblaw.com, respectively.

ANSWER: The information contained in Paragraph 2 is required by Rule 310(a) (1) (B) and is not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b) (2). Notwithstanding the above, Department admits the factual allegations contained in Paragraph 2.

3. Petitioner's FEIN is 52-2207068 .

ANSWER: The information contained in Paragraph 3 is required by Rule 310(a) (1) (C) and is not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b) (2). Notwithstanding the above, Department admits the factual allegations contained in Paragraph 3.

4. Petitioner's Illinois Account Number is 3261-2192.

ANSWER: The information contained in Paragraph 4 is required by Rule 310(a) (1) (C) and is not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b) (2). Notwithstanding the above, Department admits the factual allegations contained in Paragraph 4.

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.

ANSWER: The Department admits that the Department is an agency of the State of Illinois and that the Department is responsible for enforcing the Illinois Income Tax Act (35 ILCS 5/101 et seq.), which is relevant to the legal claims raised in Taxpayer's

Petition. The term "tax laws" is vague and therefore the Department denies all other allegations contained in Paragraph 5 and demands strict proof thereof.

NOTICES

6. On December 31, 2013, and January 21, 2014 the Department issued Petitioner Notices of Claim Denial ("Notices") for the taxable years ending March 31, 2005, March 31, 2006 and March 31, 2007 ("Years at Issue") denying Petitioner's claims for refund of its Illinois corporate income tax overpayments in the following amounts: $764,876.00; $1,642,057.00; and $5,141,601.00, respectively.

ANSWER: A copy of the Notice is required to be attached to the Taxpayer's Petition pursuant to Rule 310(a) (1) (D) and is not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b) (2). To the extent an answer is required, Department admits Department issued Notices of Claim Denial for the years ending March 31, 2005, March 31, 2006 and March 31, 2007. Department admits Taxpayer's claims for refund in the following amounts $764,876; $1,642,057; and $5,141,601, respectively were denied.

7. True and accurate copies of the Notices are attached hereto as Exhibit A.

ANSWER: A copy of the Notice is required by Rule 310(a) (1) (D) and is not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b) (2). To the extent an answer is required, Department admits Department issued a Notice of Denial dated January 16, 2014 for tax year ending March 31, 2005 and a Notice of Denial dated December 31, 2013 for tax years ending March 31, 2006 and March 31, 2007 and that the Notice of Denial speaks for itself.

8. The total amount denied for the Years at Issue is $7,548,534.00.

ANSWER: The Department admits the statements contained in Paragraph 8.

JURISDICTION

9. 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.

ANSWER: The Department admits the statements contained in Paragraph 9.

10. This Tribunal has jurisdiction over this matter pursuant to Sections 1-45 and 1-50 of the Tribunal Act because Petitioner timely filed this petition within 60 days of the Notices.

ANSWER: Paragraph 10 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 at all relevant times of the statute set forth or referred to in Paragraph 10 and states that such statute speaks for itself.

BACKGROUND

11. The tax involved herein is the Illinois corporate income and replacement tax imposed under the Illinois Income Tax Act (the "Act"), 35 ILCS §5/201, et seq.

ANSWER: The Department admits the statements contained in Paragraph 11.

12. Petitioner's is a partner in Cellco Partnership ("Cellco") with six unrelated Verizon Wireless entities.

ANSWER: The Department admits the statement contained in Paragraph 12 that the Petitioner is a partner of the Cellco Partnership. With respect to the "six unrelated Verizon Wireless entities", the Department lacks sufficient knowledge or information to form a belief as to whether these entities are partners in Cellco.

13. Cellco and its subsidiaries do business as "Verizon Wireless."

ANSWER: The Department admits the statement contained in Paragraph 13.

14. Petitioner's activities in the United States are limited to its forty-five percent (45%) ownership of Cellco.

ANSWER: The Department denies the statement contained in Paragraph 14 since it is unable to determine the meaning of "activities" used in Paragraph 14.

15. Cellco's sales relate to the provision of intangible telecommunication services in the form of voice and data services, and certain sales stemming from the sale of equipment (tangible personal property), such as handsets.

ANSWER: The Department admits the statements contained in Paragraph 15.

16. Cellco calculated its sales factor apportionment formula for all states, including Illinois, utilizing a primary place of use ("PPU") methodology.

ANSWER: The Department denies the statements contained in Paragraph 16.

17. The PPU methodology sources receipts to a state based upon the physical location of the customers located within the state.

ANSWER: The Department denies the statements contained in Paragraph 17.

18. A customer's PPU is determined by the customer's billing address.

ANSWER: The Department admits the statement contained in Paragraph 18.

19. Historically, Petitioner calculated its Illinois sales factor consistent with Cellco.

ANSWER: The Department admits the statement contained in Paragraph 19.

CONTROVERSY

20. On its original returns for the Years at Issue ("Original Returns"), Petitioner sourced its receipts related to its provision of telecommunication services on a PPU basis opposed to the cost of performance methodology as required by Illinois law. 35 ILCS §5/304(a)(3)(C)(i-ii); 86 Ill. Admin. Code §100.3370(c)(3)(A).

ANSWER: The Department denies the statements contained in Paragraph 20. Additionally, the Petitioner incorrectly filed its original tax returns for the Years at Issue. Petitioner took the position that a unitary relationship existed between the Petitioner and Cellco. As a result, the Petitioner included Cellco's sales factor in its sales factor for the Years at Issue. Based on judicial admissions contained in the Petitioner's court filings in the Indiana Tax Court (See Exhibit 1), a unitary relationship did not exist between the

Petitioner and Cellco. Pursuant to 35 ILCS 5/305(a), the Petitioner was required to report its distributive share of its non-unitary business partnership income, determined by Cellco. Revised Notices of Deficiency were issued to reflect the Department's determination that the Petitioner did not have a unitary relationship with Cellco during the Years at Issue.

21. As part of an apportionment study that analyzed the proper method of sourcing receipts for apportionment factor purposes in all states, Petitioner determined that it had been incorrectly sourcing receipts to Illinois.

ANSWER: Paragraph 21 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b) (2). Further, the Department lacks sufficient knowledge or information to form a belief as to the basis for the Petitioner's determinations on its amended returns.

22. Petitioner sought the advice of an outside, third-party, expert tax-consulting firm to conduct the apportionment study.

ANSWER: The Department admits that the Petitioner sought the advice of an outside, third-party to conduct an apportionment study. The Department lacks sufficient knowledge or information to form a belief as to the expertise of this party with respect to the identified study.

23. As a result, Petitioner amended its Illinois corporate income and replacement tax returns ("Amended Returns") for the Years at Issue.

ANSWER: The Department lacks sufficient knowledge or information to form a belief as to the basis for Petitioner's amended tax returns for the Years at Issue.

24. Petitioner's basis for filing Amended Returns was that its Original Returns were filed incorrectly using the PPU methodology which is akin to a market-based approach.

ANSWER: Paragraph 24 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 lacks sufficient knowledge or information to form a belief as to the Taxpayer's basis for filing amended returns.

25. Petitioner's revised amount of tax due on its Amended Returns was calculated using Illinois's statutory cost of performance methodology in place during the Years at Issue.

ANSWER: The Department denies the statement contained in Paragraph 25.

26. Petitioner's sales factor was revised in order to (i) accurately reflect the amount of net sales in Illinois based on cost of performance resulting from Petitioner's "income-producing activities," and (ii) be consistent with the Illinois statute. *Id*

ANSWER: Paragraph 26 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b) (2).

27. Upon review of Petitioner's Amended Returns, the Department denied Petitioner's apportionment factor revisions.

ANSWER: The Department admits the statement contained in Paragraph 27.

28. The Department adjusted Petitioner's Illinois sales factor to include receipts as determined by the PPU methodology as originally reported on Petitioner's Original Returns.

ANSWER: The Department denies the statements contained in Paragraph 28. See Department's Answers to Paragraph 20.

29. On December 31, 2013, and January 16, 2014, the Department issued Petitioner Notices for the Years at Issue.

ANSWER: The Department admits the statement contained in Paragraph 29

COUNT I

30. Petitioner realleges and incorporates by this reference the allegations made in paragraphs 1 through 29.

ANSWER: Department incorporates and repeats its answers to Paragraphs 1 through 29 as if fully set forth herein.

31. A multistate taxpayer divides its taxable profits between Illinois and the other jurisdictions where it operates by multiplying its net income by an "apportionment" percentage. 35 ILCS 5/304(a).

ANSWER: The Department admits the statement contained in Paragraph 31. The cited statute speaks for itself.

32. During the Years at Issue, the percentage was based solely on the sales factor.

ANSWER: The Department admits the statement contained in Paragraph 32.

33. The sales factor is the ratio of the taxpayer's total sales in this State during the taxable period over the taxpayer's total sales everywhere during the taxable period. 35 ILCS 5/304(a)(3)(A).

ANSWER: The Department admits the statement contained in Paragraph 33.

34. For purposes of calculating a taxpayer's Illinois sales factor for sales other than the sale of tangible personal property during the Years at Issue, Illinois followed a pure "cost of performance" model. 35 ILCS §5/304(a)(3)(C)(i-ii); 86 Ill. Admin. Code §100.3370(c)(3)(A).

ANSWER: Paragraph 34 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b) (2). The cited statute and regulation speak for themselves.

35. With respect to sales other than sales of tangible personal property, *e.g.*, sales of communications services, a taxpayer's sales are "in this State" if the taxpayer's income-producing activity is performed both inside and outside Illinois, and the greater proportion of the activity is performed inside Illinois than outside Illinois, based on the costs of performing the activities. 35 ILCS 5/304(a)(3)(C)(ii).

ANSWER: Paragraph 35 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b) (2). The cited statute speaks for itself.

36. "Income producing activity" was defined as transactions and activity directly engaged in by the person in the regular course of its trade or business for the ultimate purpose of gain or profit. 86 Ill. Admin. Code §100.3370(c)(3)(A).

ANSWER: Paragraph 36 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b) (2). The cited regulation speaks for itself.

37. Cellco's principal income-producing activities during the Years at Issue consisted of providing telecommunications and data services.

ANSWER: The Department denies the statement contained in Paragraph 37. The facts alleged in Paragraph 37 are inconsistent with the facts alleged in Paragraph 15.

38. Therefore, 35 ILCS §5/304(a)(3)(C) controls the determination of whether and to what extent earnings received from the sales of Cellco's telecommunication and data services should be attributed to Illinois for purposes of calculating Petitioner's Illinois sales factor.

ANSWER: The Department denies the statements contained in Paragraph 38. See Department's Answer to Paragraph 20

39. On its Original Return, Petitioner sourced Illinois earnings based upon the billing address (market-based) of the customer to whom the services were sold.

ANSWER: The Department denies the statement contained in Paragraph 39.

40. Petitioner filed an Amended Returns for the Years at Issue to reflect the proper Illinois apportionment factor.

ANSWER: Paragraph 40 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b) (2).

41. On its Amended Return, Petitioner's Illinois sales factor was adjusted to accurately reflect the amount of net sales in Illinois based on cost of performance, Illinois's statutorily required sourcing method during the Years at Issue.

ANSWER: The Department denies the statement contained in Paragraph 41. See Department's Answer to Paragraph 20.

42. Upon audit, the Department denied Petitioner's adjustments.

ANSWER: The Department denies the statement contained in Paragraph 42 since no adjustment was specifically identified.

43. Petitioner's sourcing method on its Original Return was incorrect and contrary to the cost of performance method required by Illinois law during the Years at Issue.

ANSWER: The Department denies the statements contained in Paragraph 43. See Department's Answer to Paragraph 20.

44. Illinois did not move to a market-based approach for the sourcing of sales to the State until tax years beginning on or after December 31, 2008. 35 ILCS §5/304(a)(3)(C-5).

ANSWER: The Department admits that the statute cited in Paragraph 44 pertains to tax years ending on or after December 31, 2008. All other statements contained in Paragraph 44 contain legal conclusions, and not material allegations of fact, and therefore do not require an answer pursuant to Rule 310(b) (2).

45. By using the billing address of Cellco's customers to source earnings from the sale of Cellco's telecommunications services to Illinois, Petitioner attributed a substantially greater amount of those earnings to Illinois than should have been attributed by the statutorily required cost of performance method.

ANSWER: The Department denies the statements contained in Paragraph 45. See Department's Answer to Paragraph 20.

46. During the Years at Issue, more than 50% of Cellco's direct costs of performance for its telecommunication and data services occurred outside of Illinois.

ANSWER: The Department denies the statements contained in Paragraph 46.

47. As a result, the revenue associated with these sales should be excluded from the numerator of Petitioner's Illinois sales factor.

ANSWER: The Department denies the statements contained in Paragraph 47. See Department's Answer to Paragraph 20.

48. Accordingly, Petitioner properly sourced its income to Illinois on a cost of performance basis and the Department's re-allocation of 100% of Petitioner's income to Illinois was improper.

ANSWER: The Department denies the statements contained in Paragraph 48. See Department's Answer to Paragraph 20.

49. The Department's proposed sales factor adjustment is contrary to the law and is not supported by the facts.

ANSWER: The Department denies the statements contained in Paragraph 49.

WHEREFORE, the Department prays that this Tribunal enter an Order that:

a. denies each prayer for relief in Count I of the Taxpayer's Petition;

b. finds the Notices of Denial are correct as adjusted;

c. orders judgment in favor of the Department and against the Taxpayer; and

d. grants any further relief this Tribunal deems just and appropriate.

COUNT II

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

ANSWER: Department incorporates and repeats its answers to Paragraphs 1 through 49 as if fully set forth herein.

51. The purpose of the apportionment formula is to assign profits to Illinois in proportion to the level of business activity a taxpayer conducts in the state. *Continental Illinois Nat'l Bank and Trust v. Lenckos,* 102 Ill. 2d 210, 224 (1984); *Caterpillar Tractor Co. v. Lenckos,* 84 Ill. 2d 102, 123 (1981) (the purpose of the formula is to confine the taxation of income to the portion of the total income that is attributable to local activities).

ANSWER: Paragraph 51 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b) (2).

52. On its Amended Returns, Petitioner sourced Cellco's Illinois earnings based on the cost of performance methodology as required by Illinois law.

ANSWER: The Department denies the statements contained in Paragraph 52. See Department's Answer to Paragraph 20.

53. The majority of the costs of performance for Cellco's telecommunication and data services occurred outside of Illinois.

ANSWER: The Department denies the statements contained in Paragraph 53.

54. As a result, the revenue associated with these sales was excluded from the numerator of Petitioner's Amended Illinois sales factor.

ANSWER: The Department denies the statements contained in Paragraph 54.

55. Upon audit, the Department denied Petitioner's adjustments and reallocated Cellco's sales to Illinois based on the billing address of the customer, i.e., a market-based sourcing methodology.

ANSWER: The Department denies the statements contained in Paragraph 55.

56. Illinois did not move to a market-based approach for the sourcing of sales to the State until tax years beginning on or after December 31, 2008. 35 ILCS §5/304(a)(3)(C-5).

