

ILLINOIS INDEPENDENT TAX TRIBUNAL

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

Notice of Filing

To: 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

PLEASE TAKE NOTICE that on April 22, 2015, the Respondent filed the attached **RESPONSE IN OPPOSITION TO IBM'S MOTION FOR SUMMARY JUDGMENT** in the above captioned case with the Illinois Independent Tax Tribunal, 160 N. LaSalle, Room N506, Chicago, Illinois.

Susan Budzileni

Susan Budzileni
Special Assistant Attorney General
Illinois Department of Revenue
100 West Randolph Street, 7-900
Chicago, IL 60601
(312) 814-1716
Susan.budzileni@Illinois.gov

Proof of Service

I, Susan Budzileni, an attorney for the Department of Revenue, state that I have this 22nd day of April, 2015, served the foregoing Notice of Filing and attached RESPONSE IN OPPOSITION TO IBM'S MOTION FOR SUMMARY JUDGMENT upon the person(s) to whom said Motion is directed, by email to marc.simonetti@sutherland.com.

Susan Budzileni

Susan Budzileni

ILLINOIS INDEPENDENT TAX TRIBUNAL

INTERNATIONAL BUSINESS)	
MACHINES COPRPORATION,)	
Petitioner,)	
)	
v.)	14 TT 229
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ILLINOIS DEPARTMENT OF REVENUE,)	
Respondent.)	

RESPONSE IN OPPOSITION TO IBM’S MOTION FOR SUMMARY JUDGMENT

NOW COMES the Illinois Department of Revenue (“Department”), Respondent herein, by and through its attorney, Lisa Madigan, Attorney General of and for the State of Illinois, and hereby responds to Petitioner’s Motion for Summary Judgment as follows:

1. A Motion for Summary Judgment may be granted only “if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” 735 ILCS 5/2-1005(c).

IBM’s Motion is legally insufficient

2. Petitioner’s motion entitled “Motion for Summary Judgment” is in fact a Motion for Judgment on the Pleadings. *Tompkins v. France*, 21 Ill.App.2d 227, 230-31 (1st Dist. 1959) (“A motion for a judgment on the pleadings submits to the court that there is no issue of fact to be tried and that the moving party is entitled to judgment under the averments and admissions made by the pleadings. A summary judgment, on the other hand, may be based on affidavits and the submission of documents revealing that no genuine issue of fact is involved.”) *State Farm Fire & Cas. Co. v. Kleckner*, 194 Ill.App.3d 371, 375 (2d Dist. 1990) (“A motion for judgment on the pleadings differs from a summary judgment motion in that the former asserts that the movant is entitled to judgment solely on the basis of the pleadings, while the latter may include affidavits, deposition transcripts and other evidentiary documents in order to establish the absence of a factual issue.”).
3. A proper Motion for Summary Judgment must contain either an Affidavit attesting to the undisputed material facts, or the Petition must be verified. *In re Marriage of Colangelo and Sebela*, 355 Ill.App.3d 383, 393 (2d Dist. 2005) citing *Rotzoll v. Overhead Door Corp.*, 289 Ill.App.3d 410, 418 (4th Dist. 1997) (Unsworn, unverified statements may not be considered in ruling on a motion for summary judgment.).
4. Where the movant fails to attach an affidavit and the movant’s complaint is not verified, the non-moving party may rely on the Answer to establish a triable issue of

fact. *Komater v. Kenton Court Associates*, 151 Ill.App.3d 632, (2d Dist. 1986) (citing *Smith v. St. Therese Hospital* 106 Ill.App.3d 268, 270 (2d Dist. 1982) and *Cato v. Thompson* 83 Ill.App.3d 321, 323, (2d Dist. 1980).

5. Here, the Petition of International Business Machines Corporation (FEIN: 13-0871985) (“IBM”) is not verified and IBM failed to attach any Affidavits to its “Motion for Summary Judgment.”
6. Therefore, this Tribunal should construe Taxpayer’s “Motion for Summary Judgment” as a Motion for Judgment on the Pleadings.
7. The Department’s Answer raises triable issues of fact as to the U.S. business activity of IBM World Trade Corporation (FEIN: 13-1602820) (“WTC”), including WTC’s payroll factor and WTC’s property factor, for purposes of the 80/20 Business Activity Test pursuant to 35 ILCS 5/1501(a)(27). See Answer Paragraphs 12, 13, 18, 22, **26, 27, 28, 29**, 31, 35, 37, 38, 41, 42, 43, 44, 45, 47, 48, 49, 50, 51, 52, 54, 55, 57, 59, 75, 77, 78, 79, 81, 83, 85, 86, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 106, 107, 108, 109, 110, 111, 113, 119, 120, 121, 122, 123, and 125 for example, and Affidavit of Angel Morgan dated January 6, 2015, attached to Department’s Answer.
8. For these reasons alone, IBM’s Motion for Summary Judgment must be denied.
9. However, even if IBM were to attach an affidavit to its Motion, several additional reasons exist to deny IBM’s Motion for Summary Judgment.

Department’s Prima Facie Case Remains Unrebutted

10. Foremost, IBM has failed to overcome the Department’s *prima facie* case established by the Notices of Deficiency. 35 ILCS 5/904(a). Copies of the Department’s Notices of Deficiency are attached hereto as Department Exhibit 1.
11. “To overcome the Department’s *prima facie* case, a taxpayer must present more than its testimony denying the accuracy of the assessments, but must present sufficient documentary support for its assertions.” *Mel-Park Drugs, Inc. v. Department of Revenue*, 218 Ill.App.3d 203, 217, 577 N.E.2d 1278 (1991).
12. IBM has failed to present either testimony or documentation showing the correctness of WTC’s alleged payroll factor or property factor.
13. IBM attached to its Motion Department’s Notices (Memorandum in Support of Motion for Summary Judgment (“MSJ), Exhibit B) and the Auditor’s worksheets (MSJ, Exhibit A). Neither of these exhibits provide documentary support for IBM’s claim that WTC meets the 80/20 Business Activity Test.
14. Because IBM did not provide testimony or documentation of WTC’s property and payroll factors, IBM has failed to overcome the Department’s *prima facie* case.

