

Respectfully submitted,

SUTHERLAND ASBILL & BRENNAN LLP
Attorneys for Petitioner

By:



Marc A. Simonetti
SUTHERLAND ASBILL & BRENNAN LLP
The Grace Building, 40th Floor
1114 Avenue of the Americas
New York, NY 10036-7703
(212) 389-5015
marc.simonetti@sutherland.com
ARDC #6315874

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IBM's Illinois unitary combined returns for the tax years ended December 31, 2007 and December 31, 2008 ("Tax Years").

2. On April 22, 2015, IBM served the Department with Petitioner's First Set of Document Requests. The Department served IBM with its response on June 24, 2015.

3. In its First Set of Document Requests, IBM requested that the Department provide copies of all authority, guidelines, and policies, whether official or unofficial, published or unpublished, internal or public, that the Department has regarding an 80/20 company determination. The Department's response to this request was incomplete to the extent that the Department did not provide its Audit Manual.

4. The Department in its written response informed IBM that it would not produce its Audit Manual because the Department asserts that it is not relevant to the case. During a telephone conference conducted on August 6, 2015, the Department reiterated this position and informed IBM's counsel that it would not produce its Audit Manual.

5. In its First Set of Document Requests, IBM also requested that the Department provide a copy of the Department's audit file of IBM for the Tax Years. The Department provided an audit file of IBM for the Tax Years, but the Department stated that this audit file did not include documents the Department's auditor reviewed or possessed that the auditor did not ultimately rely upon to make the determination at issue in this case. To the extent such documents were excluded from the audit file provided to IBM, the Department's response to IBM's request for its audit file for the Tax Years was incomplete.

6. During a telephone conference conducted on August 6, 2015, the Department informed IBM's counsel that it would not produce such documents, and would produce only documents that the auditor ultimately relied upon to make the determination at issue in this case.

II. Standard of Review

7. Illinois Supreme Court Rule 201(b)(1) provides that a party may obtain by discovery full disclosure regarding any matter relevant to the subject matter involved in the pending action, if not otherwise protected from discovery under the Illinois Supreme Court Rules.

8. Illinois Supreme Court Rule 219(a) provides that if a party refuses to comply with a request for the production of documents, the party serving the request may move for an order compelling compliance with the request.

9. A court should grant a motion to compel discovery if the information sought is relevant and not otherwise protected by the Illinois Supreme Court Rules. Illinois Supreme Court Rule 201(b)(1); *Vitacco v. Eckberg*, 271 Ill. App. 3d 408 (Ill. App. Ct. 1995).

10. The concept of relevance for purposes of discovery includes not only what is admissible at trial, but also that which leads to what is admissible. *Pemberton v. Tieman*, 117 Ill. App. 3d 502, 504–05 (Ill. App. Ct. 1983).

11. Illinois courts have long recognized that the purposes of litigation are best and most effectively served when each party knows as much about the controversy as is reasonably practicable. *King v. Am. Food Equipment Co.*, 160 Ill. App. 3d 898, 910 (Ill. App. Ct. 1987). The rules regarding discovery were enacted to enable attorneys to effectively prepare, evaluate, and present their cases; accordingly, courts allow great latitude in the scope of discovery. *Leeson v. State Farm Mutual Ins. Co.*, 190 Ill App. 3d 359, 365 (Ill. App. Ct. 1989).

III. Analysis

12. The Tribunal should issue an order compelling the Department to produce its Audit Manual because it is relevant and not otherwise protected from discovery.

- a. Producing the Audit Manual would help IBM and its attorneys determine whether the Department acted arbitrarily when it assessed IBM.
 - i. If the Department acted in direct contravention of its stated position in its audit manual, it is evidence that the Department acted arbitrarily.
 - ii. If a taxing authority's assessment is arbitrary and excessive, the burden shifts from the taxpayer to the taxing authority. *Helvering v. Taylor*, 293 U.S. 507, 515 (1937).
 - iii. Any arbitrary act by the taxing authority that destroys the foundation of the assessment itself shifts the burden of proof. *See Ruth v. United States*, 823 F.2d 1091, 1094 (7th Cir. 1987); *Pittman v. Comm'r*, 100 F.3d 1308, 1313 (7th Cir. 1996); *Zuhone v. Comm'r*, 883 F.2d 1317, 1325 (7th Cir. 1989).
- b. Producing the Audit Manual would aid IBM and its attorneys in effectively preparing, evaluating, and presenting their case to the Tribunal.
 - i. IBM has challenged the Department's imputation of property and payroll for purposes of the 80/20 test.
 - ii. In conducting its audit of IBM, the Department determined that WTC was not an 80/20 company, while other IBM subsidiaries were 80/20 companies.
 - iii. Information included in the Audit Manual relating to the 80/20 test would help IBM determine why the Department distinguished WTC from IBM's other foreign subsidiaries, and why the Department chose to scrutinize the relationship between IBM and WTC, and not the

relationships between IBM and its other foreign subsidiaries.