ANSWER: The Department admits that the statute cited in Paragraph 56 pertains to tax years ending on or after December 31, 2008. All other statements contained in Paragraph 56 contain legal conclusions, and not material allegations of fact, and therefore do not require an answer pursuant to Rule 310(b) (2). The statute speaks for itself.

57. By using the billing address of Cellco's customers to source earnings from the sale of Cellco's telecommunications services to Illinois, Petitioner attributed a substantially greater amount of those earnings to Illinois than should have been attributed by the statutorily required cost of performance method.

ANSWER: The Department denies the statements contained in Paragraph 57.

58. The use of the Department's method is inappropriate because it assigns income to Illinois that is out of all appropriate proportion to Petitioner's in-state income-producing activities.

ANSWER: The Department denies the statements contained in Paragraph 58.

59. Accordingly, the Department erred in adjusting Petitioner's Illinois apportionment factor for the Years at Issue.

ANSWER: The Department denies the statements contained in Paragraph 59.

WHEREFORE, the Department prays that this Tribunal enter an Order that:

a. denies each prayer for relief in Count II of the Taxpayer's Petition;

b. finds the Notices of Denial are correct as adjusted;

c. orders judgment in favor of the Department and against the Taxpayer; and

d. grants any further relief this Tribunal deems just and appropriate.

COUNT III

60. Petitioner realleges and reincorporates the allegations in paragraphs 1 through 59, inclusive, hereinabove.

ANSWER: Department incorporates and repeats its answers to Paragraphs 1 through 59 as if fully set forth herein.

61. Under Illinois law, a partnership is a "contractual relationship of mutual agency which is formed to carry on a business purpose." *Acker v. Dep't. of Rev.,* 116 Ill. App. 1080, 1083 (1st Dist. 1983).

ANSWER: Paragraph 61 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b) (2).

62. For Illinois income tax purposes, the partnership is regarded as an independently recognizable entity apart from the aggregate of its partners" whose income is taxed to each partner as if "the partnership was merely an agent or a conduit through which the income passed." *Id.*

ANSWER: Paragraph 62 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b) (2). Additionally, Paragraph 62 does not accurately state the law. In *Borden Chemicals and Plastics, L.P. v. Zehnder,* 312 Ill. App. 3rd 35 (1st Dist. 200), the Illinois Appellate court stated that Section 305 is the appropriate code section to apply when calculating the amount of partnership income to report on a partner's tax return. "The partnership is regarded as an independently recognizable entity apart from the aggregate of its partners. Once its income is ascertained and reported, its existence may be disregarded *since each partner must pay a tax on a portion of the income as if the partnership were merely an agent or conduit through which income passed."* (Emphasis added). *Borden* at 45 (citing *Acker v. Department of Revenue,* 116 Ill. App. 3rd 1080, 1083 (1983)).

63. As such, each partner is entitled to a distribute share of the partnership income from every source and should be taxed on that basis.

ANSWER: Paragraph 63 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b) (2).

64. Specifically, Section 305(c) provides that "base income of a partnership shall be allocated or apportioned to this State pursuant to Article 3, in the same manner as it is allocated or apportioned for any other nonresident." 35 ILCS §5/305(c); 86 Ill. Admin. Code §100.3500(b)(2); *See Also, BP Oil Pipeline Co. v. Bower,* Docket No. 1-01-2364 (Ill App. 1st Dist.) (5/21/2004); *Exxon Corp. v. Bower,* Docket No. 1-01-3302 (Ill App. 1st Dist.) (5/21/2004).

ANSWER: Paragraph 64 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b) (2). The cited statute speaks for itself.

65. Here, for purposes of calculating a nonresident-taxpayer's Illinois sales factor for sales other than the sale of tangible personal property during the Years at Issue, Illinois followed a pure "cost of performance" model. 35 ILCS §5/304(a)(3)(C)(i-ii); 86 Ill. Admin. Code §100.3370(c)(3)(A).

ANSWER: Paragraph 65 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b) (2). The cited statute speaks for itself.

66. Accordingly, Petitioner was required to calculate the numerator of its Illinois sales factor on a cost of performance basis for the Years at Issue.

ANSWER: Paragraph 66 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b) (2). Further, the Department denies any factual allegations contained in Paragraph 66 since the allegation of fact in Paragraphs 65 and 66 are based on an undefined term "pure cost of performance model". See Department's Answer to Paragraph 20.

67. Petitioner's Amended Returns were filed in accordance with Illinois law in effect during the Years at Issue.

ANSWER: The Department denies the statements contained in Paragraph 67.

68. The Department's denial of Petitioner's adjustments and issuance of its Notices was erroneous.

ANSWER: The Department denies the statements contained in Paragraph 68.

WHEREFORE, the Department prays that the Tribunal enter an Order that:

a. denies each prayer for relief in Count III of the Taxpayer's Petition;
b. finds the Notices of Denial are correct as adjusted;
c. orders judgment in favor of the Department and against the Taxpayer; and
d. grants any further relief this Tribunal deems just and appropriate.

COUNT IV

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

ANSWER: The Department incorporates and repeats its answers to Paragraphs 1 through 68 as if fully set forth herein.

70. On January 2, 2015, the Department sent Petitioner's counsel via email correspondence copies of statements identified as revised notices of deficiency (collectively referred to as the "Revised Notices") for the fiscal tax year ending: (i) March 31, 2005 ("2005 Notice") and (ii) March 31, 2006 and March 31, 2007 ("2006 & 2007 Notice"); (Revised Years at Issue") that it intended to issue to Petitioner.

ANSWER: The Department admits the statements contained in Paragraph 70. Additionally, the revised notices referred to in Paragraph 70 were mailed to the Taxpayer at its last known address on the same date as the date the referenced email was sent.

71. True and accurate copies of the Revised Notices are attached hereto as Exhibit B.

ANSWER: The Department admits the statements contained in Paragraph 71.

72. A true and accurate copy of the January 2nd email correspondence is attached hereto as Exhibit C.

ANSWER: The Department admits the statement contained in Paragraph 72.

73. The Revised Notices include the first Notice of Deficiency issued for the 2005 taxable year.

ANSWER: The Department denies the statements contained in Paragraph 73. The Notices referred to in Paragraph 71 were not intended to act as Notices of Deficiency as referred to in 35 ILCS 5/905. The notices are intended to advise the Taxpayer that the Department corrected its records to reflect the correct amount of tax due, even if the statute of limitations would bar a collection action. See *Dynamics Corp. of America,* 392 F. 3d 241, 248 (Ct. Cl. 1968).

74. The 2005 Notice assessed Plaintiff an additional amount of $2,054,674.00 comprised of $1,018,210.00 of tax, $354,404.00 of penalties and $682,060.00 of interest.

ANSWER: The Department denies the statements contained in Paragraph 74. See Department's Answer to Paragraph 73.

75. The 2005 Notice is back-dated to January 16, 2014, which corresponds to the date the 2005 refund denial was issued to Petitioner.

ANSWER: The Department admits the statements contained in Paragraph 75. See Department's Answer to Paragraph 73.

76. The 2006 & 2007 Notice is back-dated to December 31, 2013, which corresponds to the date of the 2006 Original Notice.

ANSWER: The Department admits the statements contained in Paragraph 76. See Department's Answer to Paragraph 73.

77. This is the first Notice of Deficiency issued for the 2007 taxable year.

ANSWER: The Department denies the statements contained in Paragraph 77. See Department's Answer to Paragraph 73.

78. The 2006 & 2007 Notice assessed Plaintiff an additional amount of $8,174,413.00 comprised of $5,386,412 of tax, $1,077,282 of penalties and $1,710,719.00 of interest attributable to the 2006 taxable year.

ANSWER: The Department denies the statements contained in Paragraph 78. See Department's Answer to Paragraph 73.

79. The 2006 & 2007 Notice assessed Plaintiff an additional amount of $3,579,309.00 comprised of $2,500,498.00 of tax, $503,512.00 of penalties and $575,309.00 of interest attributable to the 2007 taxable year.

ANSWER: The Department denies the statements contained in Paragraph 79. See Department's Answer to Paragraph 73.

80. During the Years at Issue, Petitioner and Cellco filed as members of the same unitary group.

ANSWER: The Department denies the statements contained in Paragraph 80. Cellco's income and apportionment factors were reflected on the Petitioner's tax returns but Cellco was not listed as a member of Vodafone's unitary business group on Schedule UB.

81. Petitioner filed its Illinois Corporate Income and Replacement tax returns on a combined basis and included Cellco in its unitary group.

ANSWER: The Department denies the statements contained in Paragraph 81. See Department's Answer to Paragraph 80.

82. Upon conclusion of the Department's original audit, the Department determined that Petitioner and Cellco were unitary. True and accurate copies of the auditor's comments supporting the unitary finding are attached hereto as Exhibit D.

ANSWER: The Department denies the statements contained in Paragraph 82. The Department's auditor accepted Vodafone's characterization of a unitary relationship between Vodafone and Cellco based on the best information available at the time of the audit.

83. The Department, through its audit review and conclusions, agreed that Petitioner and Cellco were unitary by upholding and not adjusting the unitary relationship on audit.

ANSWER: Paragraph 83 contains a legal conclusion, not a material statement of fact, and therefore does not require an answer pursuant to Rule 310(b)(2).

84. The Department's Original Claim Denials did not adjust the unitary relationship upheld on audit.

ANSWER: Paragraph 84 contains a legal conclusion, not a material statement of fact, and therefore does not require an answer pursuant to Rule 310 (b)(2).

85. The Department's basis for its Revised Notices is the change in its theory of assessment finding that Taxpayer is not unitary with Cellco.

ANSWER: Paragraph 85 contains a legal conclusion, not a material statement of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). In October 2014, information contained in Department Exhibit 1 attached came to the attention of the Department which indicated that Vodafone and Cellco did not have a unitary relationship during the Years at Issue. The notices referred to in Paragraph 71 which were emailed to the Taxpayer's attorney and sent to the Taxpayer's last known address, were sent to inform the Taxpayer that the Department had corrected its records to reflect the correct amount of tax due as a result of re-characterizing Cellco as a non-unitary partnership.

86. The Department conducted no independent review or investigation to support their new theory.

ANSWER: Paragraph 86 contains a legal conclusion, not a material statement of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). See Department's Answer to Paragraph 85.

87. The Department did not issue a new audit report supporting its determination that the Petitioner is not unitary with Cellco.

ANSWER: The Department denies the statements contained in Paragraph 87. See Taxpayer's Exhibits B and C.

88. The Department is required to examine a return as soon as practicable after it is filed in order to determine the correct amount of tax due. 35 ILCS §5/904(a) and 86 Ill. Admin. Code §100.9300(a).

ANSWER: The Department admits the statements contained in Paragraph 88. A timely audit of the Taxpayer's Years at Issue was conducted based on the information available at the time of the audit. In October 2014, information relating to the relationship between Vodafone and Cellco became available which was not provided by the Taxpayer at the time of the Department's audit. The Department has the right to correct its records to reflect the correct amount of tax due. See Department's Answer to Paragraph 73.

89. If the Department determines that the correct amount of tax exceeds that shown on the return, then subject to the applicable statute of limitations, the Department may issue a notice of deficiency setting forth the amount of tax and any penalties to be assessed. *Id.*

ANSWER: The Department admits the statements contained in Paragraph 89. See Department's Answer to Paragraph 73.

90. The Department's findings under 35 ILCS §5/904(a) and 86 Ill. Admin. Code §100.9300(a) are deemed prima facie correct and constitute prima facie correctness of the tax and penalties due. *Id.*

ANSWER: The Department admits the statement contained in Paragraph 90.

91. Pursuant to Illinois law, (i) a notice of deficiency shall be issued not later than three years after the date the return was filed; and (ii) no deficiency shall be assessed or collected unless the notice is issued within such period. 35 ILCS §5/905(a)(1) and (2); 86 Ill. Admin. Code §100.9320(a); See Also, *Caterpillar Tractor Co. v. Lenckos,* 77 Ill. App. 3d 90, 100 (3rd Dist. 1979) (A notice of deficiency to be effective, must not be issued later than three years after

the date the return was filed unless such notice is timely given, a deficiency cannot be assessed or collected).

ANSWER: The Department admits the statements contained in Paragraph 91. See Department's Answer to Paragraph 73.

92. In making its determination to issue Revised Notices, the Department did not examine Petitioner's returns as soon as practicable after they were filed.

ANSWER: The Department denies the statements contained in Paragraph 92. See Department's Answer to Paragraph 85.

93. Petitioner filed its Amended Returns for the Years at Issue between January 2009 and May 2011.

ANSWER: The Department admits the statements contained in Paragraph 93.

94. Here, the Revised Notices were not presented to Petitioner's counsel until January 2, 2015, well beyond the original three year statute of limitation and any waivers signed by Taxpayer.

ANSWER: Paragraph 94 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). See Department's Answer to Paragraph 73.

95. Based on the plain language of 35 ILCS §5/905, the Revised Notices are invalid because they were issued beyond the three-year statute of limitations. See Also, *American*

Airlines, Inc. v. Dep't. of Rev., 402 Ill. App. 3d 579, 598 (1 Dist. 2009) ("each time an amount is claimed, it is subject to the operative statute of limitations, so that even a so-called amended claim that seeks an additional amount, albeit, for the same type of exemption, would have to independently satisfy the statute of limitations.").

ANSWER: Paragraph 95 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). See Department's Response to Paragraph 73.

96. Accordingly, the Department's Revised Notices cannot be considered to be prima facie correct pursuant to 35 ILCS §5/904(a) and 86 Ill. Admin. Code §100.9300(a).

ANSWER: Paragraph 96 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b)(2). See Department's Answer to Paragraph 73.

WHEREFORE, the Department prays that the Tribunal enter an Order that:

a. denies each prayer for relief in Count IV of the Taxpayer's Petition;
b. finds the Notices of Denial are correct as adjusted;
c. orders judgment in favor of the Department and against the Taxpayer; and
d. grants such further relief as the Tribunal deems just and appropriate.

COUNT V

97. Petitioner realleges and incorporates by this reference the allegations made in Paragraphs 1 through 96, inclusive, hereinabove.

ANSWER: Department incorporates and repeats its answers to Paragraphs 1 through 96 as if fully set forth herein.

98. On January 2, 2015, the Department's auditor emailed Petitioner's counsel copies of the Revised Notices.

ANSWER: The Department admits that a Department representative emailed copies of the Revised Notices to the Petitioner's counsel and mailed copies of the Revised Notices to the Taxpayer at its last known address.

99. The emailed versions of the Revised Notices received by Petitioner's counsel from the Department are the only copies of the Revised Notices issued to the Petitioner.

ANSWER: The Department denies the statements contained in Paragraph 99. Copies of the notices were mailed to the Taxpayer's last known address.

100. Petitioner never received copies of the Revised Notices from the Department.

ANSWER: The Department lacks sufficient knowledge or information to form a belief as the truth or falsity of the statement contained in Paragraph 100.

101. Pursuant to 35 ILCS §§5/902(a) and 86 Ill. Admin. Code §100.9100, the Department "shall, as soon as practicable after an amount payable under this Act is deemed assessed...give notice to each person liable for any unpaid portion of such assessment, stating the amount unpaid and demanding payment thereof...Such notice shall be left at the dwelling or

usual place of business of such person or shall be sent by mail to the person's last known address."