*IBM has not shown by clear and convincing evidence
that WTC meets the 80/20 Business Activity Test*

15. The issue in this case is whether WTC, a unitary affiliate of IBM, may be excluded from IBM’s Illinois unitary business group because WTC meets the 80/20 business activity test. 35 ILCS 5/1501(a)(27).
16. Thus, IBM seeks an exemption from the rule in Illinois Income Tax Act Section 304(a) that WTC’s income should be included in IBM’s unitary business income because WTC and IBM are members of a Unitary Business Group. *Zebra Technologies Corp. v. Topinka*, 344 Ill.App.3d 474, (1st Dist. 2003) (“The 80/20 rule, in our view, is an exception to the rule announced in section 304(e) of the Act.”).
17. The party seeking the exemption has the burden of proving by clear and convincing

- evidence that it is entitled to the exemption. *United Airlines*, 84 Ill. 2d at 455 (1981).
18. To show that WTC meets the 80/20 business activity test, IBM must present sufficient evidence to show that WTC's "business activity outside the United States is 80% or more of [WTC's] total business activity." 35 ILCS 5/1501(a)(27)(A).
 19. The question raised by IBM – whether the Department may "impute" or otherwise allocate payroll and property to WTC – only arises once IBM proves by clear and convincing evidence that WTC meets the 80/20 business activity test.
 20. IBM did not attach any testimony or documentation showing that WTC meets the 80/20 business activity test.
 21. Additionally, IBM only alleged approximate figures for its payroll factor and property factor for 2007 and 2008 respectively. Petition, ¶¶ 26, 27, 28, 29.
 22. Therefore, IBM has failed to meet its burden of proof and IBM's Motion must be denied.

IBM's Motion relies on bad law

23. If this Tribunal finds that the issue raised by IBM is a question of law that can be decided prior to the establishment that WTC meets the claimed 80/20 exemption and prior to discovery, then Department asserts that the case relied upon by IBM is not good law.
24. Taxpayer cites "*Ill. Dep't of Revenue v. Shanghai, Inc.*, IT 02-1," an Office of Administrative Hearings decision dated February 7, 2002, for its contention that "the Department does not have the authority to impute property or payroll to WTC for the 80/20 Test." MSJ, pg. 5.
25. Foremost, *Shanghai* is not a decision of the Illinois Appellate or Supreme Courts and therefore is only persuasive authority. *O'Casek v. Children's Home and Aid Soc. of Illinois*, 229 Ill.2d 421, 440 (2008) ("[S]tare decisis requires courts to follow the decisions of higher courts, but does not bind courts to follow decisions of equal or inferior courts.").
26. In *Shanghai*, the ALJ held that where the Department stipulated that Shanghai's claimed 80/20 sub "had no employees during the years at issue," "owned no real or tangible personal property during the years at issue," and the record was devoid of any evidence that the sub leased any real or tangible personal property within the water's edge of the United States, the subsidiary's U.S. payroll factor was 0 and the subsidiary's U.S. property factor was 0. *Ill. Dep't of Revenue v. Shanghai, Inc.*, IT 02-1.
27. However, in *Zebra Technologies Corp. v. Topinka*, 344 Ill.App.3d 474, (1st Dist. 2003), the Illinois Appellate Court held that the taxpayer's subsidiaries were not allowed an 80/20 exemption because taxpayer failed to produce the evidence necessary to show that the subsidiaries were entitled to the exclusion under the 80/20 rule where all property owned by the subsidiaries was located in Bermuda, but, a considerable amount of business activity relating to development, protection, and quality control of the intellectual property used by the subsidiaries was conducted by parent's employees in the United States, and where taxpayer knew the extent to which this activity was conducted in the United States, and could have calculated the percentage of the activities conducted within and without the United States such that it could show compliance with the exemption requirements in section 1501(a)(27) of the Illinois Income Tax Act, but failed to make such calculation.

28. Thus in *Zebra*, the Appellate Court held that services performed by parent's employees on behalf of the alleged-80/20 subsidiary, could be included in the subsidiary's property and payroll factors to calculate the amount of subsidiary's U.S. business activity under the 80/20 business activity test. *Zebra Technologies Corp. v. Topinka*, 344 Ill.App.3d at 484.
29. *Zebra* is binding on this Tribunal. *O'Casek*, 229 Ill.2d at 440 (“[S]tare decisis requires courts to follow the decisions of higher courts, but does not bind courts to follow decisions of equal or inferior courts.”).
30. Thus, the Department may allocate services provided by IBM, or another member of IBM's unitary business group, on behalf of WTC to WTC for purposes of determining the amount of WTC's U.S. business activity. *Zebra Technologies Corp. v. Topinka*, 344 Ill.App.3d at 484.

Material facts are in dispute

31. The true issue in this case – whether WTC is exempt from IBM's Illinois unitary business group because at least 80% of WTC's business activity (as defined by the 80/20 Business Activity Test) was conducted outside the water's edge of the United States in the Years at Issue – is a mixed question of law and fact.
32. Department asserts that there are material facts in dispute that prevent summary judgment and require discovery. Department attaches hereto Exhibit 2, Affidavits of Angele Morgan and Laurie Evans attesting to material facts in dispute in this case pursuant to Illinois Supreme Court Rule 191(b).
33. Department incorporates in this paragraph its Memorandum of Law in Support of its Response to IBM's Motion for Summary Judgment as if fully set forth herein.

WHEREFORE, Department prays this Tribunal enter an order

1. Finding that the holding in *Ill. Dep't of Revenue v. Shanghai, Inc.*, IT 02-1 is neither binding nor persuasive authority;
2. Denying IBM's Motion for Summary Judgment; and
3. Granting other relief this Tribunal deems just.

Respectfully Submitted,

LISA MADIGAN
Attorney General
State of Illinois

By:



Special Assistant Attorney General

Susan Budzileni
Sean Cullinan
Jennifer Kieffer
Special Assistant Attorneys General
Illinois Department of Revenue
Office of Legal Services

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Sean.Cullinan@illinois.gov
Jennifer.Kieffer@Illinois.gov

DATED: April 22, 2015

Notice of Deficiency

for Form IL-1120, Corporation Income and Replacement Tax Return



#B KMGV
NXX X173 1727 6328#
INTERNATIONAL BUSINESS MACHINES CORP
ATTN: INCOME TAX DEPT
NORTH CASTLE DRIVE
ARMONK NY 10504

September 24, 2014



Letter ID: CNXXX17317276328

Taxpayer ID: 13-0871985
Reporting period: December 2007
Total Deficiency: \$15,949,669.74
Balance due: \$15,949,669.74

We have audited your account for the reporting period listed above. The attached statement explains the computation of your deficiency and the balance due. Illinois law requires that we notify you of this deficiency and your rights.

If you agree to this deficiency, pay the total balance due as soon as possible to minimize penalty and interest assessed. Make your check payable to "Illinois Department of Revenue," write your taxpayer ID on your check, and mail a copy of this notice along with your payment.

If you do not agree, you may contest this notice by following the instructions listed below.

- If the amount of this tax deficiency, exclusive of penalty and interest is more than \$15,000, or if no tax deficiency is assessed but the total penalties and interest is more than \$15,000, file a petition with the Illinois Independent Tax Tribunal within 60 days of this notice. Your petition must be in accordance with the rules of practice and procedure provided by the Tribunal (35 ILCS 1010/1-1, et seq.).
- In all other cases, file a protest with us, the Illinois Department of Revenue, within 60 days of this notice. If you file a protest on time, we must reconsider the proposed deficiency, and if requested, grant you or your authorized representative an administrative hearing. An administrative hearing is a formal legal proceeding conducted pursuant to rules adopted by the Department and is presided over by an administrative law judge. Submit your protest on Form EAR-4, Format for Filing a Protest for Income Tax, (available on our website at tax.illinois.gov). If we do not receive your protest within 60 days, this deficiency will become final. A protest of this notice does not preserve your rights under any other notice.
- In any case, you may instead, under Sections 2a and 2a.1 of the State Officers and Employees Money Disposition Act (30 ILCS 230/2a, 230/2a.1), pay the total deficiency under protest using Form RR-374, Notice of Payment Under Protest (available on our website at tax.illinois.gov), and file a complaint with the circuit court for a review of our determination.

