ILLINOIS INDEPENDENT

TAX TRIBUNAL

International Business Machines , Corporation Petitioner, v. THE STATE OF ILLINOIS DEPARTMENT OF REVENUE, Respondent.	)))))))))	14 TT 229 Chief Judge James M. Conway

NOTICE OF FILING
CERTIFICATE OF SERVICE VIA EMAIL TRANSMISSION

To: **Email: marc.simonetti@sutherland.com; andrew.appleby@sutherland.com**
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On October 20, 2016 the undersigned filed with the Illinois Independent Tax Tribunal located at 160 North LaSalle St., N506, Chicago, Illinois 60601 the attached 2nd Motion to Compel. The undersigned further certifies that as of the date listed below a copy of the attached answer was served on the above prior to the hour of 5:00 p.m.

Respectfully submitted,

/s/ Sean P. Cullinan
Sean P. Cullinan
Special Assistant Attorney General

Date: October 20, 2016

ILLINOIS INDEPENDENT TAX TRIBUNAL

INTERNATIONAL BUSINESS MACHINES CORPORATION, Petitioner,	)	
v.	)	14 TT 229
	)	Chief Judge James M. Conway
ILLINOIS DEPARTMENT OF REVENUE, Respondent.	)	

DEPARTMENT'S SECOND MOTION TO COMPEL

NOW COMES the Department of Revenue ("Department"), by its duly authorized representatives, Special Assistant Attorneys General, pursuant to Illinois Supreme Court Rules 213 and 214, moves this Tribunal to enter an order compelling International Business Machines ("IBM" or "Petitioner") to fully respond to the Department's First Set of Interrogatories and First Request for Production of Documents, and in support thereof states as follows:

A. Background.

1. IBM and subsidiaries filed Illinois Corporation Income and Replacement Tax Returns ("IL-1120-X") for tax year ending December 31, 2007 through December 31, 2008 (the "Years at Issue") claiming an exemption from tax for its subsidiary IBM World Trade Corporation ("WTC") based on the 80/20 business activity test in Section 1501(a)(27) of the Illinois Income Tax Act ("IITA").

2. The Department conducted an audit of IBM and its subsidiaries for the Years at Issue.

3. Based on the facts obtained during the audit, the Department's auditor determined

that WTC did not meet the 80/20 business activity test during the Years at Issue.

4. Based on the auditor's determination, the Department issued IBM Notices of Deficiency dated September 24, 2014, for the Years at Issue.

5. On December 2, 2014, this Tribunal received IBM's protest Petition in response to the Notices of Deficiency. The Department filed its Answer on January 7, 2015.

6. At the initial status conference on January 20, 2015, this Tribunal ordered the parties to issue written discovery by March 20, 2015.

7. On March 19, 2015, IBM filed a Motion for Summary Judgment and requested an extension of the time to issue written discovery. This Tribunal's March 19, 2015 Order granted an extension of time to issue written discovery.

8. On March 31, 2015, this Tribunal set a briefing schedule on Petitioner's Motion for Summary Judgment and ordered the parties to file written discovery by April 22, 2015.

9. The parties timely filed their Response and Reply to IBM's Motion for Summary Judgment.

10. On June 30, 2015, this Tribunal denied IBM's Motion for Summary Judgment.

11. In its Order denying Summary Judgment, this Tribunal held that the Department has the authority to determine the correct payroll and property tax figures for WTC. This Tribunal further held that: "Whether IBM was correct in treating WTC as an exempt 80/20 company or whether the Department was correct in denying the exemption cannot be determined until a factual record concerning WTC's U.S and worldwide business activities is developed."

12. On April 22, 2015, the Parties issued discovery.

13. The Parties agreed to an extension of the time for responding of discovery to June

24, 2015. The parties timely tendered discovery responses.

14. On July 30, 2015, the parties met via teleconference to discuss the deficiencies in the discovery responses.

15. On August 6, 2015, the parties again conferred by teleconference to try to resolve their discovery disputes.

16. On August 12, 2015, Petitioner's counsel sent Department's counsel a draft Motion for Protective Order and Proposed Protective Order.