ANSWER: The Department admits the statements contained in Paragraph 101. See the Department's Answers to Paragraphs 73 and 85.

102. Petitioner's usual place of business is located at Denver Place South Tower, Ste. 1750, 999 18th Street, Denver, CO 80202-2404 ("Denver Address").

ANSWER: The Department admits the statements contained in Paragraph 102.

103. The address contained on the Revised Notices is the Denver Address.

ANSWER: The Department admits the statements contained in Paragraph 103.

104. Petitioner's address used on its last Illinois return was One Verizon Way, P.O. Box 627, Basking Ridge, NJ 07920-0627 ("New Jersey Address").

ANSWER: The Department admits the statements contained in Paragraph 104.

105. Petitioner's filings with the Department for the Years at Issue used both the Denver Address and the New Jersey Address.

ANSWER: The Department admits the statements contained in Paragraph 105.

106. The Department did not send the Revised Notices to Petitioner's usual place of business or Petitioner's last known address.

ANSWER: The Department denies the statements contained in Paragraph 106.

107. As a result, Petitioner did not receive proper and timely notice of its alleged tax liabilities.

ANSWER: The Department denies the statements contained in Paragraph 107.

108. There is an actual controversy between Petitioner and Department concerning Petitioner's entitlement to a refund.

ANSWER: The Department admits Paragraph 108.

WHEREFORE, the Department prays that the Tribunal enter an Order that:

a. denies each prayer for relief in Count V of the Taxpayer's Petition;

b. finds the Notices of Denial are correct as adjusted;

c. orders judgment in favor of the Department and against the Taxpayer; and

d. grants any further relief this Tribunal deems just and appropriate.

COUNT VI

109. Petitioner realleges and incorporates by this reference the allegations made in paragraphs 1 through 108, inclusive, herein above.

ANSWER: Department incorporates and repeats its answers to Paragraph 1 through 108 as if fully set forth herein.

110. The Illinois Taxpayer Bill of Rights requires the Department to include on all tax notices an explanation of tax liabilities and penalties. 20 ILCS §2520/4(b).

ANSWER: The Department admits the statements contained in Paragraph 110. The statute speaks for itself. See Department's Answers to Paragraphs 73 and 85.

111. Notices of Deficiency are required to set forth the adjustments being made to the taxpayer's return and the reasons therefor. 35 ILCS §5/904(c).

ANSWER: The Department admits the statements contained in Paragraph 111. The statute speaks for itself. See Department's Answers to Paragraphs 73 and 85.

112. The Department's basis for its Revised Notices is the change in its theory of assessment finding that Taxpayer is not unitary with Cellco.

ANSWER: Paragraph 112 contains a legal conclusion, not a material allegation of fact, therefore does not require an answer pursuant to Rule 310(b)(2). See Department's Answer's to Paragraphs 73 and 85.

113. Here, the Department issued the Revised Notices changing the Department's entire theory of assessment with no independent investigation performed to support its new theory.

ANSWER: The Department denies the statements contained in Paragraph 113.

114. The Revised Notices provided no other explanation of the new liabilities or penalties assessed.

ANSWER: The Department denies the statements contained in Paragraph 114.

115. Although Notices of Deficiency are to be prepared and issued by Audit Review, they are still subject to review by the Income Tax Legal Division before issuance. 86 Ill. Admin. Code §100.9000(b)(3).

ANSWER: The Department admits the statements contained in Paragraph 115. The cited Department regulation speaks for itself. As stated in the referenced regulation, while a notice is subject to a review by the Income Tax Legal Division before issuance, it is not required. See Department's Answers to Paragraphs 73 and 85.

116. Here, both the Department's Audit Review and the Department's Income Tax Legal Division reviewed the original audit report and the notices of Claim Denials for the Years at Issue prior to the issuance of the Claim Denials and the unitary finding was upheld.

ANSWER: The Department denies the statements contained in Paragraph 116.

117. Without providing an explanation as to its adjustments, the Department has deprived the Petitioner of a meaningful opportunity to protest the adjustments.

ANSWER: The Department denies the statements contained in Paragraph 117. See Department's Answers to Paragraphs 73 and 85.

118. Because the Revised Notices do not comply with the Taxpayer Bill of Rights and 35 ILCS 5/904(c), depriving Petitioner of a meaningful opportunity to challenge the assessment, the Revised Notices are invalid.

ANSWER: The Department denies the statements contained in Paragraph 118.

119. Accordingly, the Revised Notices violate the requirements in the Taxpayer Bill of Rights that taxpayers be provided an explanation of tax liabilities and penalties.

ANSWER: The Department denies the statements contained in Paragraph 119.

120. Taxpayers have a right to recover damages in a suit if the Department intentionally disregards the tax laws or regulations, or rights of taxpayers, in collecting taxes. 20 ILCS 2520/5.

ANSWER: Paragraph 120 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b)(2).

WHEREFORE, the Department prays that the Tribunal enter an Order that:

a. denies each prayer for relief in Count VI of the Taxpayer's Petition;

b. finds the Notices of Denial are correct as adjusted

c. orders judgment in favor o the Department and against the Taxpayer; and

d. grants any further relief this Tribunal deems just and appropriate.

COUNT VII

121. Petitioner realleges and incorporates by this reference the allegations made in paragraphs 1 through 120, inclusive and hereinabove.

ANSWER: Department incorporates and repeats its answers to Paragraphs 1 through 120 as if fully set forth herein.

122. In order to adequately preserve its rights, after a notice of deficiency is issued a taxpayer must timely file a protest against the notice within 60 days of its issuance with either

the Department's Administrative Hearings Division or the Illinois Independent Tax Tribunal. 35 ILCS §5/908(a); 86 Ill. Admin. Code §100.9100(b)(2).

ANSWER: The Department admits the statements contained in Paragraph 122. The statute and regulation speak for themselves. As stated above, the Department did not issue the Notices of Deficiency pursuant to 35 ILCS 5/905. Based on information obtained by the Department in October 2014, not provided by the Taxpayer, the Taxpayer was issued notices to inform the Taxpayer that the Department had corrected its records to reflect the correct amount of tax due. See Department's Answers to Paragraphs 73 and 85.

123. A taxpayer may elect to bypass the administrative hearings division or tax tribunal process by paying the total amount due under protest with a completed Form RR-374, Notice of Payment Under Protest, or a written protest letter in the format specified in Sections2a and 2a.1 of the State Officers and Employees Money Disposition Act ("Protest Monies Act"). 30 ILCS 230/2a, 230/2a.1.

ANSWER: The Department admits the statements contained in Paragraph 123. The statute speaks for itself. See the Department's Answer to Paragraph 122.

124. Pursuant to Section 2a of the Protest Monies Act, a party that has made a payment under protest as provided in section 2a.1 of that Act must secure a preliminary injunction or a temporary restraining order, within 30 days of the payment, which enjoins the transfer of the payment under protest from the Protest Fund to the appropriate fund in which payment would be placed had the payment been made without a protest. 30 ILCS 230/2a.

ANSWER: The Department admits the statements contained in Paragraph 124. The statute speaks for itself. See the Department's Answer to Paragraph 122.

125. The Department considers a notice's date of "issuance" to be the mailing date contained on the notice of deficiency. See 86 Ill. Admin. Code §100.9200(a)(3).

ANSWER: The Department admits the statements contained in Paragraph 125. See Department's Answer to Paragraph 122.

126. Here, the Revised Notices were provided to Petitioner's counsel on January 2, 2015; however, they were back-dated to correspond to the dates of the Original Claim Denials.

ANSWER: The Department admits the statements contained in Paragraph 126. See the Department's Answer to Paragraph 122.

127. This Tribunal has accepted jurisdiction of the 2005, 2006 and 2007 Years at Issue pursuant to Petitioner's filing a Petition on or about February 26, 2014.

ANSWER: The Department admits the statements contained in Paragraph 127.

128. However as a result of the Department's back-dating of the Revised Notices, Petitioner's statutory right of recourse against the Revised Notices pursuant to the Protest Monies Act expired on March 17, 2014 (2005 Notice) and March 1, 2014 (2006 & 2007 Notice), respectively.

ANSWER: The Department denies the statements contained in Paragraph 128. See Department's Answer to Paragraph 122.

129. As a result of the Department back-dating the Revised Notices, Petitioner is foreclosed from protecting its rights through either protesting the notices or making a payment under protest pursuant to the Protest Monies Act.

ANSWER: The Department denies the statements contained in Paragraph 129. See the Department's Answer to Paragraph 122.

130. As a result of the Department's back-dating of the Revised Notices, if this Tribunal does not accept jurisdiction over the Revised Notices then Petitioner will suffer irreparable harm due to its inability to have a method of recourse against the Department's Revised Notices.

ANSWER: The Department denies the statements contained in Paragraph 130. This Tribunal has previously accepted jurisdiction over the Revised Notices.

WHEREFORE, the Department prays that the Tribunal enter an Order that:

a. Denies each prayer for relief in Count VII of the Taxpayer's Petition;
b. Finds the Notices of Denial are correct as adjusted;
c. Orders judgment in favor of the Department and against the Taxpayer; and
d. grants any further relief this Tribunal deems just and appropriate.

COUNT VIII

131. Petitioner realleges and incorporates by this reference the allegations made in paragraphs 1 through 130, inclusive, hereinabove.

ANSWER: The Department incorporates and repeats its answers to Paragraphs 1 through 130 as if fully set forth herein.

132. Pursuant to 35 ILCS §5/909(a), in the case of any overpayment, the Department, within the applicable period of limitations for a claim for refund, may offset the overpayment against any liability, regardless of whether other collection remedies are closed to the Department.

ANSWER: The Department admits the statements contained in Paragraph 132. The statute speaks for itself.

133. However, no deficiency shall be assessed or collected unless the notice is issued within such period. 35 ILCS §5/905(a)(1) and (2); 86 Ill. Admin. Code §100.9320(a); See Also, *Caterpillar Tractor Co. v. Lenckos,* 77 Ill. App. 3d 90, 100 (3rd Dist. 1979).

ANSWER: Paragraph 133 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(b)(2).

134. The Department's Revised Notices were issued beyond the three year statute of limitations and any waivers signed by Taxpayer.

ANSWER: The Department denies the statements contained in Paragraph 134. See the Department's Answer to Paragraph 122.

135. The Department intends to offset any future refund or overpayment of Petitioner's to account for the new liabilities produced by the Revised Notices. See Exhibit C, the Department's email correspondence to Petitioner's counsel attaching the Revised Notices and stating the Department's intentions to offset future overpayments.

ANSWER: The Department admits the statements contained in Paragraph 135. See the Department's Answers in Paragraphs 73, 85 and 122.

136. The Department does not consider an offset to be "collection;" however, if the purpose of an activity taken in relation to a liability is to "obtain payment" then the activity is properly considered collection. *Glazer v. Chase Home Finance, LLC,* 704 F.3d 453 (2013); See Also, *Trinova Corp. v. Michigan Dept. of Treasury*, 498 U.S. 358, 374 (1991)(A "tax on sleeping measured by the number of pairs of shoes you have in your closet is a tax on shoes.").

ANSWER: Paragraph 136 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(B)(2). See the Department's Answer to Paragraph 122.

137. Any offset by the Department is a collection action taken against Petitioner.

ANSWER: Paragraph 137 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(B)(2).

138. Until this Tribunal adjudicates both the validity of the issuance of the Revised Notices and the underlying issue as to whether the liabilities stemming from the Revised Notices are valid and properly due, the Department should not be permitted to collect/offset taxes that have not yet been determined due. See, *Gordon v. United States,* 2009 U.S. Dist. LEXIS 115352 (S.D. N.Y. 2009), Citing, *Lewis v. Reynolds,* 284 U.S. 281 (1931) (a taxpayer's claim for refund must be reduced by the amount of the correct tax liability for the taxable year, regardless of the fact that the Commissioner can no longer assess any deficiency for the taxable year.).

ANSWER: Paragraph 138 contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer pursuant to Rule 310(B)(2). The determination of the correct tax due is relevant to the proper calculation of a deficiency or amount of refund allowed a taxpayer. See 35 ILCS 5/904(a).

WHEREFORE, the Department prays that the Tribunal enter an Order that:

a. denies the prayer for relief in Count VIII of the Taxpayer's Petition;

b. finds the Notices of Denial are correct as adjusted;

c. orders judgment in favor of the Department and against the Taxpayer; and

d. grants any relief this Tribunal deems just and appropriate.

Respectfully Submitted,

LISA MADIGAN
Attorney General
State of Illinois

By: Rebecca L. Kulekowskis
Rebecca L. Kulekowskis
Special Assistant Attorney General

Ronald Forman
Rebecca L. Kulekowskis
Special Assistant Attorneys General
Illinois Department of Revenue
Office of Legal Services
100 W. Randolph St., 7-900
Chicago, IL 60601

Telephone: (312) 814-9500
(312) 814-3318

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

VODAFONE USA PARTNERS & AFFILIATES AND VODAFONE AMERICAS HOLDINGS, INC. & AFFILIATES

v.

ILLINOIS DEPARTMENT OF REVENUE

DOCKET NO. 14-TT-023

VERIFICATION AND AFFIDAVIT AS TO LACK OF SUFFICIENT KNOWLEDGE

Laurie Evans, being first duly sworn, deposes and says that she is an employee and duly authorized agent of the Illinois Department of Revenue ("Department"), that she has read the foregoing Department's Answers to Taxpayer's First Amended Petition, that she is well acquainted with its contents, and under penalties as provided by law pursuant to 735 ILCS 5/1-109 of the Illinois Code of Civil Procedure, she certifies that the statements set forth in that instrument are true and correct, except as to allegations claiming lack of sufficient knowledge (Paragraphs 12, 21, 22, 23, 24 and 100) pursuant to 735 ILCS 5/2-610(b), which she verily believes to be true.

Laurie Evans
Manager, Technical Review
Illinois Department of Revenue

IN THE
INDIANA TAX COURT

CAUSE NO. 49T10-1002-TA-00007

FILED
MAR 27 2013

VODAFONE AMERICAS INC.
and VODAFONE HOLDINGS LLC,

Petitioners,

v.

INDIANA DEPARTMENT OF
STATE REVENUE,

Respondent.