If you do not protest this notice or pay the balance due in full, we may take collection action against you for the balance due, which may include levy of your wages and bank accounts, filing of a tax lien, or other action.

If you have questions, call us at the telephone number shown below.

Sincerely,

Brian Hamer
Director

ILLINOIS DEPARTMENT OF REVENUE
AUDIT BUREAU
PO BOX 19012
SPRINGFIELD IL 62794-9012

(217) 785-4472

Statement

Date: September 24, 2014
Name: INTERNATIONAL BUSINESS MACHINES CORP
Taxpayer ID: 13-0871985
Letter ID: CNXXX17317276328

Reasons for deficiency

See attached Explanation of Adjustment.

If this liability qualified for amnesty, and you did not pay that liability during the amnesty period held October 1, 2010, through November 8, 2010, your penalty and interest amounts may be doubled. [86 Ill. Admin. Code 520/101(b)]

Penalties

We are imposing an additional late-payment penalty because you did not pay the amount shown due on the Form IL-870, Waiver of Restrictions, within 30 days after the "Date of Issuance" shown on the form. Once an audit has been initiated, the additional late payment penalty is assessed at 15% of the late payment. Failure to pay the amount due or invoke protest rights within 30 days from the "Date of Issuance" on the Form IL-870, results in this penalty increasing to 20%. [35 ILCS 735-/3-3(b-20)(2)] (for liabilities due on or after 1/1/2005)

Interest

Interest on tax in the amount of \$3,778,124.34 has been computed through September 24, 2014.

Statement

Date: September 24, 2014
Name: INTERNATIONAL BUSINESS MACHINES CORP
Taxpayer ID: 13-0871985
Letter ID: CNXXX17317276328

Computation of deficiency

Reporting Period: 31-Dec-2007

Income or loss	
Federal taxable income	\$3,834,211,925.00
Net operating loss deduction	\$164,236,410.00
State Municipal and other interest excluded	\$43,077,315.00
Income tax and replacement tax deduction	\$178,436.00
Other additions	\$0.00
Income or loss	\$4,041,704,086.00
Base income or loss	
Foreign dividends subtraction	\$927,869,456.00
Total subtractions	\$927,869,456.00
Base income or net loss	\$3,113,834,630.00
Income allocable to Illinois	
Non-business income or loss	\$0.00
Non-unitary partnership bus. income or loss	\$0.00
Business income or loss	\$3,113,834,630.00
Apportionment formula	
Total sales everywhere	\$34,934,020,174.00
Total Illinois sales	\$1,485,046,920.00
Apportionment factor	0.042510
Business income/loss apportionable to IL	\$132,369,110.00
Nonbusiness income/loss allocable to IL	\$0.00
Non-unitary part. business income app. to IL	\$0.00
Base income or net loss allocable to IL	\$132,369,110.00
Net income	
Base income or net loss	\$132,369,110.00
IL net loss deduction (NLD)	\$0.00
Net income	\$132,369,110.00
Net replacement tax	
Replacement tax	\$3,309,228.00
Recapture of investment credits	\$0.00
Replacement tax before credits	\$3,309,228.00
Replacement tax investment credits	\$0.00
Net replacement tax	\$3,309,228.00
Net income tax	
Income tax	\$6,353,717.00
Recapture of investment credits	\$0.00

Statement

Date: September 24, 2014
Name: INTERNATIONAL BUSINESS MACHINES CORP
Taxpayer ID: 13-0871985
Letter ID: CNXXX17317276328

Income tax before credits	\$6,353,717.00
Income tax investment credit	\$0.00
Net income tax	\$6,353,717.00
Refund or balance due	
Net replacement tax	\$3,309,228.00
Net income tax	\$6,353,717.00
Total net income and replacement tax due	\$9,662,945.00
Minus tax previously assessed	-\$968,984.00
Total tax deficiency	\$8,693,961.00
UPIA-5 late-payment penalty (Audit)	\$3,477,584.40
Plus interest on tax through September 24, 2014	\$3,778,124.34
Total deficiency	* \$15,949,669.74
If you intend to pay under protest, you must pay this total deficiency amount.	
Computation of balance due	
Remaining amount due (or overpaid)	-\$266.37
Balance due	* \$15,949,403.37

Bankruptcy Information

If you are currently under the protection of the Federal Bankruptcy Court, contact us and provide the bankruptcy number and the bankruptcy court. The bankruptcy automatic stay does not change the fact that you are required to file tax returns.

Taxpayer Bill of Rights

- You have the right to call the Department of Revenue for help in resolving tax problems.
- You have the right to privacy and confidentiality under most tax laws.
- You have the right to respond, within specified time periods, to Department notices by asking questions, paying the amount due, or providing proof to refute the Department's findings.
- You have the right to appeal Department decisions, in many instances within specified time periods, by asking for Department review, by filing a petition with the Illinois Independent Tax Tribunal, or by filing a complaint in circuit court.
- If you have overpaid your taxes, you have the right to a credit (or, in some cases, a refund) of that overpayment.
- For more information about these rights and other Department procedures, you may contact us. Our contact information is on the front of this notice.

Notice of Deficiency

for Form IL-1120, Corporation Income and Replacement Tax Return



September 24, 2014



Letter ID: CNXXX15295657121

#B KMGV
NXXX15295657121#
INTERNATIONAL BUSINESS MACHINES CORP
ATTN: INCOME TAX DEPT
NORTH CASTLE DRIVE
ARMONK NY 10504

Taxpayer ID: 13-0871985
Reporting period: December 2008
Total Deficiency: \$11,972,596.94
Balance due: \$11,972,596.94

We have audited your account for the reporting period listed above. The attached statement explains the computation of your deficiency and the balance due. Illinois law requires that we notify you of this deficiency and your rights.

If you agree to this deficiency, pay the total balance due as soon as possible to minimize penalty and interest assessed. Make your check payable to "Illinois Department of Revenue," write your taxpayer ID on your check, and mail a copy of this notice along with your payment.

If you do not agree, you may contest this notice by following the instructions listed below.