17. The parties negotiated an agreed protective order, which the Tribunal entered on September 28, 2015.

18. On October 2, 2015, Petitioner served the Department with Petitioner's Supplemental Responses to the Department's First Set of Interrogatories and Requests for Production of Documents.

19. On November 19, 2015, the Department filed its Motion to Compel Discovery.

20. On November 20, 2015, Petitioner served the Department with Petitioner's Second Supplemental Responses to the Department's First Set of Interrogatories and Requests for Production of Documents.

21. On January 7, 2016, Petitioner filed its Response to the Department's Motion to Compel Discovery.

22. On January 21, 2016, the Department filed its Reply to the Petitioner's Response to the Department's Motion to Compel Discovery.

23. The parties unsuccessfully tried to work out certain outstanding discovery issues.

24. On May 24, 2016, this Honorable Tribunal entered an order on the Motion to

Compel.

25. On July 19, 2016, Petitioner served the Department with Petitioner's Third Supplemental Responses to the Department's First Set of Interrogatories and Requests for Production of Documents.

26. On July 26, 2016, Petitioner served the Department with Petitioner's Fourth Supplemental Responses to the Department's First Set of Interrogatories and Requests for Production of Documents.

27. On August 9, 2016, Petitioner served the Department with Petitioner's Fifth Supplemental Responses to the Department's First Set of Interrogatories and Requests for Production of Documents.

28. Soon after receipt, Department's counsel promptly reviewed the Petitioner's Supplemental Answers and Production.

29. On September 22, 2016, the Department again raised concerns to this Tribunal about not receiving full responses to discovery.

30. Pursuant to Illinois Supreme Court Rule 201(k), Department's counsel sent Petitioner's counsel a letter on October 22, 2015, detailing the deficiencies with Petitioner's Answers to Department's First Set of Interrogatories and Petitioner's Production in response to Department's First Request for Production of Documents. A copy of that 201(k) Letter is attached as Exhibit 1.

31. In its letter, Department's counsel asked Petitioner's counsel to contact Department's counsel to discuss the deficient discovery.

32. To date, Petitioner's counsel has not contacted the Department, nor has it

produced any additional discovery materials in response to the 201(k) Letter.

B. Issue

33. Department is entitled to full disclosure of discoverable information. Ill. Sup. Ct. R. 201(b)(1) ("Except as provided in these rules, a party may obtain by discovery full disclosure regarding any matter relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking disclosure or of any other party, including the existence, description, nature, custody, condition, and location of any documents or tangible things, and the identity and location of persons having knowledge of relevant facts.").

34. The Department asserts that many of Petitioner's responses to the Department's First Set of Interrogatories and First Request for Production of Documents (hereafter "Discovery Requests") are deficient. Accordingly, the Department now Moves to Compel Petitioner's complete responses to the Department's Discovery Requests.

35. The issue in this case is whether IBM can show by clear and convincing evidence that WTC meets the 80/20 business activity exemption. 35 ILCS 5/1501(a)(27) (The unitary business "group will not include those members whose business activity outside the United States is 80% or more of any such member's total business activity."). That is, whether 80% or more of WTC's property and payroll activities were conducted outside the water's edge of the United States.

36. Accordingly, the Department propounded Discovery Requests to obtain facts to determine what evidence exists that would show that WTC meets the 80/20 business activity test.

37. "It is well established that discovery is to be 'a mechanism for the ascertainment

of truth, for the purpose of promoting either a fair settlement or a fair trial.' To this end, the object of all discovery procedures is disclosure, *** however, that right is limited to disclosure regarding matters relevant to the subject matter of the pending action. Nevertheless, great latitude is allowed in the scope of discovery." *Pemberton v. Tieman*, 117 Ill.App.3d 502, 504 (1st Dist. 1983) (Internal citations omitted).

38. In Illinois, the concept of relevance for purposes of discovery is broader than for purposes of admitting evidence at trial. *Id.*; *Bauter v. Reding*, 68 Ill. App. 3d 171, 175 (3d. Dist. 1979).