PETITIONERS' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Larry J. Stroble (Atty. No. 732-49)
Randal J. Kaltenmark (Atty. No. 19428-53)
Ziaaddin Mollabashy (Atty. No. 24650-84)
BARNES & THORNBURG LLP
11 South Meridian Street
Indianapolis, Indiana 46204
Telephone: (317) 236-1313
Facsimile: (317) 231-7433

Attorneys for Petitioners
Vodafone Americas Inc.
and Vodafone Holdings LLC

EXHIBIT
DEPARTMENT
1

Table of Contents

Page

I. The Department Has Failed To Distinguish *Riverboat Development*, Which Is Controlling Authority in This Case. 1
A. *Riverboat Development* Is Not Dependent on Whether a Partner Is Unitary with the Partnership in Which It Holds an Interest. 1
B. The Department's Arguments Have Already Been Rejected by the Court in *Riverboat Development*. 4

II. The Department Is Prohibited from Rejecting Its Own Letter of Findings. 7

III. Vodafone and Cellco Did Not Have a Unitary Relationship. 10
A. The Department Bears the Burden of Proof on the Unitary Issue. 10
B. The Cellco Prospectus and Form 10-K Should Be Struck As Exhibits and Given No Weight. 11
C. The Department's Evidence Does Not Support a Finding of a Unitary Relationship. 13

IV. The 2009 and 2011 Amendments to I.C. § 6-3-2-2(a) Represented a Change in Policy by the Legislature. 32

V. The Department Has Presented Nothing That Rebuts Vodafone's Constitutional Challenges. 35
A. Due Process Clause. 35
B. Commerce Clause. 37

VI. The Department Has Waived Any Attempted Defense Based on Commissioners Directive # 38. 38

VII. Conclusion. 39

TABLE OF AUTHORITIES

FEDERAL CASES

Allied-Signal, Inc. v. Director, Division of Taxation,
504 U.S. 768 (1992) 14, 27

Asarco Inc. v. Idaho State Tax Commission,
458 U.S. 307 (1982) 14

Complete Automobile Transit, Inc. v. Brady,
430 U.S. 274 (1977) 38

Container Corp. of America v. Franchise Tax Board,
463 U.S. 159 (1983) 14

F.W. Woolworth Co. v. Taxation and Revenue Department of N.M.,
458 U.S. 354 (1982) 14

Hanson v. Denckla,
357 U.S. 235 (1958) 36

J. McIntyre Machinery, Ltd. v. Nicastro,
131 S. Ct. 2780 (2011) 14

Meadwestvaco Corp. v. Illinois Department of Revenue,
553 U.S. 16 (2008) 14

Mobil Oil Corp. v. Commissioner of Taxes of Vermont,
445 U.S. 425 (1980) 14, 27

Quill Corp. v. North Dakota,
504 U.S. 298 (1992) 35

Shaffer v. Carter,
252 U.S. 37 (1920) 35

STATE CASES

American Mgt. v. MIF Realty, L.P.,
666 N.E.2d 424 (Ind. Ct. App. 1996) 11

Auto-Owners Insurance Co. v. Bill Gaddis Chrysler Dodge, Inc.,
973 N.E.2d 1179 (Ind. Ct. App. 2012) 13

Carroll County Rural Electric Membership Corp. v. Indiana Dep't of St. Rev.,
733 N.E.2d 44 (Ind. Tax Ct. 2000) 8

Central National-Gottesman, Inc. v. Director, Division of Taxation,
14 N.J. Tax 545 (N.J. Tax Ct. 1995), *aff'd*
677 A.2d 265 (N.J. Super. 1996) 26

Chief Industries, Inc. v. Indiana Department of State Revenue,
792 N.E.2d 972 (Ind. Tax Ct. 2000) 4

Doe v. Shults-Lewis Child and Family Services, Inc.,
718 N.E.2d 738 (Ind. 1999) 11

Enhanced Telecommunications Corp. v. Indiana Department of State Revenue,
916 N.E.2d 313 (Ind. Tax Ct. 2009) 19

Five Star Concrete, L.L.C. v. Klink, Inc.,
693 N.E.2d 583 (Ind. Ct. App. 1998)..33

Gross Income Tax Division v. P.F. Goodrich Corp.,
292 N.E.2d 247 (Ind. 1973) 36-37

Haas Publishing Co. v. Indiana Department of State Revenue,
835 N.E.2d 235 (Ind. Tax Ct. 2005) 34

Hoskins v. Sharp,
629 N.E.2d 1271 (Ind. Ct. App. 1994)..12

Hunt Corp. v. Indiana Department of State Revenue,
709 N.E.2d 766 (Ind. Tax Ct. 1999) 34

Indiana Department of State Revenue v. Endress & Hauser, Inc.,
404 N.E.2d 1173 (Ind. Ct. App. 1980)..3

Indiana University Medical Ctr. v. Logan,
728 N.E.2d 855 (Ind. 2000) 13

Kohl's Department Stores, Inc. v. Indiana Department of State Revenue,
822 N.E.2d 297 (Ind. Tax Ct. 2005) 34

Kronmiller v. Wangberg,
665 N.E.2d 624 (Ind. Ct. App. 1996)..13

May Department Stores Co. v. Indiana Department of State Revenue,
749 N.E.2d 651 (Ind. Tax Ct. 2001) 14

Monarch Beverage Co., Inc. v. Indiana Department of State Revenue,
589 N.E.2d 1209 (Ind. Tax Ct. 1992) 20

Norrell Services, Inc. v. Indiana Department of State Revenue,
816 N.E.2d 517 (Ind. Tax Ct. 2004) 8

Park 100 Development Corp. v. Indiana Department of State,
429 N.E.2d 220 (Ind. 1981) 33

Reed v. City of Evansville,
956 N.E.2d 684 (Ind. Ct. App. 2011) 15

Riverboat Development, Inc. v. Indiana Department of State Revenue,
881 N.E.2d 107 (Ind. Tax Ct. 2008), *review denied*
898 N.E.2d 1220 (Ind. 2008) .... passim

Spudich v. Northern Indiana Public Service Co.,
745 N.E.2d 281 (Ind. Ct. App. 2001) 15

Subaru-Isuzu Automotive Inc. v. Indiana Department of State Revenue,
782 N.E.2d 1071 (Ind. Tax Ct. 2003) 2

U-Haul Co. of Indiana, Inc. v. Indiana Department of State Revenue,
896 N.E.2d 1253 (Ind. Tax Ct. 2008) 8

Wabash, Inc. v. Indiana Department of State Revenue,
729 N.E.2d 620 (Ind. Tax Ct. 2000) 11

Wallace v. Indiana Insurance Co.,
428 N.E.2d 1361 (Ind. Ct. App. 1981) 13

STATE ADMINISTRATIVE AUTHORITY

LOF 96-0632 ITC, 22 Ind. Reg. 595 (Nov. 1, 1998) 14, 18, 19

LOF 00-0379, 27 Ind. Reg. 1677 (Feb. 1, 2004) 14, 19

LOF 01-0297, 25 Ind. Reg. 3957 (Aug. 1, 2002) 9

LOF 02-0022, 27 Ind. Reg. 3410 (July 1, 2004) 19

LOF 02-0102, 27 Ind. Reg. 3412 (July 1, 2004) 14, 19

LOF 03-0030, 28 Ind. Reg. 694 (Nov. 1, 2004) 9

LOF 04-0241, 29 Ind. Reg. 2414 (April 1, 2006) 14, 19

LOF 06-0310, 20070523 Ind. Reg. 045070261NRA (May 24, 2007) 19

Rev. Rul. 2000-02 FIT, 24 Ind. Reg. 1236 (Jan. 1, 2001) 6

FEDERAL STATUTES

Internal Revenue Code § 957(a) 16

STATE STATUTES

6 Del. Code § 15-201(a) 36

6 Del. Code § 17-303(b) 19

I.C. § 6-3-2-2(a)(5) ....passim

I.C. § 6-5.5-4 6-7

I.C. § 6-8.1-3-3 ....7-9, 39

MISCELLANEOUS

1990 Op. Ind. Atty. Gen. 90-21 (Oct. 10, 1990), 1990 Ind. AG LEXIS 9

Commissioner's Directive #38 (October 2009) 38-39

Ind. Trial Rule 56(E) 12, 15

Hellerstein & Hellerstein, II State Taxation (3rd ed. 2000) 38

Neal S. McCoy & Marcia R. Nirenstem, *Preparing the Business Combination Registration Statement*, *in* 5 SECURITIES REGULATIONS SERIES, SECURITIES LAW TECHNIQUES (A.A. Summers, Jr., ed., 2012) 12

Newton's Telecommunications Dictionary (2009) 23, 28

Securities and Exchange Commission Rule 405 15-16

IN THE
INDIANA TAX COURT

CAUSE NO. 49T10-1002-TA-00007

VODAFONE AMERICAS INC. and VODAFONE HOLDINGS LLC,	)
Petitioners,	)
v.	)
INDIANA DEPARTMENT OF STATE REVENUE,	)
Respondent.	)

PETITIONERS' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Vodafone Americas Inc. and Vodafone Holdings Inc. ("Vodafone") file this brief in support of their motion for summary judgment and in reply to the response brief of the Indiana Department of State Revenue (the "Department").

I. The Department Has Failed To Distinguish *Riverboat Development*, Which Is Controlling Authority in This Case.

A. *Riverboat Development* Is Not Dependent on Whether a Partner Is Unitary with the Partnership in Which It Holds an Interest.

Riverboat Development, Inc. v. Indiana Dep't of State Revenue, 881 N.E.2d 107 (Ind. Tax Ct. 2008), *review den.* 898 N.E.2d 1220 (Ind. 2008), is controlling authority that compels a decision for Vodafone.[1] However, the Department attempts to distinguish *Riverboat Development* on the basis that Vodafone allegedly had a unitary relationship with Cellco Partnership d/b/a Verizon Wireless ("Cellco") and an active involvement in Cellco's business

[1] Vodafone Brief's at 8-12.

operations.[2] As discussed below, the Department has not introduced anything that would show that Vodafone was unitary with Cellco or had an active involvement in its business operations.[3] More fundamentally, *Riverboat Development* was not based on whether Riverboat Development, Inc. ("RDI") was unitary with RDI/Caesars Riverboat Casino LLC ("Caesars") or had any involvement in its management or business operations.

The Court's analysis in *Riverboat Development* was based on I.C. § 6-3-2-2(a)(5). Under that section income from an intangible was derived from sources within Indiana if the receipt from the intangible was attributable to Indiana under I.C. § 6-3-2-2.2. An interest in a limited liability company (which is treated as a partnership for tax purposes) is intangible personal property. If the income from a limited liability company (or a partnership) is not attributable to Indiana under I.C. § 6-3-2-2.2, it is not part of the Indiana tax base. I.C. §§ 6-3-2-2(a)(5) and 6-3-2-2.2 make no distinction based on whether the income is from a unitary partnership or a nonunitary partnership.

The word "unitary" does not appear in the *Riverboat Development* opinion. Furthermore, the Court does not address whether RDI had managerial control over Caesars or was involved in its business operations. Any such facts had no bearing on the outcome of the case. Instead, the Court applied the clear language of the statute in reaching its decision that RDI's income from Caesar's was not derived from Indiana sources.

The Legislature is free to define the tax base any way it chooses. The Department seeks to have the Court re-write the statute by injecting a nonunitary requirement that was not imposed by the Legislature. "[T]his Court applies the tax laws as the Legislature writes them." *Subaru-*

[2] Department's Brief at 23-24.

[3] Vodafone Reply Brief at 13-32.

Isuzu Automotive Inc. v. Indiana Dep't of State Revenue, 782 N.E.2d 1071, 1077 (Ind. Tax Ct. 2003). "[L]egislatures make the tax statutes and courts enforce them as written, not as departments of revenue may wish they had been written. Such interpretations have the salutory effect of not extending the tax statutes by implication beyond the clear language of the statutes themselves, thereby enlarging their sphere of operation." *Indiana Dep't of State Revenue v. Endress & Hauser, Inc.*, 404 N.E.2d 1173, 1178 (Ind. Ct. App. 1980).

In its unsuccessful attempt to distinguish *Riverboat Development*, the Department has failed to follow the actual reasoning of the Court. First, the Department states that the reason for the Court's determination that RDI had no Indiana source income was that it "lacked sufficient nexus with Indiana."[4] To the contrary, the reason for the Court's decision was that RDI's income from Caesars was not Indiana-source income under I.C. § 6-3-2-2(a)(5) and § 6-3-2-2.2.

Second, the Department states that the Court's conclusion was based on the fact that RDI "was merely a passive investor."[5] As discussed above, the Court's holding was entirely independent of whether RDI was a passive investor[6] or an active or unitary participant in Caesars business. The Court placed no weight on such matters and never discussed what kind of business relationship RDI may have had with Caesars other than holding an LLC interest.

---

[4] Department's Brief at 23. Even if this factor were relevant, it would support Vodafone's position because Vodafone had no property or employees or any other activities in Indiana and had no form of business dealings with persons in Indiana. Vodafone App. B, First Elder Affidavit ¶ 9. (Abbreviations used to cite portions of the record in Vodafone's opening Brief are also used in this Reply Brief).

[5] Department's Brief at 23. Vodafone was also a passive investor in Cellco. Vodafone App. C, Dobemeck Affidavit ¶ 9.

[6] At 881 N.E.2d 108, n. 1, of its opinion, the Court referred to "passive interest and investment income," but that reference was to income earned by RDI from activities other than holding its interest in Caesars. As discussed, the Court's holding with respect to the income from Caesars turned on whether it fell within the statutory definition, not whether it was passive or active in nature.

Third, the Department inappropriately relies on a now-repealed version of I.C. § 6-3-2-2(a)(5) in trying to explain how *Chief Industries, Inc. v. Indiana Dep't of State Revenue*, 792 N.E.2d 972 (Ind. Tax Ct. 2000) relates to this case.[7] In its opening brief Vodafone explained that *Riverboat Development* was a straightforward application of the ruling in *Chief Industries*, which held that, in the case of income from an intangible, it is first necessary to determine whether I.C. § 6-3-2-2(a)(5) classifies the income as derived from sources within Indiana.[8] *Chief Industries* made this determination under the pre-1990 version of I.C. § 6-3-2-2(a)(5), which required that the intangible have a situs in Indiana. The post-1989 version instead required that the receipt from the intangible be attributable to Indiana under I.C. § 6-3-2-2.2. The Department erroneously attempts to apply the *Chief Industries'* situs test to Vodafone's case, ignoring the fact that the current statute no longer contains that test.[9]

Riverboat Development is controlling precedent and requires that the Court grant Vodafone's motion for summary judgment.

B. The Department's Arguments Have Already Been Rejected by the Court in *Riverboat Development*.

The Department argues that Vodafone was subject to tax in Indiana because (i) Cellco derived income from conducting business in Indiana, (ii) under the Internal Revenue Code income from a partnership is passed through to its partners, and (iii) partnership law entitles a partner to a share of partnership income.[10]

---

[7] Department's Brief at 25-26.

[8] Vodafone's Brief at 8-11.

[9] Department's Brief at 25-26.

[10] Department's Brief at 18-23.

There is no dispute that Cellco earned income from conducting business in Indiana. However, the issue is the tax treatment of Vodafone, not Cellco. It is not disputed that Vodafone derived income from Cellco. Whether Vodafone was taxable in Indiana depends on whether its income from Cellco was sourced to Indiana, which is a matter governed by specific statutes.