- If the amount of this tax deficiency, exclusive of penalty and interest is more than \$15,000, or if no tax deficiency is assessed but the total penalties and interest is more than \$15,000, file a petition with the Illinois Independent Tax Tribunal within 60 days of this notice. Your petition must be in accordance with the rules of practice and procedure provided by the Tribunal (35 ILCS 1010/1-1, et seq.).
- In all other cases, file a protest with us, the Illinois Department of Revenue, within 60 days of this notice. If you file a protest on time, we must reconsider the proposed deficiency, and if requested, grant you or your authorized representative an administrative hearing. An administrative hearing is a formal legal proceeding conducted pursuant to rules adopted by the Department and is presided over by an administrative law judge. Submit your protest on Form EAR-4, Format for Filing a Protest for Income Tax, (available on our website at tax.illinois.gov). If we do not receive your protest within 60 days, this deficiency will become final. A protest of this notice does not preserve your rights under any other notice.
- In any case, you may instead, under Sections 2a and 2a.1 of the State Officers and Employees Money Disposition Act (30 ILCS 230/2a, 230/2a.1), pay the total deficiency under protest using Form RR-374, Notice of Payment Under Protest (available on our website at tax.illinois.gov), and file a complaint with the circuit court for a review of our determination.

If you do not protest this notice or pay the balance due in full, we may take collection action against you for the balance due, which may include levy of your wages and bank accounts, filing of a tax lien, or other action.

If you have questions, call us at the telephone number shown below.

Sincerely,

Brian Hamer
Director

ILLINOIS DEPARTMENT OF REVENUE
AUDIT BUREAU
PO BOX 19012
SPRINGFIELD IL 62794-9012

(217) 785-4472

Statement

Date: September 24, 2014
Name: INTERNATIONAL BUSINESS MACHINES CORP
Taxpayer ID: 13-0871985
Letter ID: CNXXX15295657121

Reasons for deficiency

See attached Explanation of Adjustment

If this liability qualified for amnesty, and you did not pay that liability during the amnesty period held October 1, 2010, through November 8, 2010, your penalty and interest amounts may be doubled. [86 Ill. Admin. Code 520/101(b)]

Penalties

We are imposing an additional late-payment penalty because you did not pay the amount shown due on the Form IL-870, Waiver of Restrictions, within 30 days after the "Date of Issuance" shown on the form. Once an audit has been initiated, the additional late payment penalty is assessed at 15% of the late payment. Failure to pay the amount due or invoke protest rights within 30 days from the "Date of Issuance" on the Form IL-870, results in this penalty increasing to 20%. [35 ILCS 735-13-3(b-20)(2)] (for liabilities due on or after 1/1/2005)

Interest

Interest on tax in the amount of \$2,246,263.54 has been computed through September 24, 2014.

Statement

Date: September 24, 2014
 Name: INTERNATIONAL BUSINESS MACHINES CORP
 Taxpayer ID: 13-0871985
 Letter ID: CNXXX15295657121

Computation of deficiency

Reporting Period: 31-Dec-2008

Income or loss	
Federal taxable income	\$9,437,765,868.00
Net operating loss deduction	\$160,891,249.00
State Municipal and other interest excluded	\$9,882,623.00
Income tax and replacement tax deduction	\$5,303,711.00
Illinois bonus depreciation addition	\$1,091,981,552.00
Other additions	\$0.00
Income or loss	\$10,705,825,003.00
Base income or loss	
Foreign dividends subtraction	\$6,633,979,077.00
Illinois bonus depreciation subtraction	\$214,021,623.00
Total subtractions	\$6,848,000,700.00
Base income or net loss	\$3,857,824,303.00
Income allocable to Illinois	
Non-business income or loss	\$0.00
Non-unitary partnership bus. income or loss	\$0.00
Business income or loss	\$3,857,824,303.00
Apportionment formula	
Total sales everywhere	\$35,052,333,144.00
Total Illinois sales	\$1,540,893,009.00
Apportionment factor	0.043960
Business income/loss apportionable to IL	\$169,589,956.00
Nonbusiness income/loss allocable to IL	\$0.00
Non-unitary part. business income app. to IL	\$0.00
Base income or net loss allocable to IL	\$169,589,956.00
Net income	
Base income or net loss	\$169,589,956.00
IL net loss deduction (NLD)	\$0.00
Net income	\$169,589,956.00
Net replacement tax	
Replacement tax	\$4,239,749.00
Recapture of investment credits	\$0.00
Replacement tax before credits	\$4,239,749.00
Replacement tax investment credits	\$0.00
Net replacement tax	\$4,239,749.00
Net income tax	

Statement

Date: September 24, 2014
Name: INTERNATIONAL BUSINESS MACHINES CORP
Taxpayer ID: 13-0871985
Letter ID: CNXXX15295657121

Income tax	\$8,140,318.00
Recapture of investment credits	\$0.00
Income tax before credit	\$8,140,318.00
Income tax investment credits	\$69,541.00
Net income tax	\$8,070,777.00
Refund or balance due	
Net replacement tax	\$4,239,749.00
Net income tax	\$8,070,777.00
Total net income and replacement tax due	\$12,310,526.00
Minus tax previously assessed	-\$5,363,145.00
Total tax deficiency	\$6,947,381.00
UPIA-5 late-payment penalty (Audit)	\$2,778,952.40
Plus interest on tax through September 24, 2014	\$2,246,263.54
Total deficiency	* \$11,972,596.94
If you intend to pay under protest, you must pay this total deficiency amount	
Computation of balance due	
Remaining amount due (or overpaid)	-\$500.00
Balance due	* \$11,972,096.94

Bankruptcy Information

If you are currently under the protection of the Federal Bankruptcy Court, contact us and provide the bankruptcy number and the bankruptcy court. The bankruptcy automatic stay does not change the fact that you are required to file tax returns.

Taxpayer Bill of Rights

- You have the right to call the Department of Revenue for help in resolving tax problems.
- You have the right to privacy and confidentiality under most tax laws.
- You have the right to respond, within specified time periods, to Department notices by asking questions, paying the amount due, or providing proof to refute the Department's findings.
- You have the right to appeal Department decisions, in many instances within specified time periods, by asking for Department review, by filing a petition with the Illinois Independent Tax Tribunal, or by filing a complaint in circuit court.
- If you have overpaid your taxes, you have the right to a credit (or, in some cases, a refund) of that overpayment.
- For more information about these rights and other Department procedures, you may contact us. Our contact information is on the front of this notice.