39. Relevance for discovery purposes includes not only what is admissible at trial, but also that which leads to admissible trial evidence. *TTX Co. v. Whitley*, 295 Ill. App. 3d 548, 556 (1st Dist. 1998); *Pemberton*, 117 Ill.App.3d at 505; *Crnkovich v. Almeida*, 261 Ill. App. 3d 997, 999 (3rd Dist. 1994); *United Nuclear Corp. v. Energy Conversion Devices, Inc.*, 110 Ill. App. 3d 88, 104 (1st Dist. 1982). Therefore, inquiries made under either Rule 213 or Rule 214 are permissible if they seek information that "may" lead to admissible evidence, as opposed to "must" lead to admissible evidence. *TTX Co. v. Whitley*, 295 Ill. App. 3d at 556.

40. "Relevancy is determined by reference to the issues, for generally, something is relevant if it tends to prove or disprove something in issue." *Bauter v. Reding*, 68 Ill. App. 3d at 175.

41. In the instant matter, the Department requested information pertaining to the real and tangible personal property and payroll of WTC. Additionally, Department requested information to identify what person(s) performed these activities on behalf of WTC. Accordingly, the Department's Discovery Requests are relevant to the 80/20 exemption claimed

by Petitioner.

42. Inasmuch as the Department's Discovery Requests seek information regarding the real and tangible personal property owned, leased or used by WTC, the compensation for services performed by employees of WTC, and the activities performed on behalf of WTC, Petitioner's relevance objections are not valid, and therefore must be overruled. *Zebra Technologies Corp. v. Topinka*, 344 Ill.App.3d 474, 482-483 (1st Dist. 2003) (The foreign subsidiaries "had other individuals in the U.S. performing activities for these companies." "Zebra knew the amount of time spent by the committee on quality control issues and was capable of allocating this expense to the Bermuda companies because it was this committee which was protecting the license for these companies.").

43. Petitioner objected to certain Discovery Requests on the basis that the information sought was protected by the attorney-client privilege. Interrogatory Response No. 12 and Document Responses No. 1, 2, 24, 27, and 32. Petitioner has not tendered a privilege log or otherwise supported its privilege claim "with a description of the nature of the documents, communications or things not produced or disclosed." Ill. Sup. Ct. R. 201(n). Department requests the Tribunal overrule Petitioner's objections and order Petitioner to provide a response to Interrogatory No. 12 and all responsive documents to Production Requests No. 1, 2, 24, 27, and 32.

C. <u>Interrogatories</u> (To prevent confusion, Department has referred to each discovery request by its number, and has not otherwise numbered the following paragraphs.)

<u>Interrogatory No. 3.</u> Interrogatory 3 requests "the names,... job titles, job descriptions, and work addresses of the individuals that comprise the 2007 and 2008 wages paid by WTC to IBM under the Shared Services Cost Sharing Amendments." In the Tribunal's May 24, 2016

Order on the Department's Motion to Compel, this Honorable Tribunal compelled the production of: "Names, job titles, job descriptions and work addresses of IBM employees whose worked on several matters and whose (salary) expenses were ***reimbursed*** by WTC under cost sharing agreements." (Emphasis added).

In Taxpayer's third supplemental response, Taxpayer provided documents that listed serial numbers and wage amounts of IBM personnel performing work under the CSA. [redacted] The information is represented in IBM_3124 thru IBM_7729. (*See* IBM_3124 thru IBM_3149 as a representative sample). In its fifth supplemental response, TP provided a list of job titles and job locations for the CSA and the internal code IBM maintained to represent it. (IBM_7932 thru IBM_9152). (*See* IBM_7932 thru IBM_7957 as a representative sample) [redacted] While the 5/24/16 order compels production of the wages reimbursed under the CSA, it is unclear what the wage amounts provided in these pages actually represent. For example, [redacted] spend 100% of their time working on WTC matters such that the wage amount represented is their full salary for 2007 and 2008? Or are the wage amounts provided a percentage of their overall salary based on the allocation of that particular IBM personnel's time spend on WTC matters, with the rest of their wage allocated elsewhere?