The Department's recycled and previously rejected arguments do not change the result in *Riverboat Development* or justify overruling that decision. The Court recognized that the income of Caesars -- a limited liability company ("LLC") taxed as a partnership -- was derived from activities in Indiana. 881 N.E.2d at 109. Further, the Court noted that under I.C. § 23-18-1-10, a member of an LLC has an economic right to a share of the LLC's income[11] and under the Internal Revenue Code its income is passed through to its members. However, the Court held that none of these considerations controlled the determinative issue before the Court -- whether the income that RDI derived from Caesars was adjusted gross income derived from sources within Indiana. 881 N.E.2d at 110. The Court ruled that "RDI's income is not generated by the operation of a riverboat in Indiana. Rather, RDI's income is generated as a result of it membership interest in an Indiana limited liability company (*i.e.*, intangible personal property)." 881 N.E. 2d at 111, n.8. In reaching this conclusion, the Court relied on the specific statutes that defined when income had an Indiana source. The fact that the income was derived from an entity taxed as a partnership and doing business in Indiana did not change the analysis. The LLC income was derived from intangible personal property, and thus, under the statutes that existed at the time, it was sourced to Indiana only if attributable to this state under I.C. § 6-3-2-2.2, which it was not.

[11] The partnership statutes provide the same for partners' interests. I.C. § 23-4-1-26.

The Department also takes issue with the Tax Court's holding in *Riverboat Development* that I.C. § 6-3-2-2.2(g) applied to attribute RDI's income from Caesars to its commercial domicile.[12] 881 N.E.2d at 111. Under I.C. § 6-3-2-2(a)(5) as it existed at the time of the case, income was to be sourced to Indiana only if it was attributable to Indiana under I.C. § 6-3-2-2.2. The Court reviewed the different attribution rules in I.C. § 6-3-2-2.2. Subsection (g) dealing with dividend income was most applicable. Although the Internal Revenue Code's definition of "dividends" applies only to corporations, in a more general sense RDI's income from Caesars was the equivalent of dividends -- a distribution representing a return on an equity investment. I.C. § 6-3-2-2.2 does not incorporate the Internal Revenue Code by reference or otherwise indicate that it refers to the Code's definitions rather than a broader, more inclusive definition.

In any event it would hardly have helped the Department if the Court had concluded RDI's income from Caesar's was not the equivalent of dividends. None of the other subsections of I.C. § 6-3-2-2.2 remotely apply to LLC or partnership income. Under that reading I.C. § 6-3-2-2.2 would not attribute any of the income from an LLC or partnership to Indiana, and thus it could not be income derived from sources within Indiana under I.C. § 6-3-2-2(a)(5).

A Department ruling on a financial institutions tax issue confirms this conclusion. In Rev. Rul. 2000-02 FIT, 24 Ind. Reg. 1236 (January 1, 2001), a bank held non-Indiana municipal investments and U.S. Treasury, federal agency, and corporate securities. The Department noted that, although receipts from Indiana municipal securities are attributed to Indiana, the taxpayer's other receipts were not covered by any of the attribution rules in the applicable statutes -- I.C. § 6-5.5-4-3 through I.C. § 6-5.5-4-13. The Department recognized that such receipts were not attributed to Indiana for apportionment purposes for that reason:

[12] Department's Brief at 31-34.

> Receipts included in the numerator of the apportionment factor are limited to those specifically enumerated in I.C. 6-5.5-4-3 through I.C. 6-5.5-4-13. Receipts from investments other than from Indiana municipal investments are not specifically enumerated and, therefore, not included in the numerator of the apportionment factor irrespective of the fact that the taxpayer's commercial domicile is in Indiana or the fact that the management of investments other than Indiana municipal investments' takes place in Indiana.

Thus, the attribution rules in I.C. § 6-5.5-4 are all-inclusive in the sense that, if a category of receipts is not listed in the attribution rules, that category is not treated as an Indiana receipt. The list of attribution rules in I.C. § 6-3-2-2.2 largely parallels those in § I.C. 6-5.5-4. By the same reasoning as the ruling, if a type of intangible income is not listed in I.C. § 6-3-2-2.2, it is not sourced to Indiana under I.C. § 6-3-2-2(a)(5).

II. <u>The Department Is Prohibited from Rejecting Its Own Letter of Findings</u>

In its Letter of Findings, the Department held that Vodafone was not unitary with Cellco "under established standards, disregarding ownership."[13] However, in its Brief, the Department purports to reverse this determination and now argues that Vodafone was unitary with Cellco.[14] Apparently, the Department believes that it is free to ignore its own administrative decisions and take whatever position it thinks is strategically more advantageous in litigation. However, the Legislature has expressly prohibited the kind of flip-flopping attempted by the Department in this case. IND. CODE § 6-8.1-3-3 provides:

> No change in the department's interpretation of a listed tax may take effect before the date the change is:
> (1) adopted in a rule under this section; or
> (2) published in the Indiana Register under I.C. 4-22-7-7(a)(5), if I.C. 4-22-2 does not require the interpretation to be adopted as a rule;
> if the change would increase a taxpayer's liability for a listed tax.

[13] Vodafone's App. A, Stip., Ex. 20, p. 6.

[14] Department's Brief at 10.

This Court, the Department itself, and the Attorney General have all recognized that this section prohibits the Department from changing its position if the change increases the taxpayer's liability unless and until it publishes notice of the change in the Indiana Register. The Register sets forth the Department's official position on issues. *See* I.C. § 4-22-7-7 requiring the Department to publish letters of finding in the Register. The Legislature has decided that the Department must give prospective notice of a change in its official position by publishing the change in the Register.

In *Norrell Services, Inc. v. Indiana Dep't of State Revenue*, 816 N.E. 2d 517 (Ind. Tax Ct. 2004), the Department issued a 1984 letter of findings ruling that the taxpayer's local activities were insufficient to permit the Department to impose gross income tax on fees from Indiana-based franchisees because the franchisees were not the taxpayer's agent. In 1998, the Department issued another letter of findings ruling that the same taxpayer was subject to tax on a portion of such fees, holding that the franchisees were agents of the taxpayer. The Tax Court ruled that the Department had violated I.C. § 6-8.1-3-3 because it tried to apply its change in position to taxable years pre-dating the publication of the 1998 letter of findings.

In *U-Haul Co. of Indiana, Inc. v. Indiana Dep't of State Revenue*, 896 N.E. 2d 1253 (Ind. Tax Ct. 2008), the Court held that the Department violated I.C. § 6-8.1-3-3 when it failed to follow a letter of findings ruling that the taxpayer was not subject to gross income tax. *See also Mirant Sugar Creek, LLC v. Indiana Dep't of State Revenue*, 930 N.E.2d 697, 701 (Ind. Tax 2010) (a ruling published in the Indiana Register "is to be given binding effect . . .); *Carroll County Rural Electric Membership Corp. v. Indiana Dep't of State Revenue*, 733 N.E.2d 44, 49 n. 5 (Ind. Tax Ct. 2000) ("[t]he Letter of Findings is intended to provide the public with guidance on the Department's 'official position concerning specific issues'"; therefore, the Department was required to publish a modified letter of findings before it could change its position); Letter of Findings 03-0030, 28 Ind. Reg. 694 (November 1, 2004) (the Department's change in position treating the taxpayer and its affiliates as nonunitary could be prospective only because of I.C. § 6-8.1-3-3); Letter of Findings 01-0297, 25 Ind. Reg. 3957 (August 1, 2002) ("[T]he Department of Revenue is without authority to reinterpret a taxpayer's liability without promulgating and publishing a regulation giving notice of that reinterpretation"); 1990 Op. Ind. Atty. Gen. 90-21 (October 10, 1990), 1990 Ind. AG LEXIS (applying I.C. § 6-2.1-8-3, which was substantively the same as I.C. § 6-8.1-3-3 but was limited to gross income tax).

It is also clear that the Department was presented with sufficient evidence to make a well-informed decision on the unitary issue. Michael Ralston of PwC represented Vodafone at the administrative hearing[15] and requested a ruling on the unitary issue.[16] He provided the Department with Internet links to the Cellco Partnership Agreement (the "Partnership Agreement"),[17] thus permitting the Department to see that Vodafone did not control Cellco because it appointed only four of nine positions on the Cellco board of representatives.[18] He also explained that Cellco's other partner -- Verizon Communications, Inc. -- controlled Cellco because it appointed a majority of the board of representatives.[19] As an example, he pointed out to the Department that the Partnership Agreement required Cellco to make quarterly distributions to cover its partners' tax liability for their respective allocable share of taxable partnership

[15] Vodafone Suppl. Desig. Evid., App. F, Ralston Affidavit ¶ 7. (References to "Ralston Affidavit" are to the affidavit of Troy Michael Ralston submitted with Vodafone's Supplemental Designated Evidence, App. F).

[16] Vodafone Suppl. Desig. Evid., App. F, Ralston Affidavit ¶ 8.

[17] Vodafone Suppl. Desig. Evid., App. F, Ralston Affidavit ¶¶ 12-13.

[18] *See* discussion of the control issue below at pages 15-16.

[19] Vodafone Suppl. Desig. Evid., App. F, Ralston Affidavit ¶ 9.

income. In addition to the tax distributions, the Partnership Agreement required the payment of dividend-style distributions for the first sixty months. However, once the sixty-month period ended in April, 2005, Verizon Communications -- by virtue of its ability to control Cellco -- prohibited the payment of any further distributions until January, 2011, even though, during the entirety of this period, Cellco was generating significant free cash flow every month.[20]

Mr. Ralston also informed the Department that Vodafone lacked control or influence over Cellco sufficient to cause or compel Cellco to develop and deploy wireless technologies that were compatible with Vodafone's wireless networks, which are deployed outside of the United States. The result was that Cellco's wireless technology is wholly incompatible with that used by Vodafone on its own networks outside the United States. Thus, any synergies between Vodafone and Cellco were (and still are) physically impossible.[21]

Once the Department issued its Letter of Findings ruling that Vodafone was not unitary with Cellco, it could not rescind that position -- as it has attempted to do before this Court -- without issuing and publishing a new letter of findings or adopting a regulation. As shown below, the Department has not introduced any material evidence that differs from that introduced to the Department during the administrative process.

III. Vodafone and Cellco Did Not Have a Unitary Relationship.

A. The Department Bears the Burden of Proof on the Unitary Issue.

In its Response Brief, the Department argues for the first time[22] that Vodafone and Cellco had a unitary relationship -- a position that directly contradicts its Letter of Findings -- and that

[20] Vodafone Supp. Desig. Evid., App. F, Ralston Affidavit ¶10.

[21] Vodafone Suppl. Desig. Evid., App. F, Ralston Affidavit ¶11.

[22] The Department also did not make this assertion in its Contentions filed with the Court on June 24, 2011. Vodafone Supp. Desig. Evid., App E.

this unitary relationship allows it to distinguish *Riverboat Development.* Because the Department raised this issue for the first time in the Tax Court, the Department bears the burden of proof. *Wabash, Inc. v. Indiana Dep't of State Revenue*, 729 N.E.2d 620, 624 (Ind. Tax Ct. 2000).

B. The Cellco Prospectus and Form 10-K Should Be Struck As Exhibits and Given No Weight.

In support of its opposition to Vodafone's motion for summary judgment, the Department has submitted as designated evidence (at pages 67-306) a prospectus prepared by Cellco in connection with its offer to exchange new notes for outstanding floating rate notes (the "Prospectus"). The Prospectus was filed with the SEC on July 6, 2009, together with an SEC Form S-4. Vodafone objects to the Prospectus and requests the Court to strike it for purposes of this summary judgment proceeding. Defective evidence submitted in connection with a summary judgment proceeding may be opposed either by motion or by objection. *Doe v. Shults-Lewis Child and Family Services, Inc.* 718 N.E.2d 738, 749 (Ind. 1999); and *American Mgt. v. MIF Realty, L.P.*, 666 N.E.2d 424, 429 (Ind. Ct. App. 1996). The Department has also submitted selected pages from a Verizon Communications Form 10-K for the year ended December 31, 2008.[23] Vodafone also objects to the Form 10-K and requests the Court to strike it as well.

A prospectus is a marketing document provided to potential purchasers of securities. An issuer of securities is required to file the prospectus with the SEC in a preliminary form along with a registration form (in this case the Form S-4). The SEC staff reviews the prospectus, makes comments or requests changes, and approves the prospectus when it is satisfied with the changes. Only then is the registration statement effective, at which point the seller may sell the

[23] Form 10-K, Department's Desig. Evid. 307-319.

securities. Neal S. McCoy & Marcia R. Nirenstein, *Preparing the Business Combination Registration Statement*, *in* 5 SECURITIES REGULATION SERIES, SECURITIES LAW TECHNIQUES 65-80 (A.A. Summers, Jr., ed., 2012).

The Prospectus is not proper evidence in this case for several reasons.

First, the Prospectus is not reliable relevant information. The document included with the Department's designated evidence is a preliminary prospectus. It was subject to change, either at the request of the SEC or upon Cellco's initiative. The Prospectus warns readers that "[t]he information contained in this prospectus is not complete and may be changed"[24] and that it is "[s]ubject to change." The Department should not be permitted to rely on a preliminary document subject to change to try to establish the truth of the matters stated therein.

Second, Trial Rule 56(E) provides that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." The Prospectus does not rise to the level of an affidavit because, among other things, it has not been sworn to as the truth before an authorized officer. *Hoskins v. Sharp*, 629 N.E.2d 1271, 1277 (Ind. Ct. App. 1994). Although the Form S-4 is signed by certain Cellco officers and board representatives, there is no indication which, if any, of the signatories had personal knowledge of the contents of the Prospectus, or, in any event, the sections cited by the Department in its Brief.

Third, even considered as a non-affidavit exhibit, the Prospectus has not been verified, certified, or otherwise authenticated. There is no showing that the Prospectus included as part of the Department's designated evidence is a true and accurate copy of the material it purports to

[24] Prospectus, Department's Desig. Evid. 69.

be. Therefore, it is not admissible. *Kronmiller v. Wangberg*, 665 N.E.2d 624, 627 (Ind. Ct. App. 1996). "[U]nsworn statements and unverified exhibits do not qualify as proper Rule 56 evidence." *Indiana University Medical Ctr. v. Logan*, 728 N.E.2d 855, 858 (Ind. 2000) (approving the striking of uncertified medical records, the opinion of a medical review panel, an uncertified laboratory report, and a portion of an article from the Internet); *Auto-Owners Insurance Co. v. Bill Gaddis Chrysler Dodge, Inc.*, 973 N.E.2d 1179, 1182-83 (Ind. Ct. App. 2012) (unverified and unsworn bank records, employment records, and pages from the Bureau of Motor Vehicles website were stricken); *Wallace v. Indiana Insurance Co.*, 428 N.E.2d 1361, 1365 (Ind. Ct. App. 1981) ("an unsworn or unverified exhibit does not qualify as proper evidence"); and *Kronmiller*, 665 N.E.2d at 627 (unauthenticated medical records were properly struck).

Vodafone also objects to the portion of the Form 10-K submitted by the Department in its designated evidence[25] on the second and third grounds stated above. It has not been sworn to as the truth before an authorized officer. In fact, the portion of the Form 10-K submitted contains no signatures at all. In addition, the pages of the Form 10-K submitted have not been verified, certified, or otherwise authenticated

C. The Department's Evidence Does Not Support a Finding of a Unitary Relationship.

The Department's basic argument is that *Riverboat Development* does not control this case because Vodafone and Cellco had a unitary relationship. The test for a unitary relationship has been addressed by the United States Supreme Court in several decisions.