ILLINOIS INDEPENDENT TAX TRIBUNAL

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

**AFFIDAVIT OF LAURIE EVANS
PURSUANT TO ILLINOIS SUPREME COURT RULE 191(b)**

STATE OF ILLINOIS

COUNTY OF SANGAMON

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

1. I am currently employed by the Illinois Department of Revenue.
2. My current title is Revenue Audit Supervisor for Income Tax, Audit Planning & Technical Support.
3. Additional discovery is required to determine the business activity within and without the United States of IBM World Trade Corporation (FEIN: 13-1602820) (“WTC”) for the tax years ending December 31, 2007 or December 31, 2008 (“Years at Issue”).
4. The following questions related to the proper computation of WTC’s property and payroll factors for purposes of computing the 80/20 test were left unanswered by the information made available during the audit. This list is not exhaustive or exclusive.
 - a) What were the duties of WTC’s officers? What was the compensation of WTC’s officers? Who did WTC’s officers supervise?
 - b) What real and tangible personal property did WTC’s employees, including officers, utilize? What is the cost, rent, or reasonable rental rate of that property?
 - c) Did a “legal relationship of employer and employee” exist between WTC and individuals other than those individuals who received a W-2 Form from WTC in 2007 and 2008? If so, what was each individual’s compensation? What real and tangible personal property did the individual utilize in performing his/her duties? What is the cost, rent, or reasonable rental rate of that property?
 - d) Did any employees of IBM, or a subsidiary of IBM, perform services on behalf of WTC? What services were provided? Who provided the services? What was each

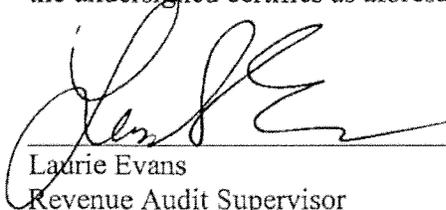
individual's remuneration for providing the services? What real and tangible personal property did the service provider utilize? What is the cost, rent, or reasonable rental rate of that property?

- e) Did any agreements for services (i.e. management services agreement) exist between WTC and IBM, or a subsidiary thereof? What services were provided? Who provided the services? What was each individual's remuneration for providing the services? What real and tangible personal property did the service provider utilize? What is the cost, rent, or reasonable rental rate of that property?
 - f) Who protected and enforced IBM's intellectual property that was licensed to WTC and sublicensed by WTC to WTC customers? What was each individual's remuneration for providing the services? What real and tangible personal property did the service provider utilize? What is the cost, rent, or reasonable rental rate of that property?
 - g) What was the cost, rent, or reasonable market rate of all U.S. real property utilized by WTC during the Years at Issue?
 - h) What was the cost, rent or reasonable market rental rate of each item of tangible personal property located in the U.S. and utilized by WTC during the Years at Issue?
 - i) What documentation supports the answers to each of the above questions/answers?
5. Depositions will be required of twelve or more individuals, including WTC officers and employees, regarding the services performed for WTC and the value of the time spent performing those services.
 6. Depositions will be required of twelve or more individuals, including WTC officers and employees, regarding the use of real and tangible personal property in conjunction with the services performed for WTC and the cost, fair market value or rental rate of that property.
 7. The following persons were WTC officers and/or employees and would have factual information affecting the calculation of WTC's payroll and property factors. Therefore, his/her deposition may be necessary to develop the facts of this case.
 - a) Joyce A Bergman, Assistant Secretary, WTC, during the Years at Issue.
 - b) Andrew Bonzani, Secretary, WTC, during the Years at Issue.
 - c) Harsh Chugh, Assistant Treasurer, WTC, during the Years at Issue.
 - d) Douglas T. Elix, Chairman, President and CEO, WTC, during the Years at Issue.
 - e) John P. Gianukakis, Controller, WTC, during the Years at Issue.
 - f) Jesse J. Greene Jr., Treasurer, WTC, during the Years at Issue.
 - g) David L. Johnson, Vice President, WTC, during the Years at Issue.
 - h) Franklin R. Kern III, Chairman, President and CEO, WTC, during the Years at Issue.
 - i) Martin Schroeter, Assistant Treasurer and Treasurer, WTC, during the Years at Issue.
 - j) Maureen Sladek, Vice President, WTC, during the Years at Issue.
 - k) Gerard Vilcot, Controller, WTC, during the Years at Issue.
 - l) Daniel M. Zuchelli, Assistant Treasurer, WTC, during the Years at Issue.
 - m) Patricia Vitolo, 1641 Boulevard, Peekskill, NY 10566
 - n) Deborah J Arias, 138 Gaymoor Drive, Stamford, CT 06907
 - o) George E Arias, 138 Gaymoor Drive, Stamford, CT 06907
 - p) Brigitte M Cottrell, P.O. Box 112, Briarcliff Manor, NY 10510

- q) John A Dejoy, 32 Lynette Blvd, Kingston, NY 12401
- r) Robert T Depasquale, 74 Hoose Blvd, Fishkill, NY 12524
- s) Denise A Durling, 91 Remington Road, Ridgefield, CT 06877
- t) Lorin C Feng, 261 Carroll Close, Tarrytown, NY, 10591
- u) John P Freiling, IBM Apse 3-2-31, Roppongi, Minato-Ku Tokyo, 10
- v) Sushil R Gandhi, 279 Longwood Run Lane, Somerset Run, Somerset, NJ, 08873
- w) Lois A Hritz, 12 Vista Court, Ossining, NY, 10562
- x) Arun V Kamath, 49 Railroad Ave, Norwood, NJ, 07648
- y) Samuel S Lam, 43 Mystic Drive, Ossining, NY 10562
- z) Kenneth W Lee, 155 Ferris Ave Apt. 1F, White Plains, NY 10603
- aa) Mary M Li, 147 Rock Creek Lane, Scarsdale, NY, 10583
- bb) Gerard McGorry, 20 Croton Street, Melville, NY 11747
- cc) Tina Nader, 2 Interlaken Drive, Eastchester, NY 10709
- dd) Thomas E Rizzotti, 61 Bigelow Road, New Fairfield, CT 06812
- ee) Mark H Roper, P.O. Box 561, Hopewell Junction, NY 12533
- ff) Theresa A Thomas, 162 Charter Circle, Ossining, NY 10562
- gg) Franklin Thompson, 2405 Vinings Oaks Court, Syrmna, GA 30082

8. This is not an exhaustive list, and other discovery may be necessary to develop the material facts of this case.
9. I am an adult resident of the State of Illinois and can truthfully and competently testify to the matters contained herein based upon my own personal knowledge.

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



Laurie Evans
 Revenue Audit Supervisor
 Income Tax, Audit Planning &
 Technical Support
 Illinois Department of Revenue

Date: 4/22/15

ILLINOIS INDEPENDENT TAX TRIBUNAL

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

**AFFIDAVIT OF ANGELE MORGAN
PURSUANT TO ILLINOIS SUPREME COURT RULE 191(b)**

STATE OF NEW JERSEY

COUNTY OF BERGEN

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

1. I am currently employed by the Illinois Department of Revenue.
2. My current title is Revenue Auditor III.
3. I audited IBM's Illinois Corporate Income and Replacement Tax Returns for the tax years ending December 31, 2007 and December 31, 2008 ("Years at Issue").
4. As part of my audit I requested information from IBM.
5. IBM did not provide me with all of the information I requested for purposes of the audit.
6. As part of my audit, I requested compensation information, including W-2 Forms, for the Officers of IBM World Trade Corporation (FEIN: 13-1602820) ("WTC") for the Years at Issue.
7. IBM refused to provide compensation information, including W-2 Forms, for the Officers of WTC for the Years at Issue.
8. As part of my audit, I requested but did not receive information concerning the location and cost (basis, rent, or reasonable market rental rate) of WTC's U.S. real and tangible personal property during the Years at Issue.
9. During my audit, IBM provided no documentation supporting WTC's real or tangible personal property figures.
10. I used the best information available to determine WTC's property and payroll factors.
11. Based on the information available, I determined that IBM and WTC are members of the same Unitary Business Group and that WTC did not meet the 80/20 business activity test.