Interrogatory No. 4. In the Tribunal's May 24, 2016 Order on the Department's Motion to Compel, Petitioner was compelled to produce this information. The Petitioner provided the job title, job description and work location of those it contends are WTC U.S. employees. However, the Petitioner has not provided the name of each person who had authority to direct

the manner of each employee's performance of work, including such things as hiring and terminating employment. Rather, Petitioner it it's third supplemental response answered: "Only WTC officers had legal authority to direct the manner of each WTC employee's performance of work. See Bate Stamp number IBM_0195." (*Attached hereto*). IBM_0195 only lists the officer's name, job title and work location. The interrogatory seeks the names of the individuals that directed, supervised, and evaluated the U.S. employees of WTC; not those who hypothetically had such legal authority. If the U.S. WTC employees had no one that directed, supervised and evaluated them, Petitioner needs to state so.

Interrogatory No. 5 (Related to Document Request No. 28). In Interrogatory No. 5, the Department seeks each real property location (address, city and state) in the United States where an officer, director, or employee of WTC performed services, including training, on behalf of WTC.

The 5/24/16 order compelled IBM to provide Real Property locations in the U.S. where officers, directors, employees of WTC worked. Facilities which are rented pursuant to lease agreements are included.

Petitioner provided the following documents.

a. Document titled WTC Officers for 2007-2008 (IBM_0195) identifies general work location for 8 WTC Officers (but not a specific address) and specific work locations for 3 WTC Officers. The Department is entitled to the specific addresses for the 8 WTC officers.

b. Petitioner did not identify WTC's directors and it did not provide work locations for any WTC directors. The Department is entitled to the work location (address, city, state) of WTC's directors.

c. W-2 Forms (IBM_0196 through IBM_0217) that identify the names of the WTC officers and lists an "Employer's name, address and ZIP code," but

lists a different work location than identified on IBM_0195.

d. Petitioner provided a list properties with addresses, which identified whether the property was owned or leased, included total space, and whether the property included a fitness center, training center/hotel/convention center, manufacturing plant(s), cafeteria, and parking (IBM_1316 through IBM_1329). However, the documentation did not identify whether the real property locations had conference rooms or lobbies. In one phone conference between the Department and Petitioner, Petitioner's attorney stated they would generally agree that all buildings have lobbies, but were unsure about conference rooms. While Petitioner verbally provided a response, the Department requests that Petitioner's oral response be memorialized in writing.

e. Petitioner, in its 3rd Supplemental response provided identical responses to Interrogatories No. 5 and No. 6 and provided identical documents (IBM_1316 through IBM_1329) to both interrogatories. Because identical documents were provided in response to two separate and distinct interrogatories, the Department cannot ascertain from these documents where officers, directors and employees of WTC worked/performed services on behalf of WTC (Interrogatory No. 5) or where personnel of IBM performed services on behalf of WTC (Interrogatory No. 6).

   Because Petitioner stated "IBM-1316 through IBM_1329 contain locations of all IBM real property in the U.S." for both Interrogatories No.5 and No.6, the response is incomplete because the Department has the right to know whether Petitioner contends that all of the IBM real property is 100% utilized by officers, directors and employees of WTC or, in the alternative, a percentage of each of the identified real properties was utilized by officers, directors and employees of WTC, and if so, what is that percentage.

Interrogatory No. 6 (relates to Request No. 34). In Interrogatory No. 6, the Department requested the locations of real property (address, city and state) where an officer, director, employee or agent of Petitioner/IBM performed services on behalf of WTC.

The 5/24/16 order compelled IBM to provide location of real property in U.S. where personnel of IBM performed services on behalf of WTC.

Petitioner provided the following documents.

a. Petitioner, in its 3rd Supplemental response provided identical responses to Interrogatories No. 5 and No. 6 and provided identical documents (IBM_1316 through IBM_1329) to both interrogatories. Because identical documents were provided in response to two separate and distinct interrogatories, the Department cannot ascertain from these documents where officers, directors and employees of WTC worked/performed services on behalf of WTC (Interrogatory No. 5) or where personnel of IBM performed services on behalf of WTC (Interrogatory No. 6).