[25] Form 10-K, Department's Desig. Evid. 307-319.

As the Supreme Court stated most recently in *Meadwestvaco Corp. v. Illinois Dep't of Revenue*, 553 U.S. 16, 30 (2008), "[w]here, as here, the asset in question is another business, we have described the 'hallmarks' of a unitary relationship as functional integration, centralized management, and economies of scale," citing *Mobil Oil Corp. v. Commissioner of Taxes of Vt.*, 445 U.S 425, 438 (1980); *F.W. Woolworth Co. v. Taxation and Revenue Dept. of N.M.*, 458 U.S. 354, 364 (1982); *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 165–166 (1983); and *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768, 783 (1992). In its past rulings, the Department has agreed that these are the three factors that must be evaluated to determine whether a partner and a partnership are unitary under the Indiana adjusted gross income tax act. *See, e.g.*, LOF 04-0241, 29 Ind. Reg. 2414 (April 1, 2006).[26]

The Department has ruled several times that before a partner may be determined as unitary with a partnership, "one characteristic appears to be essential -- day-to-day operational control." LOF 96-0632 ITC, 22 Ind. Reg. 595 (November 1, 1998); and LOF 00-0379, 27 Ind. Reg. 1677 (February 1, 2004), citing *Container Corp.*, 463 U.S. 159; *Asarco Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307 (1982); and *Allied Signal*, 504 U.S. 768. *See also* LOF 02-0102, 27 Ind. Reg. 3412 (July 1, 2004).

None of the Department's designated evidence establishes a genuine issue of material fact with respect to whether Vodafone controlled Cellco or whether Vodafone and Cellco were

[26] Contrary to the Department's suggestion in its Brief at 15, n.65, the financial institutions tax definition of "unitary business" at I.C. § 6-5.5-1-18(a) has not been incorporated into the adjusted gross income tax, and the Tax Court did not rely on it in as the applicable definition for adjusted gross income tax purposes in *May Dep't Stores Co. v. Indiana Dep't of State Revenue*, 749 N.E.2d 651, 657 n.8 (Ind. Tax Ct. 2001). Rather, it cited I.C. § 6-5.5-1-18 as one formulation of the unitary business principle but did not use that definition in deciding *May*. Therefore, the Department's attempt to use the language of I.C. § 6-5.5-1-18 -- a financial institution's tax statute -- in this case is inappropriate.

unitary. The facts cited by the Department, together with supplemental facts designated by Vodafone,[27] show that they were not.

The Department's primary focus is on Vodafone's role in the management of Cellco. Cellco was a general partnership[28] formed under Delaware law.[29] It is undisputed that Vodafone held a 45% minority interest in Cellco.[30] It is also undisputed that Cellco's board of representatives managed the business and affairs of Cellco[31] and that Vodafone appointed four of the nine members of the board, with Verizon Communications appointing the other five and thus holding a majority position.[32] Vodafone could not act on behalf of Cellco.[33]

"Control" means sufficient power to determine management and policies. Merely holding a minority interest in an entity or appointing a minority of the governing body is not "control" within the normal usage of the term. For example, the term "control" is defined in the SEC's Rule 405 as follows:

---

[27] See Vodafone's Supplemental Designation of Evidence filed at the same time as this Reply Brief. T.R. 56(E) allows either party to submit supplemental affidavits. *Spudich v. Northern Indiana Public Service Co.*, 745 N.E.2d 281, 288 (Ind. Ct. App. 2001); and *Reed v. City of Evansville*, 956 N.E.2d 684, 690 (Ind. Ct. App. 2011).

[28] Partnership Agreement Recital A, Vodafone App. C, Ex. 27, p. 1; and Partnership Agreement § 1.2, Vodafone App. C, Ex. 27, p. 9.

[29] Vodafone App. A, Stip. ¶ 2.

[30] Vodafone App. C, Dobemeck Affidavit ¶ 8; and Cellco Partnership Agreement § 3.3 (as amended effective July 24, 2003) at Vodafone App. C, Ex. 29, p. 1.

[31] Section 3.2(a) of the Cellco Partnership Agreement provided:

> The business and affairs of the Company shall be managed by or under the direction of the Board of Representatives, except as may otherwise be provided in this Agreement. The Board of Representatives shall have the power on behalf and in the name of the Company to carry out any and all objects and purposes of the Company contemplated by this Partnership Agreement and to perform all acts which they may deem necessary, advisable or appropriate in connection therewith.

Vodafone's App. C, Ex. 27, p. 15.

[32] Vodafone's Suppl. Desig. Evid., App. F, Ralston Affidavit ¶ 9; Vodafone App. C , Dobemeck Original Affidavit ¶ 8.

[33] Partnership Agreement § 1.11, Vodafone App. C, Ex. 27, p. 11.

> The term 'control' (including the terms 'controlling', 'controlled by' and 'under common control with') means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.

The Internal Revenue Code defines a "controlled foreign corporation" as any foreign corporation if more than 50% of the voting power or value of the stock of the corporation is owned by a United States shareholder. IRC § 957(a).

Vodafone lacked "control" over Cellco because it held a minority of the partnership interests and appointed a minority of the board of representatives. The Prospectus also acknowledged Verizon Communications' control of Cellco, stating that Cellco "is generally controlled by Verizon Communications" although certain limited actions must be approved by Vodafone.[34] These actions are discussed below at pages 18-20.

The Department cites several facts taken from the Partnership Agreement or the Prospectus, but, even if the Prospectus is treated as proper evidence, none of the cited facts support a reasonable inference that Vodafone had day-to-day operational control or any other type of control over Cellco or was unitary with it because of any other reason.

1. <u>Formation of Cellco</u>. The Department has noted that Vodafone transferred its domestic wireless assets to Cellco in exchange for its minority partnership interest.[35] This undisputed fact merely describes the formation of Cellco. It says nothing about the relationship of Vodafone with Cellco after the transfer except that it was a partner.

---

[34] Prospectus, Department's Desig. Evid. 91.

[35] Department's Brief at 2. (This Brief cites the pages of the Department's Brief at which the designated evidence was discussed).

2. "Parent Entity." Vodafone was defined as a "Parent Entity" of Cellco by the Partnership Agreement.[36] "Parent Entity" was a defined term in the Partnership Agreement and referred to Cellco's partners -- Vodafone, Bell Atlantic (a predecessor of Verizon Communications), and their successors.[37] The term carried no further significance concerning Vodafone's relationship with Cellco.

3. Independence of Board Representatives. Cellco's board of representatives was not independent of its partners under the listing standards of the New York Stock Exchange[38] because Verizon Communications and Vodafone appointed the members of the board. That fact has no bearing on whether Vodafone was unitary with Cellco. The Department inaccurately stated in its Brief at page 5 that the Prospectus said that the board members were not independent of Vodafone. The actual statement was that the board of representatives as a whole was not independent of its partners considered together.

4. Cellco Matters Requiring Vodafone Approval. Verizon Communications appointed the majority of the board of representatives, and with very limited exceptions, board decisions were made on a majority vote. The Partnership Agreement did provide at Section 4.1[39] that at least two Vodafone appointed members had to approve certain specified actions.[40] The nature of these actions was directly relevant and limited to Vodafone's financial interest in Cellco and did not give it any authority over the operations or the management policies of Cellco. The fact that a taxpayer is given certain rights to protect its investment "do not give

[36] Department's Brief at 2, 13.

[37] Partnership Agreement § 1.1, Vodafone App. C, Ex. 27, p. 6.

[38] Department's Brief at 5.

[39] Partnership Agreement, Vodafone App. C, Ex. 27, pp. 19-20.

[40] Discussed at Department's Brief at 5, 12, 17.

taxpayer any significant control over the partnership[], nor do they evidence the existence of a unitary relationship." 96-0632 ITC, 22 Ind. Reg. 595 (November 1, 1998). The actions were[41]:

a. Changing Cellco's basic business as a wireless communications provider.[42]

b. Dissolving or liquidating Cellco or filing a bankruptcy or insolvency petition.

c. Taking any action contrary to the preservation and maintenance of Cellco's existence, rights, franchises, or privileges under Delaware law.

d. Acquiring or disposing of assets with a fair market value exceeding 20% of the fair market value of Cellco's net assets.

e. Cellco entering into transactions with Verizon Communications involving more than $10 million to $15 million depending on the type of transaction.[43]

f. Admission of new partners or issuance of new partnership interests.

g. The redemption or repurchase of partnership interests.

h. Amendment or modification of the Partnership Agreement.

i. Capital calls.

j. Selection of independent CPAs.

A veto power over these types of actions is entirely consistent with one's role as a passive minority investor whose singular focus is on preserving and enhancing the value of its financial interest. Consequently, Vodafone's limited blocking rights do not signify any control over day-to-day operations or other management policies. These are the same types of veto rights that a limited partnership has over actions of a limited partnership. However, both the Delaware

[41] Partnership Agreement § 4.1, Vodafone's App. C, Ex. 27, pp. 19-20.

[42] Obviously, a change in Cellco's basic business would affect Vodafone's interests as an investor.

[43] Requiring approval by the minority owner of potential conflict-of-interest transactions by the majority owner is a logical power to grant a minority passive investor to prevent abusive transactions by the majority owner.

Revised Uniform Limited Partnership Act and the Indiana Revised Uniform Limited Partnership Act provide that a limited partner may engage in such actions without "participat[ing] in the control of the business."[44] Del. Code § 17-303(b) and I.C. § 23-16-4-3(b).

The Department has ruled numerous times that limited partners do not have a unitary relationship with the partnerships in which they hold interests. The Department bases its determinations on the inherent restrictions barring a limited partner from managing or controlling a limited partnership, even though it possesses a veto right over specified major actions. LOF 96-0632 ITC, 22 Ind. Reg. 595 (Nov. 1, 1998); LOF 00-0379, 27 Ind. Reg. 1677 (Feb. 1, 2004); LOF 02-0102, 27 Ind. Reg. 3412 (July 1, 2004); LOF 02-0022, 27 Ind. Reg. 3410 (July 1, 2004); LOF 04-0241, 29 Ind. Reg. 2414 (April 1, 2006); and LOF 06-0310, 20070523 Ind. Reg. 045070261NRA (May 24, 2007). While Vodafone was a general partner of Cellco, its lack of control placed it in essentially the same position as a limited partner. Indiana determines tax consequences based on substance, not form. *Enhanced Telecommunications Corp. v. Indiana*

[44] DEL. CODE § 17-303(b) sets forth various rights and actions that do not cause a limited partner to participate in control of the partnership. Among those rights and powers are the following:

(1) Transacting business with the partnership;
(2) Consulting with or advising a general partner;
(3) Voting with respect to any matters;
(4) Attending meetings of the partnership;
(5) Serving on a partnership committee or appointing representatives to serve on a committee; and
(6) Having a veto power over:
    (a) dissolution of the partnership;
    (b) the sale of partnership assets;
    (c) changing the nature of the business;
    (d) admitting a partner;
    (e) transactions involving a conflict of interest;
    (f) amendment of the partnership agreement;
    (g) merger or consolidation of the partnership;
    (h) capital contribution calls;
    (i) the making of investments in property; and
    (j) the removal of an independent contractor for the partnership.

See also I.C. § 23-16-4-3.

Dep't of State Revenue, 916 N.E.2d 313, 318 (Ind. Tax Ct. 2009), citing *Monarch Beverage Co., Inc. v. Indiana Dep't of State Revenue*, 589 N.E.2d 1209, 1215 (Ind. Tax Ct. 1992).

5. Quorum. At least one of the members of the board of representatives appointed by Vodafone had to be present at a board meeting to constitute a quorum.[45] This rule for a quorum did not give Vodafone any right of control. It merely provided that a Vodafone representative had a right to be present at meetings at which the Verizon Communications-appointed majority took action, which implies no power to control. In any case, the representatives appointed by Verizon Communications could circumvent this quorum requirement by adjourning the meeting and reconvening it with two days' notice. At the reconvened meeting, the representatives present constituted a quorum even without the attendance of Vodafone-appointed members.[46]

6. Committees. The Department's Brief states that "Vodafone's involvement was a necessary prerequisite in the forming of any committee within the partnership."[47] More specifically, Section 3.3(f) of the Partnership Agreement provided that any committee of the board must include at least one Vodafone-appointed member unless Vodafone waived membership on the committee.[48] The inclusion of one member on a board committee does not amount to control of the committee, let alone control of the partnership.

7. Risks to Noteholders. The Department's Brief states that "Vodafone's control created an appreciable business risk to the partnership's decision making ability,"[49] citing

[45] Department's Brief at 6, 12, 17, citing § 3.4(c) of the Partnership Agreement, Vodafone App. C, Ex. 27, p. 17.

[46] Partnership Agreement § 3.4(c), Vodafone App. C, Ex. 27, p. 17.

[47] Department's Brief at 6, 13.

[48] Partnership Agreement, Vodafone App. C, Ex. 27, p. 16.

[49] Department's Brief at 6.

the Prospectus.[50] This statement does not represent an accurate summary of the referenced-section of the Prospectus. Rather, that section explained various business risks to the noteholders, who were the intended recipients of the Prospectus. The point of the risk section was that the interests of the Cellco partners might differ from the noteholders and therefore could adversely affect the noteholders.[51] It stated that Cellco is "generally controlled by Verizon Communications," with the exception of certain actions described in Section 4.1 of the Partnership Agreement, which are discussed above. The other potential actions listed in this risk section of the Prospectus were under the control of Verizon Communications because of its majority on the board of representatives. Thus, there is nothing in this section that implies that Vodafone controlled day-to-day operations of Cellco or controlled anything else beyond the actions subject to its veto powers described in Section 4.1 of the Partnership Agreement.

8. Cellco and Vodafone's Businesses. Cellco and Vodafone were both in the wireless communications business.[52] However, after 2000 Vodafone engaged in the wireless business only in countries outside the United States. It neither owned nor operated a wireless business in the United States.[53] Cellco, on the other hand, conducted its wireless business only within the United States[54] and is affirmatively prohibited from providing service outside the United States under the Partnership Agreement.[55] Neither VAI nor VHI engaged in the wireless

---

[50] Prospectus, Department's Desig. Evid. 91-92.

[51] *Id.*

[52] Department's Brief at 6, 16.

[53] Vodafone Suppl. Desig. Evid., Doberneck Suppl. Affidavit ¶ 7. (References to the "Doberneck Suppl. Affidavit" are to the affidavit provided by Megan Doberneck and attached to Vodafone's Supplemental Designation of Evidence as Appendix G.)