12. The following facts alleged by IBM in the Petition are NOT true and correct and the Department denies these allegations:
- a) In 2007, WTC had everywhere payroll of approximately \$30 million and U.S. payroll of approximately \$2 million. Petition, ¶26.
 - b) In 2008, WTC had everywhere payroll of approximately \$14 million and U.S. payroll of approximately \$2 million. Petition, ¶27.
 - c) In 2007, WTC had everywhere property of approximately \$80 million and U.S. property of approximately \$1.2 million. Petition, ¶28.
 - d) In 2008, WTC had everywhere property of approximately \$73 million and U.S. property of approximately \$1 million. Petition, ¶29.
13. The following facts alleged by IBM in its unsworn Motion are NOT true and correct and the Department disputes these alleged facts:
- a) Department disputes that, "During the audit, IBM provided the Department with W-2 Forms that illustrated WTC had 20 employees in the U.S., and illustrated the payroll for those employees." IMB's Memorandum of Law ("MOL"), pg. 3, #3. The W-2 Forms for 2007 and 2008 provided to me did not include officers of WTC. The Department, therefore, disputes that WTC had only 20 employees and that the W-2s provided showed WTC's total U.S. payroll.
 - b) Department disputes that, "In 2007 and 2008, WTC operated a network of foreign branches that employed hundreds of employees and at least fifty contractors outside the United States." IMB's MOL, pg. 3, #4. IBM has not provided documentation supporting this statement.
 - c) Department disputes that, "During the audit, IBM provided the Department with documentation that illustrated WTC's U.S. property for the Years at Issue." IMB's MOL, pg. 3, #5.
 - d) Department disputes that, "During the audit, IBM provided tax return documentation that reflected WTC's everywhere property and payroll." IMB's MOL, pg. 3, #6.
 - e) Department disputes that, "Pursuant to the documentation and tax returns, WTC qualified as an 80/20 Company." IMB's MOL, pg. 3, #7.
 - f) Department disputes that, "Nevertheless, the Department issued an assessment of additional tax because the Department disregarded WTC's statutory classification as an 80/20 Company." IMB's MOL, pg. 4, #8.
 - g) Department disputes that, "Department imputed U.S. property and payroll from IBM to WTC for purposes of the 80/20 Test." IMB's MOL, pg. 4, #10. Department has objected to the word "impute." Because IBM failed to provide the requested documentation, I used the best information available to determine WTC's U.S. Business Activity. Because the compensation of the WTC officers was not provided to me during the audit, I used the best information available to estimate the compensation of the officers of WTC. Because WTC failed to provide documentation of the reasonable market rental rate for the real and tangible personal property it used during the Years at Issue, I used the best information available to determine WTC's U.S. real and tangible personal property during the Years at Issue.
 - h) Department disputes that, "The Department's sole basis to disregard WTC's statutory characterization as an 80/20 Company was the imputation of property and

payroll from IBM to WTC." IMB's MOL, pg. 4, #12.

- i) Department disputes that, "Without the imputation of U.S. property and payroll from IBM to WTC, the Department agrees with WTC's statutory classification as an 80/20 Company." IMB's MOL, pg. 4, #13.

14. The following material issues of fact, which were not provided by IBM during the audit, are necessary to a determination of WTC's business activity for the Years at Issue. This list is not exhaustive or exclusive.

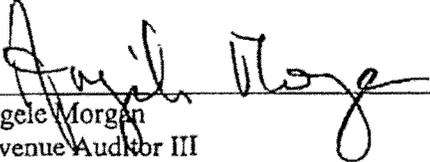
- a) WTC had at least 12 officers during the Years at Issue.
- b) WTC's officer's compensation was not included in the information provided to me by IBM.
- c) IBM did not provided supporting documentation to show that WTC maintained employees based in countries other than the United States in 2007 and 2008 or the compensation of those employees.
- d) Documentation showing the correctness of WTC's everywhere payroll during the Years at Issue was not provided to me during the audit.
- e) WTC's officer's compensation was not included in WTC's U.S. Payroll figure of \$2 million for 2007 or 2008, respectively.
- f) A "legal relationship of employer and employee" may have existed between WTC and other individuals excluded from the WTC employees presented to me (in the form of W-2 Forms) for 2007 and 2008. (Hereinafter referred to as "misclassified employees.")
- g) The compensation of the misclassified employees was not included in WTC's U.S. Payroll figure of \$2 million for 2007 or 2008, respectively.
- h) WTC's employees and officers were physically present in the United States when they performed services on behalf of WTC in 2007 and 2008.
- i) WTC therefore had to own, rent or otherwise utilize real and personal property for the use of its employees, including officers:
- j) The location (address, city, state) of each U.S. real property utilized by WTC during the Years at Issue was not provided to me during the audit.
- k) The cost or reasonable market value of each U.S. real property utilized by WTC during the Years at Issue was not provided to me during the audit.
- l) The cost or reasonable market value of each item of tangible personal property located in the U.S. and utilized by WTC during the Years at Issue was not provided to me during the audit.
- m) WTC's U.S. Property figure of \$1.2 million for 2007 and \$1 million for 2008 is not correct.
- n) Supporting documentation showing the correctness of the cost or reasonable market value of WTC's everywhere property during the Years at Issue was not provided to me during the audit.
- o) IBM provided services to WTC during the Years at Issue that should be allocated to WTC for purposes of the 80/20 Business Activity Test.
- p) IBM failed to provide me documentation of the services provided by IBM, or another IBM subsidiary, to WTC during the Years at Issue.
- q) Services provided by IBM on behalf of WTC during the Years at Issue are not included in WTC's U.S. Payroll figure of \$2 million for 2007 or 2008, respectively, or U.S. property figures of \$1.2 million for 2007 and \$1 million for 2008.

r) The entity and/or persons who protected and enforced IBM's intellectual property that was licensed to WTC and sublicensed by WTC to WTC customers was not provided to me during the audit. Compensation paid to persons performing these services was also not provided to me during the audit.

15. The above is not an exhaustive list of the factual information requested during the audit and is not intended as an exhaustive or exclusive list of the material facts at issue in this case.

16. I am an adult resident of the State of New Jersey and can truthfully and competently testify to the matters contained herein based upon my own personal knowledge.

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


Angele Morgan
Revenue Auditor III
Illinois Department of Revenue

Date: April 22, 2015

**ILLINOIS INDEPENDENT
TAX TRIBUNAL**

**INTERNATIONAL BUSINESS MACHINE
CORPORATION,**

Petitioner,

v.