   Because Petitioner stated "IBM-1316 through IBM_1329 contain locations of all IBM real property in the U.S." for both Interrogatories No.5 and No.6, the response is incomplete because the Department has the right to know whether Petitioner contends that all of the IBM real property is 100% utilized by officers, directors and employees of WTC or, in the alternative, a percentage of each of the identified real properties was utilized by officers, directors and employees of WTC, and if so, what is that percentage.

b. Petitioner, in its 3rd Supplemental response, provided a list properties with addresses and identified the properties by address, owned or leased, total space, and whether the property included a fitness center, training center/hotel/convention center, manufacturing plant, cafeteria, and parking. (IBM_1316 through IBM_1329). While Petitioner did not identify whether the real property locations had conference rooms or lobbies, in one phone conference between the Department and Petitioner, Petitioner's attorney stated they would generally agree that all buildings have lobbies, but were unsure about conference rooms. While Petitioner verbally provided a response, the Department requests that Petitioner's oral response be memorialized in writing.

Interrogatory No. 7 (relates to Request No. 36). The Department requested the cost, lease amount of FMV for all items of tangible personal property used by any officer, director, employee, of WTC in performing services on behalf of WTC in the US including territories.

The 5/24/16 order compelled Petitioner to provide:

1) Costs/FMV for all tangible personal property used by WTC personnel, and;

2) Rental/lease figures.

Petitioner's First Supplemental Response to the Department's First Set of Interrogatories identified documents Bates numbers IBM_0308 through IBM_0341 as responsive. These documents contain beginning and ending balances for tangible property owned by WTC for 2007 and 2008. [redacted] Petitioner failed to provide the cost or fair market value of the tangible personal property used by WTC personnel and Petitioner failed to provide the fair market value for the value of the rental/lease figures for rented/leased space used by WTC personnel. Instead, Petitioner provided only the book value "total" for WTC's tangible personal property. Book value represents the value of the assets after depreciation for both prior and current years. Petitioner has not provided the cost for the owned property.

Petitioner, in its Third Supplemental Response, stated "IBM has not been able to locate the cost figures for WTC's tangible personal property in the U.S., which is de minis." Petitioner stated that it provided the book values (IBM_0003 through IBM_0034) (the illegible copy, not produced here) and (IBM_0308 through IBM_0341) (identical to IBM_0003 through IBM_0034, but legible). See Petitioner's Third Supplemental Response, page 4, Interrogatory No. 7.

Petitioner, in its Fourth Supplement Response, stated

> "[t]he schedules IBM provided during audit and previously in its response to written discovery reflect the cost value of WTC's tangible personal property in the U.S. The amounts reflected in these schedules do not incorporate depreciation. See IBM_0003 through IBM_0034 and IBM_0308 through IBM_0341."

See Petitioner's Fourth Supplemental Response, page 3, Interrogatory No. 7.

The information Petitioner provided does not include the date when it was placed in service, the cost, lease, or, in the alternative, the fair market value. The information only provides the 2007 Beginning Gross Tangible Property, which is the ending figures from 2006 and the same for 2008. [redacted] which is the same amount as the 2007 Ending Gross Tangible Property amount. Based on the above, depreciation is being deducted.

In one phone conference between the Department and Petitioner, Petitioner's attorney stated cost amounts were provided because "Gross" equals "Cost," which based on the documents. This is inaccurate. While Petitioner verbally provided a response, the Department requests that Petitioner's oral response be memorialized in writing. The Department requests this Tribunal to, again, compel Petitioner to provide the original cost, rental/lease amount or fair market value figures for WTC's tangible personal property located in the U.S. and to provide the rental/lease figures/amounts that supports the rental/lease amounts.

Interrogatory No. 8 "The Department requested the cost, lease amount or fair market value (as applicable) for all items of tangible personal property used by any officer, director, employee, or agent of IBM in performing services as described in The Shared Services Cost Sharing Amendments on behalf of WTC in the United States, including territories."

The 5/24/16 order compelled Petitioner to provide costs/FMV for all tangible personal property used by IBM employees who performed services on behalf of WTC as described in the cost sharing agreements.

Petitioner in its 3rd and 4th Supplemental provided IBM_1330 through IBM_2477 (list of cost and location for depreciable property owned by IBM and subs in 2007-2008) and IBM_7897 through 7931 (List of IBM division codes).