[54] *Id.*

[55] Partnership Agreement § 1.5, Vodafone App. C., Ex. 27, p. 10.

business at any geographic location.[56] Thus, there was no geographic overlap or integration of their respective businesses.[57]

9. International Insights. The Prospectus states that Vodafone provided its "insights from its international markets."[58] There is nothing in the Prospectus that labels these insights "invaluable" as the Department asserts,[59] nor does the Prospectus explain how any such "insights" may have related to Cellco's business. In any event because Vodafone operated in markets outside the United States, it could be expected that its representatives on the board could have some insights about the international marketplace. However, given its minority position on the board and the fact that Cellco operated only domestically, any such insights do not support a finding of a unitary relationship.

10. Cross Marketing. The Verizon Communications Form 10-K states that its marketing efforts focus, among other things, on "cross-marketing with Verizon's other business units and Vodafone."[60] This statement does not reveal whether the supposed cross-marketing is by Verizon Communications or Cellco. It provides no details regarding the type of cross marketing or the volume. Cellco and Verizon Communications cross marketing could be expected because Verizon Communications had control over and significant operational ties with Cellco.[61] Cross marketing with Vodafone was a different matter.

Because Cellco's wireless customer base is in the United States and Vodafone's is outside, the parties' consideration of cross-marketing never rose to the level of actually

---

[56] Vodafone Suppl. Desig. Evid., Vodafone App. G, Doberneck Suppl. Affidavit ¶ 7.

[57] *Id.*

[58] Department's Brief at 6, 16, citing Prospectus, Department's Desig. Evid. 74, 136.

[59] *Id.*

[60] Department's Brief at 6, 16, citing Prospectus, Department's Desig. Evid. 318.

[61] Vodafone's Suppl. Desig. Evid., Vodafone App. G, Doberneck Suppl. Affidavit ¶8.

generating revenue. Cellco and a foreign affiliate of Vodafone Group Plc discussed from time to time opportunities for collaboration in certain areas, such as mechanisms to enhance service offerings to their respective multinational customers. However, these discussions yielded no ongoing or meaningful collaboration because no contracts were ever signed between the two companies to provide services to multinational customers.[62] The Department's characterization of this statement [63] is overblown and lacks any basis in the Form 10-K excerpt it cites.

11. Multinational Business Clients. The Prospectus states that Cellco "teams" with Verizon Communications and Vodafone to deliver fixed and mobile telecommunications services to certain multinational business clients.[64] This statement fails to reveal how much, if any, such team efforts involved Vodafone as contrasted with Verizon Communications. As stated above, Vodafone and Cellco explored such "teaming" arrangements but never actually entered into any contracts to provide them.[65]

12. Tests of LTE Technology. The Department cites a statement in the Prospectus.[66] As of the date of the Prospectus (July 6, 2009), Cellco was conducting tests of LTE[67] technology with vendors in the United States and "in coordination with Vodafone, at test sites in Europe."[68] It is not stated whether any of those tests occurred during the Taxable Years (fiscal years ended March 31, 2005, through March 31, 2008). In any case, the complete facts reveal nothing that could be a sign of a unitary relationship.

---

[62] Vodafone's Suppl. Desig. Evid., Vodafone App. G, Dobemeck Suppl. Affidavit ¶18.

[63] Department's Brief at 6.

[64] Department's Brief at 6-7, 17, citing Prospectus, Department's Desig. Evid. 151.

[65] Vodafone's Suppl. Desig. Evid., Vodafone App. G, Dobemeck Suppl. Affidavit ¶18.

[66] Department's Brief 7, 16, citing Prospectus, Department's Desig, Evid, 148.

[67] "LTE" is an abbreviation for "long-term evolution" and is a type of wireless service marketed as 4G. Newton's Telecom Dictionary 686 (2009).

[68] Prospectus, Department's Desig, Evid, 148.

Cellco and foreign affiliates of Vodafone Group Plc have cooperated to some extent concerning certain industry-wide standards for 4G LTE wireless technology. All network operators are members of standards-setting organizations where it is common, necessary, and approved practice to develop and select core technology around interoperability requirements. Even engagement between competitors in standard-setting activities has been approved by the United States Department of Justice and the European Union Competition Authorities

Because of significant differences in underlying wireless technologies, collaboration between Vodafone and Cellco in trial and testing has been very minimal. Equipment interoperability testing is performed by equipment vendors and not by either Cellco or Vodafone. Vodafone supports only standard interfaces. There is no proprietary interface between Vodafone and Cellco or any other wireless operators. All network testing is performed by Cellco's equipment suppliers and contractors in the United States. Vodafone is not involved with this testing. Cellco's equipment and its signaling technology must conform to United States standards. Vodafone's equipment and signaling technology conforms with European standards.[69] Thus, the development of 4G LTE technology during the Taxable Years did not involve coordination between Vodafone and Cellco extending beyond the coordination of unrelated entities.

13. Contribution of Intellectual Property. Between June 1999 (when Vodafone entered the United States market) and April 3, 2000, Vodafone's wireless business in the United States was owned and operated by its subsidiary AirTouch Communications, Inc. Vodafone transferred the AirTouch wireless business to Cellco on April 3, 2000, in exchange for a partnership interest. In addition to tangible and other intangible personal property, the transfer

[69] Vodafone's Suppl. Desig. Evid., Vodafone App. G, Doberneck Suppl. Affidavit ¶ 19.

included patents, software, trademarks, trade names, copyrights, and domain names previously used by AirTouch. Other than any patents required to operate the legacy AirTouch network or defend against patent infringement claims, this intellectual property was not used by Cellco during the Taxable Years and had no value or utility during that period. Vodafone received no revenue share or license fee for the assigned patents. Vodafone itself does not use the technology covered by the assigned patents.[70]

14. Sublease of Office Space. The Department mentions the leasing of office space by Vodafone to Cellco.[71] After Vodafone moved its headquarters to Denver, Colorado, effective January 1, 2007, it had unused office space in Walnut Creek, California, that was still under lease. Cellco leased space in the same building and had a need for additional space. Vodafone subleased two floors, or 41,328 square feet, of the unused space to Cellco beginning in 2007. Vodafone charged Cellco a sublease rental rate equal to what it paid its landlord. Thus, the sublease was a "pass through" at market rates equivalent to Vodafone's rental obligation under its lease.[72]

15. Composition of Committees of the Board. Contrary to the Department's statement,[73] Vodafone representatives did not comprise 50% of all committees of the board. The Partnership Agreement required the board to appoint no more than one Vodafone-related member to committees.[74] In the case of the Human Resources committee, a Vodafone representative made up 50% of the committee because there were only two members.[75]

[70] Vodafone's Suppl. Desig. Evid., Vodafone App. G, Dobemeck Suppl. Affidavit ¶ 6.

[71] Department's Brief at 7, citing Prospectus, Department's Desig. Evid. 214.

[72] Vodafone's Suppl. Desig. Evid., Vodafone App. G, Dobemeck Suppl. Affidavit ¶ 20.

[73] Department's Brief at 13.

[74] Partnership Agreement § 3.3(f), Vodafone App. C, Ex. 27, p. 16.

[75] Prospectus, Department's Desig. Evid. 168.

16. Vodafone's Appointment of CFO. Under Section 3.5(b) of the Partnership Agreement,[76] the Cellco board was required to appoint a Vodafone representative as a "Significant Officer," a term defined by Section 1.1 of the Agreement as any one of the chief financial officer, the chief operating officer, the chief marketing officers, or the chief technology officer.[77] Vodafone appointed the chief financial officer,[78] and his reporting and fiduciary obligations ran to the Cellco board of representatives.[79] Cellco had thirteen officers in total[80] and five executive officers.[81] Vodafone's authority to appoint one officer is hardly evidence of control, given that the CEO and COO were Verizon Wireless-appointed officers, that the CFO was only one of five executive officers,[82] and that the Verizon Wireless-controlled board managed the business and affairs of the company.[83] In *Central Nat'l–Gottesman, Inc. v. Dir., Div. of Taxation*, 14 N.J. Tax 545, 557 (N.J. Tax Ct. 1995), *aff'd*, 677 A.2d 265 (N.J. Super. 1996), the New Jersey Tax Court held that the presence of four appointed senior officers did not make two businesses unitary.

In summary, the information designated by the Department in support of its Brief clearly shows that Vodafone was not unitary with Cellco, nor is there any genuine issue of material with regard to that question. Vodafone and Cellco were separate businesses operating on different continents with very little interaction beyond Vodafone's minority ownership and minority

---

[76] Partnership Agreement, Vodafone App. C, Ex. 27, p. 18.

[77] Partnership Agreement, Vodafone App. C, Ex. 27, p. 7.

[78] Department's Brief at 7, 17.

[79] Vodafone's Suppl. Desig. Evid., Vodafone App. G, Doberneck Suppl. Affidavit ¶ 15.

[80] Prospectus, Department's Designated Evidence 165.

[81] Prospectus. Department's Designated Evidence 168.

[82] Partnership Agreement § 3.2(a), Vodafone App. C, Ex. 27, p. 15.

[83] Partnership Agreement § 3.2(a), Vodafone App. C, Ex. 27, p. 15.

position on the board.[84] In *Allied Signal*, 504 U.S. at 788, the Supreme Court concluded that two corporations were not unitary on similar facts:

> There is no serious contention that any of the three factors upon which we focused in Woolworth were present. Functional integration and economies of scale could not exist because, as the parties have stipulated, "Bendix and Asarco were unrelated business enterprises each of whose activities had nothing to do with the other." App. 169. Moreover, because Bendix owned only 20.6% of ASARCO's stock, it did not have the potential to operate ASARCO as an integrated division of a single unitary business, and of course, even potential control is not sufficient.

Allied Signal, 504 U.S. at 788. Furthermore, the fact that the taxpayer appointed minority (two of fourteen) members of the board of directors did not support a finding of control. *Id.* at 775.

Because Verizon Communications, not Vodafone, controlled Cellco,[85] the unitary element of centralized management was not present. For example, notwithstanding Vodafone's objections, Verizon Communications was unwilling to declare any dividend-style distributions for a period of almost seven years notwithstanding substantial cash flow at the partnership level.[86]

The second element of a unitary relationship -- functional integration -- did not exist because of the lack of any geographic overlap of Vodafone's and Cellco's businesses, the absolute incompatibility of their technology, and the *de minimis* level of intercompany transactions. The Supreme Court has held that "unrelated business activity" that constitutes a "discrete business enterprise" is outside the definition of a unitary business. *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. at 439, 442.

---

[84] Pursuant to financial accounting rules, Verizon Communications' financial statements were consolidated with Cellco. Vodafone's financial statements were not consolidated with Cellco. Vodafone's Suppl. Desig. Evid., Vodafone App. G, Doberneck Suppl. Affidavit ¶ 16.

[85] Vodafone's Suppl. Desig. Evid., Vodafone App. G, Doberneck Suppl. Affidavit ¶ 8.

[86] Vodafone Suppl. Desig. Evid., Vodafone App. F, Ralston Affidavit ¶ 10.

Vodafone transferred its wireless business to Cellco in 2000 in exchange for its partnership interest.[87] After the transfer, Vodafone no longer owned the intangible spectrum licenses or the tangible property necessary for a telecommunications network and thus did not and could not provide wireless communications services in this country. From a world-wide brand marketing perspective, Vodafone was not a wireless services operator in the United States. Consumers in the United States were aware of the Verizon Wireless brand name, not Vodafone. Consumers outside the United States did not associate the Verizon Wireless brand name with any available wireless service because Cellco was prohibited from operating outside the United States. The Vodafone brand name was associated with wireless service provided by Vodafone affiliates in non-United States markets.[88]

The Cellco telecommunications network was and remains technically and operationally incompatible with the technology employed in Vodafone's networks operated outside the United States. Vodafone's network used GSM -- "Global System for Mobile Communications"[89] -- technology. Cellco's network employed CDMA -- or "Code Division Multiple Access"[90] -- technology. These technologies were (and are) incompatible and therefore could not be integrated.[91]

On a practical level, the complete lack of interoperability of GSM and CDMA networks meant that a call originating on one network technology could not roam on a network employing the other technology, and a cell phone manufactured for use on one network technology could

---

[87] Vodafone's Suppl. Desig. Evid., Vodafone App. G, Doberneck Suppl. Affidavit ¶ 6.

[88] *Id.*

[89] Newton's Telecom Dictionary 536 (2009).

[90] Newton's Telecom Dictionary 254 (2009).

[91] Vodafone's Suppl. Desig. Evid., Vodafone App. G, Doberneck Suppl. Affidavit ¶ 9.

not be used on a network based on a different technology. For example, a call originating in the United Kingdom on Vodafone's GSM network could not terminate in the United States on Verizon Wireless' CDMA network. To terminate a call in the United States, Vodafone's international operations had to contract with a wireless services provider that utilized GSM technology, such as T-Mobile, a major provider of wireless services in the United States that utilizes GSM technology. T-Mobile is the United States subsidiary of Deutsche Telekom, one of Vodafone's competitors in the global wireless market. Thus, because of the technological differences, Vodafone was forced to contract with a competitor to complete calls in the United States even though it owned an investment interest in one of the largest wireless operators in the market. That Vodafone was unable to offer truly global coverage by contracting with the company in which it invested in the United States demonstrates its inability to use Cellco to the benefit of its own telecommunications operations. By contrast, Deutsche Telekom can originate calls in the United Kingdom and terminate them via T-Mobile, its own subsidiary. Whether to use GSM or CDMA technology was discussed by Cellco's Board of Representatives, and the Board chose CDMA notwithstanding that Vodafone strongly preferred and unequivocally requested that Cellco adopt GSM technology. The fact that Vodafone was unable to prevent Cellco from using the incompatible CDMA technology for its 3G network is a significant example of the lack of control that Vodafone could assert over Cellco as well as the absence of functional integration.[92]

In addition, the *de minimis* level of intercompany transactions between Vodafone and Cellco eliminates any question of functional integration. Cellco provided wireless services to

[92] Vodafone Desig. Evid., Vodafone App. G, Doberneck Suppl. Affidavit ¶ 10.

Vodafone generating $300,000 in 2006, $300,000 in 2007, and $400,000 in 2008.[93] By comparison Cellco generated service revenues of $28 billion, $33 billion, and $38 billion in 2005, 2006, and 2007, respectively.[94] Cellco entered into a roaming agreement with Vodafone Libertel N.V., Vodafone's Dutch wireless affiliate, and incurred roaming charges of $95 million for 2008, $37 million for 2007, and $15 million for 2006.[95] Again, these are *de minimis* amounts compared to Cellco operating costs of $25 billion for 2005, $28 billion for 2006, and $32 billion for 2007.[96] The one million dollars per year "generated" from the Walnut Creek sublease (and which was passed through directly to Vodafone's landlord) was similarly *de minimis* if it can be taken into account at all..[97]

Finally, Cellco and Vodafone did not benefit from any common economies of scale -- the third element of a unitary business. Vodafone and Cellco engaged in no centralized purchasing, did not have shared staff, and did not have shared facilities, benefit programs, or other shared systems.[98]

The limited staff that VAI and VHI had and their restrictive functions reinforce the absence of economies of scale. After the transfer of the AirTouch wireless business to Cellco in 2000, VAI and VHI were headquartered in Walnut Creek, California. After that transfer, Vodafone steadily wound down the size and scope of the Walnut Creek office because it no longer owned or operated a United States wireless business. The predominant activity of employees at the location was to support Vodafone's holding of its minority interest in Cellco.