**ILLINOIS DEPARTMENT OF REVENUE,
Respondent.**

Case No. 14-TT-229

Chief Judge James M. Conway

**MEMORANDUM OF LAW IN SUPPORT OF THE
DEPARTMENT'S RESPONSE IN OPPOSITION TO
PETITIONER'S MOTION FOR SUMMARY JUDGMENT**

NOW COMES the Illinois Department of Revenue ("Department"), Respondent herein, by and through its attorney, Lisa Madigan, Attorney General of and for the State of Illinois, and hereby incorporates this Memorandum of Law in support of its Response to IBM's Motion for Summary Judgment and brief in support thereof, filed by Petitioner on March 19, 2015.

I. INTRODUCTION

The Illinois Department of Revenue (the "Department") audited the income tax returns of International Business Machine Corporation ("IBM") for the tax years ending December 31, 2007 and December 31, 2008 ("Audit Period" or "Years at Issue"). The Department issued Notices of Deficiency to IBM with a proposed assessment of additional tax, penalties and interest because IBM did not provide sufficient support to show that IBM World Trade Corporation ("WTC") met the 80/20 business activity test in accordance with Section 1501(a)(27) of the Illinois Income Tax Act ("IITA"). 35 ILCS 5/1501(a)(27). Because WTC did not meet the 80/20 business activity

test, WTC must remain in IBM's Illinois unitary business group with its income included in IBM's combined returns for tax years ending December 31, 2007 and December 31, 2008.

IBM protested the Department's determination. After the parties filed their respective pleadings in this matter, and before discovery had been issued, IBM filed a "Motion for Summary Judgment." In that Motion, IBM asserts that the Department imputed property and payroll to WTC without legal authority to do so. MSJ ¶¶ 2, 3.

The Department asserts several reasons why IBM's Motion for Summary Judgment should be denied. Foremost, IBM's Motion is not a proper motion for summary judgment because it is not supported by either an affidavit or verified complaint. Therefore, IBM's Motion should be treated as a Motion for Judgment on the Pleadings, and should be denied because the Answer raises triable issues of fact.

Next, even if this Tribunal finds that IBM's Motion is a proper Motion for Summary Judgment, there are multiple reasons why IBM's Motion for Summary Judgment must be denied. First, IBM relies on an Administrative Hearing decision of the Department from 2002, which was overruled by the Illinois Appellate Court one year later in *Zebra Technologies Corp. v. Topinka*, 344 Ill.App.3d 474 (1st Dist. 2003). Second, the Department's *prima facie* case may only be overcome by documentary evidence. IBM has attached no sworn evidence of WTC's property and payroll factors to its Motion. Third, the Department's authority to "impute" property and payroll is only reached if IBM establishes that WTC meets every element of the 80/20 business activity test and is therefore exempt from Illinois taxation. IBM has not shown through testimony and documents that 80% or more of WTC's business activity was outside the U.S. in the Years at Issue. Therefore, the Department's authority to impute need not be decided. Likewise, a decision holding that the Department is not authorized to impute property and payroll would not fully

resolve this case because IBM must establish that WTC is entitled to the 80/20 exemption. Finally, whether WTC is exempt from IBM's Illinois unitary business group because at least 80% of WTC's business activity (as defined by the 80/20 Business Activity Test) was conducted outside the water's edge of the United States in the Years at Issue is a mixed question of law and fact. Material issues of fact exist concerning WTC's business activity, which prevent this Tribunal from granting IBM's Motion for Summary Judgment. For these reasons, IBM's Motion for Summary Judgment should be denied.

II. FACTS

The following facts concern the income tax periods ending December 31, 2007 and December 31, 2008, unless otherwise noted.

1. IBM and WTC are members of the same Unitary Business Group as defined by 35 ILCS 5/1501(a)(27). Affidavit of Angele Morgan, ¶11, Exhibit 2 to the Department's Response.
2. WTC is a Delaware corporation with its headquarters in New York.
3. The Department audited IBM's Illinois corporate income and replacement tax returns for the Years at Issue. Affidavit of Angele Morgan, ¶3, Exhibit 2 to the Department's Response.
4. IBM failed and refused to provide some information requested by the auditor. Affidavit of Angele Morgan, ¶¶7, 8, Exhibit 2 to the Department's Response.
5. A "legal relationship of employer and employee" may have existed between WTC and individuals other than those presented to the auditor in the form of W-2 Forms. Affidavit of Angele Morgan, ¶14(f), Exhibit 2 to the Department's Response.
6. The auditor requested information regarding names, and compensation of the officers of WTC. Affidavit of Angele Morgan, ¶6, Exhibit 2 to the Department's Response.
7. IBM refused to provide the Department's auditor with any information concerning the compensation of the officers of WTC. Affidavit of Angele Morgan, ¶7, Exhibit 2 to the Department's Response.

8. IBM has not provided supporting documentation to show that WTC maintained employees based in countries other than the United States in 2007 and 2008 or the compensation of those employees. Affidavit of Angele Morgan, ¶13(b), Exhibit 2 to the Department's Response.
9. During the audit, IBM provided no documentation supporting WTC's real or tangible personal property figures. Affidavit of Angele Morgan, ¶9, Exhibit 2 to the Department's Response.
10. On September 24, 2014, the Department issued Notices of Deficiency ("Notices") to IBM proposing an assessment of \$15,641,342.00 in tax, \$6,256,536.80 in penalty, and \$6,024,387.88 in interest for tax years ending December 31, 2007 and December 31, 2008. Exhibit 1 to the Department's Response.

IV. ARGUMENT

Summary judgment is proper only when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *American States Ins. Co. v. Hamer*, 352 Ill.App.3d 521, 522 (1st Dist. 2004); 735 ILCS 5/2-1005(c). The court will "consider the pleadings, depositions, and any affidavits, drawing all reasonable inferences from them in a light most favorable to the non-moving party." *Nordness v. Mitek Corp. Surgical Products, Inc.* 286 Ill.App.3d 761, 762 (1st Dist. 1997). A motion for summary judgment is particularly appropriate when only a question of law is involved. *First of America Bank, Rockford, N.A. v. Nestch*, 166 Ill.2d 165 (1995). A question of statutory construction or interpretation presents a question of law that is ripe for a summary judgment motion. *Rice v. Board of Trustees of Adams County*, 326 Ill.App.3d. 1120, 1122 (4th Dist. 2002); *Northwest Airlines, Inc. v. Department of Revenue*, 295 Ill.App.3d 889, 892 (1998). However, "[a] triable issue precluding summary judgment exists where the material facts are disputed, or where, the material facts being undisputed, reasonable persons might draw different inferences from the undisputed facts."

Adams v. Northern Illinois Gas Co., 211 Ill.2d 32, 43 (2004). Summary judgment “is a drastic means of disposing of litigation and, therefore, should be allowed only when the right of the moving party is clear and free from doubt.” *Gilbert v. Sycamore Mun. Hosp.*, 156 Ill.2d 511, 518 (1993).