While Petitioner provided documents titled "IBM and subsidiaries 2007 Depreciable Assets" and "IBM and subsidiaries 2008 Depreciable Asset Summary" containing numerous pages that identify locations (address, city, and state) with a corresponding cost amount for most properties , Petitioner does not state or identify whether all of the depreciable assets or leasehold improvements in their entirety are used by IBM employees who performed services on behalf of WTC or a proportional amount thereof. The Department has the right to know whether all of the property listed in IBM_1330 through IBM_2477 was exclusively or 100% used by IBM when it performed services on behalf of WTC or, in the alternative, the appropriate proportionate share used by IBM personnel when it performed services on behalf of WTC. Additionally, all locations do not have a corresponding cost amount and, in the alternative, Petitioner did not provide a fair market value. For an example, attached is IBM_ 1330, IBM_1337 through IBM_1340 and IBM_1972, IBM_1975, and IBM_1981.

Interrogatory No. 13. In Interrogatory 13, Department asked Petitioner to "Identify the real property and tangible personal property (by manufacturer, model number and date placed in service) WTC owned, leased or used during the Tax Years at Issue and state the location of that property (street address, city, state and country)."

[redacted] Additionally Petitioner admits that WTC had 20 employees

in New York in 2007 and 2008, respectively. Therefore, Department has reason to believe that admitted WTC employees used both tangible personal property and real property in the course of WTC's trade or business that WTC did not own and for which WTC did not rent (or otherwise pay a fee to use).

The 5/24/16 order limited this to property within the United States not including property in other countries. Petitioner stated in its Second Supplemental Response that "Petitioner is unable to locate information at this level of detail. Petitioner will supplement its response if any additional information becomes available."

In the Petitioner's third supplemental response it stated: "WTC did not own any real property in the U.S. during the tax years at issue. WTC's inventory in the U.S. during the years at issue was stored at [redacted] It is disingenuous for Petitioner to claim that no one knows the real property locations where WTC's employees worked or [redacted] of inventory was stored before being shipped to customers. This is an interrogatory that requires a written response if Petitioner contends no document that provides this information exists. In addition, there is no information regarding the tangible personal property utilized by WTC. Petitioner did not provide any information for the use of the following facilities by WTC:

New Orchard Rd. Armonk, NY (IBM_0195)

1 North Castle Drive, Armonk, NY / 590 (IBM_0195)

Madison Avenue, New York, NY (IBM_0195)

2455 S. Road, Poughkeepsie, NY 12601 (Third Suppl. Response)

D. Requests for Production. (To prevent confusion, Department has referred to each discovery request by name, and has not otherwise numbered the following paragraphs.)

Request No. 4. Request No. 4 seeks documentation evidencing Petitioner's answer to Interrogatory 3, please see argument above.

Request No. 5. Pursuant to the Tribunal's 5/24/16 Order, Petitioner was ordered to provide access to relevant property to determine fair market value and despite repeated requests Petitioner will not comply.

Request No. 7. In its third supplemental response TP states that the officers had no employment contracts with IBM, WTC, or any IBM related company during 2007-2008. The Department believes given the size and sophistication of Petitioner that such agreements, writings or contracts, whether they are actually labelled "employment contract" or not, exist and must be produced. The Department has the right to inquire into whether there existed an employer-employee relationship between the WTC officers and any or all of these affiliated entities. As such, *any* contract or agreement that pertains to, relates to, or contains indicia relevant or could lead to relevant information regarding the conditions of each these individual's duties and rights as an officer of WTC or related IBM entity (including facts tending to demonstrate an employer-employee relationship), must be produced. This would include any contracts that cover the period 2007 and 2008 that may have been entered into prior to those years.

Request No. 15. The Department requested copies of documents ("invoices, bills, statements, contracts, etc.") evidencing the cost of all training facilities (owned or rented) located in the U.S. that were used by WTC or IBM or any IBM related entity.

The 5/24/16 order compelled Petitioner to provide information relating to training facilities in the US owned or rented through contracts or lease agreements by WTC or IBM or any IBM related entity.