[93] Prospectus, Department's Desig. Evid. 214.

[94] Prospectus, Department's Desig. Evid. 323.

[95] Prospectus, Department's Desig. Evid. 214.

[96] Prospectus, Department's Desig. Evid. 323.

[97] See discussion above at p. 25.

[98] Vodafone Desig. Evid., Vodafone App. G, Doberneck Suppl. Affidavit ¶ 11.

Certain employees also engaged in some *de minimis* residual activities, such as software research and development in support of Vodafone's global communications business and sales and support services. The employees engaging in these activities worked under the direction of a Vodafone foreign affiliate, and their work was in furtherance of Vodafone's business in Europe.[99]

Effective January 1, 2007, the headquarters of VAI and VHI was moved to Denver, Colorado. VAI and VHI had approximately fifteen employees at the Denver headquarters employed to support Vodafone's holding of its interest in Cellco and providing corporate services to the Vodafone United States subsidiaries in the areas of finance and accounting, tax, legal, human resources, payroll, and similar areas.[100]

Other interactions between Cellco and Vodafone are of such insignificance that they buttress the non-unitary conclusion.

Cellco and a foreign affiliate of Vodafone Group Plc discussed from time to time the possibility of jointly negotiating media agreements with content providers. However, these discussions yielded no meaningful collaboration between the two companies because they never resulted in any agreements that generated revenue. These discussions did not include either VAI nor VHI.[101]

During the taxable years ending March 31, 2007, and March 31, 2008, Cellco made available to Vodafone fewer than ten cubicles and one office in Cellco's office in Basking Ridge, New Jersey. The Vodafone employees occupying that space were support staff for Vodafone's

---

[99] Vodafone Desig. Evid., Vodafone App. G, Doberneck Suppl. Affidavit ¶ 13.

[100] Vodafone Desig. Evid., Vodafone App. G, Doberneck Suppl. Affidavit ¶ 14

[101] Vodafone Desig. Evid., Vodafone App. G, Doberneck Suppl. Affidavit ¶ 17.

multinational sales effort, worked in furtherance of Vodafone's business outside the United States, and had no involvement with Cellco. Vodafone paid Cellco for the cost of this space.[102]

In conclusion, the undisputed facts establish that Vodafone and Cellco were not unitary:

- There was no centralized management.
  - Vodafone held a minority ownership interest in Cellco and appointed a minority of the members of its governing board of representatives.
  - Verizon Communications, not Vodafone, controlled Cellco's management, policies, and daily operations.
  - Vodafone's limited veto rights over certain specified actions are consistent with its position as a minority passive investor.
- There was no functional integration.
  - Vodafone and Cellco operated as separate independent businesses on different continents without geographic overlap.
  - Their wireless networks could not be integrated because of fundamentally incompatible technology.
  - They had very little intercompany commercial interaction. Those limited intercompany transactions that did occur produced *de minimis* revenues and were typical of transactions that unrelated companies might have with each other.
- There were no economies of scale.
  - There was no centralized purchasing or shared staff and no shared facilities, benefit programs, or other shared systems.
  - Occasional intercompany efforts exploring possible synergies never produced any meaningful results or any revenues or cost savings.

Based on these facts, the Department's attempt to rely on the existence of a unitary relationship to avoid the holding of *Riverboat Development* must fail.

IV. The 2009 and 2011 Amendments to I.C. § 6-3-2-2(a) Represented a Change in Policy by the Legislature.

In its opening Brief, Vodafone described the amendments that the Legislatures made to I.C. § 6-3-2-2(a) after *Riverboat Development*.[103] Vodafone explained that these amendments

[102] Vodafone Desig. Evid., Vodafone App. G, Dobemeck Suppl. Affidavit ¶ 12.

enacted significant changes in the law and were not retroactive. In its Brief the Department does not contend that the amendments were retroactive, but it argues that they clarify the pre-2009 law at issue in this case.

The Department begins by asserting that *Riverboat Development* "frustrated the legislature's intent."[104] Vodafone rejects the notion that *Riverboat Development* was somehow flawed or incorrectly interpreted the Legislature's intent as clearly expressed in the statutes. Furthermore, the Department has provided no authority for its claim that pre-existing case law contradicted *Riverboat Development*. None of the cases it cites dealt with the statutory provisions concerning the sourcing of income for adjusted gross income tax purposes, which were the basis for the Court's decision in *Riverboat Development*.

First, *Park 100 Dev. Corp. v. Indiana Dep't of State*, 429 N.E. 2d 220 (Ind. 1981), was a gross income tax case and did not deal with the pass through of partnership income. The issue was whether, under the statute that existed at the time, a partnership was a taxable entity for gross income tax purposes if one of its partners was a partnership comprised of corporations.[105]

Five Star Concrete, LLC v. Klink, Inc., 693 N.E.2d 583 (Ind. Ct. App. 1998), made the unremarkable observation that partners are taxed on income passed through from a partnership. However, the Court of Appeals did not address the question of when the partners' income from a partnership should be sourced to Indiana under I.C. §§ 6-3-2-2(a) and 6-3-2-2.2.

---

[103] Vodafone's Brief at 14-18.

[104] Department's Brief at 29.

[105] The statute subjected partnerships to gross income tax if one or more of their partners was a corporation.

Vodafone discussed *Hunt Corp. v. Indiana Dep't of State Revenue*, 709 N.E.2d 766 (Ind. Tax Ct. 1999) in its opening Brief.[106] *Hunt* involved corporate partners that were domiciled in Indiana[107] and thus I.C. § 6-3-2-2(a)(5) sourced the partnership income to Indiana. The only question was whether the income from the partnership should be apportioned at the partnership level or the partner level. 709 N.E.2d at 775.

The Department presents nothing else to back up its claim that the 2009 and 2011 amendments clarified the law. The Court correctly applied the clear language of the statute as it existed before 2009. In 2009, the Legislature decided to change policy. Before that change all intangible income was sourced based on whether it was attributable to Indiana by I.C. § 6-3-2-2.2. In 2009, the Legislature decided to create a special rule for partnerships and other pass through entities. I.C. § 6-3-2-2(a). However, no such special rule existed before 2009. If the Legislature had wanted income from pass through entities to be treated differently before 2009, "it would have said so." *Haas Publishing Co. v. Indiana Dep't of State Revenue*, 835 N.E.2d 235, 242 (Ind. Tax Ct. 2005); and *Kohl's Dep't Stores v. Indiana Dep't of State Revenue*, 822 N.E.2d 297, 301 (Ind. Tax Ct. 2005).

---

[106] Vodafone's Brief at 14.

[107] *Hunt*, 709 N.E.2d at 767.

V. The Department Has Presented Nothing That Rebuts Vodafone's Constitutional Challenges.

A. Due Process Clause.

Vodafone has challenged the tax on its income from Cellco under the Due Process Clause of the Constitution.[108] The Department rejects that argument and claims that the income can be taxed to Vodafone consistent with the Due Process Clause.

The parties agree that the Due Process Clause gives states the power to tax income derived from a state. *Shaffer v. Carter*, 252 U.S. 37, 52 (1920). However, the Due Process Clause also "requires some definite link, some minimum connection between a state and the person, property or transaction it seeks to tax." *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). Thus, Indiana would have the right to tax Cellco on its income derived from Indiana sources if it wished to impose a tax on partnerships. Whether it has the power under the Due Process Clause to tax a non-domiciliary partner is a different matter.

The Department asserts Vodafone had the required contacts, claiming that it was registered to do business in Indiana, owned an interest in Cellco, and had "a right to manage [Cellco's] business" and a right to receive property, cash and other assets from Cellco.[109]

Vodafone has already discussed the implications of registering to do business in its opening Brief.[110] It has no bearing on a state's right to tax an out-of-state corporation.

With regard to Verizon's ownership in Cellco, the Department disregards the fact that Cellco and Vodafone are two different entities. Delaware law controls in this instance because

[108] Vodafone's Brief at 19-24.

[109] Department's Brief at 5.

[110] Vodafone's Brief at 13.

Cellco was formed under Delaware law. *See* 6 DEL. CODE § 15-201(a) ("A partnership is a separate legal entity which is an entity distinct from its partners . . ."). Cellco derived income from Indiana, and Vodafone derived income from Cellco. But that does not mean that Cellco conducted any form of business in Indiana or engaged in any activities in Indiana. Vodafone had no contacts with Indiana and held its interest in Cellco at its California and Colorado business locations.[111] Vodafone did not control or manage Cellco's business because of its minority ownership and board representation.[112]

The Due Process Clause does not require the physical presence of the taxpayer in the state, but it does require some form of connection between the taxpayer and the state. What must be determined is whether the person to be taxed has "purposely avail[ed] itself of the privilege of conducting activities within the forum state . . . ." *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S.Ct. 2780, 2785 (2011), quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).[113] But the minimum connection is not present when a nonresident taxpayer, such as Vodafone, does not avail itself of the privilege but merely holds a non-controlling minority interest in a partnership even if the partnership itself does conduct activities in the state.

The Indiana case cited by the Department -- *Gross Income Tax Div. v. P.F. Goodrich Corp.*, 292 N.E.2d 247 (Ind. 1973) -- actually supports Vodafone's position. In that case, the Department taxed an Indiana domiciliary corporation on the receipt of income from the dissolution of a corporation located in Illinois. Although the dissolution occurred in Illinois, the taxpayer, a shareholder, received the income from the dissolution in Indiana. The Court held that

---

[111] Vodafone Desig. Evid., App. A, First Elder Affidavit ¶ 9.

[112] *See* discussion above at pages 15-16.

[113] *See* discussion at Vodafone's opening Brief at pages 21, 24.

the taxable event was the taxpayer's receipt of income in Indiana, not the dissolution transaction itself, which occurred in Illinois. The Court held that "while the source of [the] income [the dissolution] may be beyond the jurisdiction of this state the income itself may not enjoy the same immunity." 292 N.E.2d at 249.

In *Goodrich* the Court found that the receipt of the income could be taxed because the taxpayer receiving the income had "more than the requisite minimum connection with this State." *Id.* It was incorporated in Indiana, did business in Indiana, and had its only office in Indiana. The receipt of income by such a resident was a taxable incident even if the out-of-state activities generating the income were not. 292 N.E.2d at 250.

Vodafone was in the opposite position of the taxpayer in *P.F. Goodrich*. It is a nonresident, and it received the income from Cellco outside the state. Thus, its home states -- California and Colorado -- may have had jurisdiction to tax the receipt of the income under the *Goodrich* reasoning, but Indiana would not have jurisdiction to tax because the income from Cellco was not received here.

In summary, while the Department could tax the income generated by the in-state activities of Cellco, it could not impose the tax on Vodafone, which was beyond the state's jurisdiction since it did not avail itself of activities in the state and received the income outside the state.

B. Commerce Clause.

The Department attempts to avoid Vodafone's Commerce Clauses challenge[114] by alleging that interstate commerce is not involved in this case.[115] However, the Commerce Clause

[114] Vodafone's opening Brief at 25-27.

is applicable because Indiana is attempting to tax a nonresident of the state -- a classic Commerce Clause issue. As stated in Hellerstein & Hellerstein, I STATE TAXATION ¶ 4.06 (3rd ed. 2000):

> Given the broad scope of the Court's view of what 'affects' commerce, it will be the rare case in which any serious claim can be made that a tax is immune from scrutiny under substantive Commerce Clause standards, as long as the property, activity, or enterprise on which the tax is imposed has some connection with interstate commerce.

The key Commerce Clause question in this case is whether Vodafone had substantial nexus with Indiana. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). The answer to that question depends on whether Vodafone has regularly exploited the Indiana marketplace. *See* Vodafone's opening Brief at page 26. As a passive investor in Cellco, lacking the majority ownership or board membership to control Cellco, Vodafone did nothing to exploit the local marketplace. *Id.* Once again, the Department fails to distinguish between Cellco's activities as a separate entity and Vodafone's activities, none of which occurred in Indiana.

VI. The Department Has Waived Any Attempted Defense Based on Commissioners Directive # 38.

The Department asserts in its Brief at page 8 that the Department reserves for trial or summary judgment the issue whether Vodafone claim has satisfied the requirements of Commissioner's Directive #38 (October, 2009). Vodafone's motion for summary judgment requests the Court to order the Department to refund the taxes previously paid for the Taxable Years based on the applicable statutes and the Constitution.[115] Vodafone recognizes that I.C. § 6-8.1-9-2(c) provides that any refund shall be provided in the form of credits usable against

[115] Department's Brief at 36.

[116] Vodafone's opening Brief at 27.

post-2008 tax liabilities and acknowledged that fact in its opening Brief.[117] Vodafone has met all the other requirements of I.C. § 6-8.1-9-2(c) for a refund.[118] If the Department wished to raise Commissioner's Directive #38 as a defense to the awarding of a refund to Vodafone, it had an obligation to raise that issue in its response to Vodafone's Motion for Summary Judgment. Vodafone believes that several of the requirements in Commissioner's Directive #38 are invalid and inconsistent with I.C. § 6-8.1-9-2(c). In any case Vodafone's compliance with I.C. § 6-8.1-9-2(c) is sufficient to authorize its requested refund. The Department has waived any defense based on Commissioner's Directive #38 by not raising it.

VII. Conclusion.

The Department has failed to distinguish *Riverboat Development*, a case that determines the source of income on the basis of specific statutory provisions, none of which are dependent on whether a partner in a partnership is unitary with the partnership. In any case the Department is prohibited by I.C. § 6-8.1-3-3 from applying its change of position on the unitary issue retroactively without publishing a new letters of findings. Finally, the evidence submitted by the Department, along with the taxpayer's evidence, shows that there is no doubt that Vodafone was not unitary with Cellco. This case is appropriate for summary judgment, which should be entered in favor of Vodafone, and the Court should order the Department to pay the refund requested in its claims for refund.

---

[117] *Id.*

[118] It filed a timely refund claim for a pre-2009 tax liability attributable to amounts paid by a partner of a pass through entity. It also has filed with the Department copies of its income tax returns from its home states (California and Colorado) reflecting the reporting of income from Cellco. Vodafone's Desig. Evid., App. D.

Respectfully submitted

Larry J. Stroble (Attorney No. 732-49)

Randal J. Kaltenmark (Attorney No. 19428-53)

Ziaaddin Mollabashy (Attorney No. 24650-84)

BARNES & THORNBURG LLP
11 South Meridian Street
Indianapolis, Indiana 46204
Telephone: (317) 236-1313

Counsel for Petitioners
Vodafone Americas Inc. and
Vodafone Holdings LLC

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the foregoing "Petitioners' Reply Brief in Support of Their Motion for Summary Judgment" has been served this 27th day of March, 2013, by United States First-Class Mail to the following counsel of record:

Mr. Timothy J. Schultz
Deputy Attorney General
OFFICE OF INDIANA ATTORNEY GENERAL
Indiana Government Center South, 5th Floor
302 West Washington Street
Indianapolis, Indiana 46204-2770

Randal J. Kaltenmark

1390074_1.DOC