- iv. This determination would enhance IBM's understanding of the Department's position in the present case, and would aid IBM and its attorneys in preparing, evaluating, and presenting its own position before this Tribunal. *See Leeson v. State Farm Mutual Ins. Co.*, 190 Ill App. 3d 359, 365 (Ill. App. Ct. 1989).
 - v. More generally, any information included in the Audit Manual relating to the 80/20 test, and the related concept of property and payroll imputation, would enhance IBM's understanding of the Department's position in the present case, and would aid IBM and its attorneys in preparing, evaluating, and presenting its own position before this Tribunal. *Id.*
- c. Producing the Audit Manual would help IBM and its attorneys effectively evaluate the viability of IBM's potential claims afforded by the Illinois Taxpayers' Bill of Rights Act. 20 Ill. Comp. Stat. 2520/1 *et seq.*
- i. The Department's Audit Manual provides guidelines and instructions to Department employees tasked with conducting taxpayer audits.
 - ii. In conducting taxpayer audits, Department employees must follow the instructions and guidelines provided in the Department's Audit Manual.
 - iii. The determination giving rise to this case resulted from an audit conducted by a Department employee, who was required to follow the instructions and guidelines included in the Department's Audit

Manual.

- iv. Under the Illinois Taxpayers' Bill of Rights, taxpayers have the right to sue the Department if the Department intentionally or recklessly disregards tax laws or regulations in collecting taxes. 20 Ill. Comp. Stat. 2520/5. Whether the Department, through its auditor, audited IBM in accordance with its own Audit Manual would be relevant to determine whether the Department intentionally or recklessly disregarded the tax laws or regulations in issuing the determination at issue.
- v. Under the Illinois Taxpayers' Bill of Rights, a taxpayer may be entitled to attorney's fees if the taxpayer prevails in an action under the Administrative Review Law, and the Department has made an assessment without reasonable cause. 20 Ill. Comp. Stat. 2520/7. Whether the Department, through its auditor, audited IBM in accordance with its own Audit Manual would be relevant in determining whether the Department issued the determination at issue without reasonable cause.

13. Even if this Tribunal determines that the entire Audit Manual is not relevant, it should at least compel the Department to produce the portions of the Audit Manual addressing the 80/20 test.

14. The Tribunal should issue an order compelling the Department to produce any document that the Department's auditor reviewed or possessed relating to this matter, even if it did not serve as a basis for the determination at issue, because any such document is relevant and

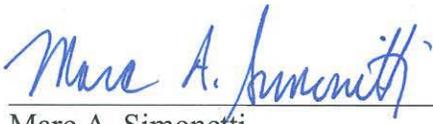
not otherwise privileged.

- a. Any document that the auditor reviewed or possessed relating to this matter may be relevant, in that such document may contain information that would be admissible at a Tribunal hearing, or may lead to the discovery of evidence that would be admissible at a Tribunal hearing. *See Pemberton v. Tieman*, 117 Ill. App. 3d 502, 504–05 (Ill. App. Ct. 1983).
- b. IBM may determine that documents not serving as a basis for the determination at issue are nevertheless helpful to IBM in presenting its position to the Tribunal. *See Leeson v. State Farm Mutual Ins. Co.*, 190 Ill App. 3d 359, 365 (Ill. App. Ct. 1989).
- c. For example, the Department recalculated WTC’s property and payroll factors based on estimated data and statistics found on unverified websites, such as open-source Corporationwiki.com, PowerProfiles.com, Manta.com, mbfinancial.sbresources.com, and showcase.com.
- d. If the auditor reviewed or possessed documents containing estimates that were more favorable to IBM—i.e., would have resulted in lower property and payroll factors—such documents would be relevant to determine whether the Department properly characterized WTC as an 80/20 company.

WHEREFORE, IBM respectfully requests that the Tribunal enter an order to compel the Department to produce: (1) the Department’s Audit Manual; and (2) any document that the Department’s auditor reviewed or possessed relating to this matter, even if it did not serve as a basis for the determination at issue.

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