Petitioner's 3rd Supplemental provided documents IBM 1316 through IBM_ 1329, which shows two facilities as having training centers. TP does not know whether any leased properties

have training facilities. [redacted]

[redacted] The Department has the right to know whether Petitioner is stating that all of the real property is 100% utilized by officers, directors and employees of IBM for services on behalf of WTC or all of the real property is 100% utilized by WTC officers, directors and employees. If not in the alternative, what percentage of each of the identified real properties was utilized by officers, directors and employees of IBM for services on behalf of WTC and what percentage of each of the identified real properties was utilized by WTC officers, directors and employees.

Request No. 18. The Department requested documents such as "purchase contracts, leases, subleases, assignments, and agreements," "evidencing procurement of office, warehouse, facilities or other storage space provided by IBM to WTC and [to] individuals that comprise all or part of the . . . wages paid by WTC to IBM" under the cost sharing agreements. See Department's Motion to Compel. Page 28, Request No. 18.

The 5/24/16 order compelled Petitioner to provide documentation for facilities provided by IBM to WTC which were reimbursed under cost sharing agreements.

Petitioner in its 3rd Supplemental Response referred to IBM_1316 through IBM_1329, which contains locations and square footage of IBM property owned or leased in the U.S. However, Petitioner was compelled to provide documents such as purchase contracts, leases, subleases, assignments and agreements. Petitioner, rather than producing said documents, stated the Department should seek said information from public ownership records or assessed value of owned land because it is publicly available. Petitioner failed to properly respond.

Request No. 19. The Department requested documents evidencing the purchase or rental by IBM of real or tangible personal property located in the United States that was used by WTC in the regular course of business.

The 5/24/16 order compelled Petitioner to provide documentation for purchase or rental by IBM of real or tangible personal property in the United States that was used by WTC.

Petitioner, in its 3rd Supplemental Response referred to IBM_1316 through IBM_2477 as responsive. For a representative sample, See IBM_ 1330, IBM_1337 through IBM_1340 and IBM_1972, IBM_1975, and IBM_1981). Petitioner provided a list of real property owned and leased by IBM and a list of tangible property owned by IBM and its subsidiaries in 2007 and 2008. Petitioner stated WTC did not own any real property in the US and IBM did not own or purchase any real property on WTC's behalf. See Petitioner's Third Supplemental Response, page 8, Response to Document Request No. 19. The Department has the right to know whether Petitioner is stating that all of the real property is 100% utilized by officers, directors and employees of WTC or, in the alternative, what percentage of each of the identified real properties was utilized by officers, directors and employees of WTC.

Request No. 23. The Department requested WTC's balance sheet and income statement for the tax years ending December 31, 2006, 2007 and 2008.

The 5/24/16 order compelled Petitioner to provide this documentation.

Petitioner provided Schedule L for 2006, 2007 and 2008, but did not tender the detail statements for the items reported on Schedule L for each of the said years. Petitioner, in its 3rd Supplemental Response, produced a book to tax trial balance for 2006-2008 and claims that WTC did not have audited financial statements during the Tax Years at Issue. The Department did not request "audited" financial statements.

The Department seeks this Tribunal to compel Petitioner to produce WTC's balance sheet and income statement and the detailed statements for the 2007 and 2008 Schedule L.

Request No. 27. The Department asked Petitioner to produce IBM's Board of Directors' meeting minutes, committee minutes, agendas, resolutions, and consents.

The 5/24/16 order compelled production of those minutes, committee minutes, agendas, resolutions, and consents related to WTC including any cost sharing agreement between IBM and WTC.

Petitioner in its 3rd Supplemental Response stated [redacted]

However, the 5/24/16 order did not limit the minutes, notes and other documentation to just the cost sharing agreement. Rather, it specifically included the cost sharing agreement as among "those items that relate to WTC." The Department contends any discussion about any activity relating to WTC's business activity that may lead to relevant information is documentation that must be produced. These documents may contain relevant information regarding WTC's activities or activities performed on behalf of WTC. As such, the Department strongly requests this Honorable Tribunal to permit it to arrange a time and a date with Petitioner to review all such documents and choose those it deems responsive to this request.

Request No. 28. The Department requested "documentation evidencing the square footage of any facility located in the United States (including U.S. territories) that was owned or leased by IBM and used by an officer, director, or employee of WTC during the years at issue."

The 5/24/16 order compelled Petitioner to provide this information.

In its initial supplemental response Petitioner produced IBM "e-place Guidelines 3.1," that described the amount of square feet of office space for different employee categories.

Petitioner, in its Third Supplemental Response stated "IBM does not have information specific to square footage of real property used by WTC employees during the Tax Years at Issue. However, IBM provides locations and square footage of all IBM property in the U.S. See response to Interrogatory No. 5." See Petitioner's Third Supplement Response, page 9, Response to Document Request No. 28. See, Department's Second Motion to Compel, Interrogatory No. 5, above.

Request No. 31. The Department requested Petitioner to produce *all* agreements between WTC and IBM.

The 5/24/16 order compelled Petitioner to provide a representative sample and a listing of the sub-licensing agreements.

Petitioner, in its 3rd Supplemental Response, provides a sample of sublicensing agreement (Software License Agreements ("SLAs") or Marketing Royalty Agreements ("MRAs").

Regarding the list of SLAs, Petitioner stated it the list only includes SLAs that generated royalty income. The Department contends that the May 24, 2016, court order did not limit the list to SLAs that produced royalty income, but that Petitioner was to produce "a listing of the "sub-licensing agreements," which would include all SLAs.

Additionally, the Department requests this Tribunal to revisit the Departments' request for the production of agreements. There are other types of agreements that may be relevant to WTC's business activity, such as a management service agreement or lease/rental agreements or intercompany agreements regarding the use of property or delegation of duties, etc.

Request No. 34. The Department requested documents pertaining to Interrogatory No. 5. See the Department's Second Motion to Compel, Interrogatory No. 5, above.

Request No. 35 seeks documents pertaining to Interrogatory Number 7.

The 5/24/2016 order compelled Petitioner to produce the underlying documents for real estate transactions. The request was limited to contracts and rental/lease agreements for facilities used by WTC employees or IBM officer/employees performing services on behalf of WTC.

Petitioner, in its Third Supplemental Response referred to it response to Interrogatory No.5, which contains locations and square footage of all IBM real property in the U.S. Petitioner also stated any additional information, such as assessed value and deeds are publicly available.

Petitioner has not produced any documents in response to the Department Request No. 35.

Request No. 36 seeks documents evidencing Petitioner's response to Interrogatory No. 7, which concerns the cost, lease amount or fair market value for all tangible personal property used by an officer, employee, or agent of WTC in performing services on behalf of WTC within the United States and its territories.

The 5/24/2016 order referred to Interrogatory No. 7

Petitioner, in its Third Supplemental Response referred to its response in Interrogatory No. 7.

The Department refers to Interrogatory No. 8 above.

Request No. 37 seeks documents evidencing Petitioner's response to Interrogatory No. 8, which concerns the cost, lease amount or fair market value for all tangible personal property used by an officer, employee, or agent of IBM in performing services on behalf of WTC within the United States and its territories.

The 5/24/2016 order referred to Interrogatory No. 8.

Petitioner, in its Third Supplemental Response referred to its response in Interrogatory No. 8.

The Department refers to Interrogatory No. 8 above.

E. Conclusion

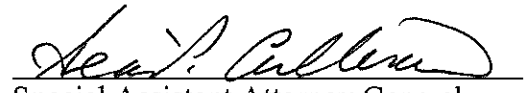
44. The purpose of discovery is the ascertainment of truth and to promote either a fair settlement or a fair trial. *Computer Teaching Corp. v. Courseware Applications, Inc.*, 199 Ill. App. 3d 154, 157 (4th Dist. 1990).

45. Another purpose is to eliminate surprises so that a judgment will rest upon the merits, and not upon the skillful maneuvering of counsel. *Mistler v. Mancini*, 111 Ill. App. 3d 228, 232 (2d Dist. 1982).

WHEREFORE, for the foregoing reasons, the Department moves this Tribunal to enter an order compelling Petitioner to respond in full to the Department's First Set of Interrogatories and First Request for Production of Documents.

Respectfully submitted,

LISA MADIGAN
ATTORNEY GENERAL, STATE OF ILLINOIS
By:



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