A. IBM’s Motion for Summary Judgment is Legally Insufficient and Must be Denied

Petitioner’s motion entitled “Motion for Summary Judgment” is in fact a Motion for Judgment on the Pleadings. *Tompkins v. France*, 21 Ill.App.2d 227, 230-31 (1st Dist. 1959) (“A motion for a judgment on the pleadings submits to the court that there is no issue of fact to be tried and that the moving party is entitled to judgment under the averments and admissions made by the pleadings. A summary judgment, on the other hand, may be based on affidavits and the submission of documents revealing that no genuine issue of fact is involved.”); *State Farm Fire & Cas. Co. v. Kleckner*, 194 Ill.App.3d 371, 375 (2d Dist. 1990) (“A motion for judgment on the pleadings differs from a summary judgment motion in that the former asserts that the movant is entitled to judgment solely on the basis of the pleadings, while the latter may include affidavits, deposition transcripts and other evidentiary documents in order to establish the absence of a factual issue.”). A proper Motion for Summary Judgment must either contain an Affidavit attesting to the undisputed material facts, or the Petition must be verified. *In re Marriage of Colangelo and Sebela*, 355 Ill.App.3d 383, 393 (2d Dist. 2005) citing *Rotzoll v. Overhead Door Corp.*, 289 Ill.App.3d 410, 418 (4th Dist. 1997) (Unsworn, unverified statements may not be considered in ruling on a motion for summary judgment.). Where the movant fails to attach an affidavit and the movant’s complaint is not verified, the non-moving party may rely on the Answer to establish a triable issue of fact. *Komater v. Kenton Court Associates*, 151 Ill.App.3d 632, (2d Dist. 1986) (citing *Smith v. St. Therese Hospital* 106 Ill.App.3d 268, 270 (2d Dist. 1982)

and *Cato v. Thompson* 83 Ill.App.3d 321, 323, (2d Dist. 1980)).

Here, IBM's Petition is not verified and IBM failed to attach any affidavits to its "Motion for Summary Judgment." Thus, none of the "FACTS" cited in Section II of Petitioner's Motion may be considered by this Tribunal. *In re Marriage of Colangelo and Sebela*, 355 Ill.App.3d 383, 393 (2d Dist. 2005) citing *Rotzoll v. Overhead Door Corp.*, 289 Ill.App.3d 410, 418 (4th Dist. 1997) (Unsworn, unverified statements may not be considered in ruling on a motion for summary judgment.). Therefore, this Tribunal should construe Taxpayer's "Motion for Summary Judgment" as a Motion for Judgment on the Pleadings. Since IBM failed to attach an Affidavit (and its complaint is not verified), the Department may rely on its Answer to establish a triable issue of fact. *Komater v. Kenton Court Associates*, 151 Ill.App.3d 632, (2d Dist. 1986) (citing *Smith v. St. Therese Hospital* 106 Ill.App.3d 268, 270 (2d Dist. 1982) and *Cato v. Thompson* 83 Ill.App.3d 321, 323, (2d Dist. 1980). The Department's Answer raises triable issues of fact as to WTC's U.S. business activity, including WTC's payroll factor and WTC's property factor, for purposes of the 80/20 Business Activity Test pursuant to 35 ILCS 5/1501(a)(27). *See* Department's Answer, ¶¶ 12, 13, 18, 22, **26, 27, 28, 29**, 31, 35, 37, 38, 41, 42, 43, 44, 45, 47, 48, 49, 50, 51, 52, 54, 55, 57, 59, 75, 77, 78, 79, 81, 83, 85, 86, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 106, 107, 108, 109, 110, 111, 113, 119, 120, 121, 122, 123, and 125 for example, and Affidavit of Angel Morgan dated January 6, 2015, attached to Department's Answer. For these reasons alone, IBM's Motion for Summary Judgment must be denied.

B. If construed as a Motion for Summary Judgment, the Motion should be Denied

If this Tribunal finds that IBM's "Motion for Summary Judgment" cannot be construed as a Motion for Judgment on the Pleadings, the Department asserts that the Motion should be denied for several other reasons. First, IBM has not overcome the Department's *prima facie* case. Second, IBM has not met its burden of establishing by clear and convincing evidence that 80% or more of WTC's business activity was outside the U.S. Third, for its argument that the Department may not "impute" property and payroll to WTC, IBM relies on an administrative decision that was overruled.

a. IBM has not put forth evidence to overcome the Department's *prima facie* case

The Department's Notice of Deficiency is *prima facie* evidence of the correctness of the Department's assessment. 35 ILCS 5/904. *Balla v. Dep't of Revenue*, 96 Ill.App.3d 293, 295 (1st Dist. 1981). Copies of the Department's Notices of Deficiency are attached as Exhibit 1 to Department's Response. "To overcome the Department's *prima facie* case, a taxpayer must present more than its testimony denying the accuracy of the assessments, but must present sufficient documentary support for its assertions." *Mel-Park Drugs, Inc. v. Department of Revenue*, 218 Ill.App.3d 203, 217, 577 N.E.2d 1278 (1991).

IBM has failed to present either testimony or documentation showing the correctness of WTC's alleged payroll factor or property factor. IBM attached to its Motion only Department's Notices (Memorandum in Support of Motion for Summary Judgment ("IBM MOL"), Exhibit B) and the Auditor's worksheets (IBM MOL, Exhibit A). Because IBM did not provide testimony or documentation of WTC's property and payroll factors, IBM has failed to overcome the

Department's prima facie case. Because IBM has not overcome the Department's *prima facie* case, summary judgment cannot be granted to IBM.

b. IBM has not met its Burden of Proving Entitlement to the Exemption

IBM seeks an exemption from the rule in Section 304 of the IITA, which requires WTC's income to be included in IBM's unitary business income because WTC and IBM are members of a Unitary Business Group. *Zebra Technologies Corp. v. Topinka*, 344 Ill.App.3d 474, (1st Dist. 2003) ("The 80/20 rule, in our view, is an exception to the rule announced in section 304(e) of the Act.").

When a taxpayer claims that it is exempt from a particular tax, the burden is on the taxpayer to prove that it meets every element of the exemption. *Balla*, 96 Ill.App.3d at 295; *United Airlines v. J. Thomas Johnson, Director of Revenue*, 84 Ill. 2d 446, 455 (1981); *Bodine Electric Co., v. Allphin*, 81 Ill.2d 502, 513 (1980). Deductions and exemptions are privileges created by statute as a matter of legislative grace. *Bodine*, 81 Ill.2d at 512-13. Statutory exemptions to taxation are strictly construed in favor of taxation. *United Airlines*, 84 Ill. 2d at 455; *Central Illinois Light Co.*, 336 Ill.App.3d 908, 912 (3rd Dist., 2003); *Balla*, 96 Ill.App.3d at 295. "Every presumption is against the intention to exempt property from taxation." *United Airlines*, 84 Ill. 2d at 456. The party seeking the exemption has the burden of proving by clear and convincing evidence that it is entitled to the exemption. *United Airlines*, 84 Ill. 2d at 455 ("A person claiming an exemption from taxation has the burden of proving clearly that he comes within the statutory exemption."); *Central Illinois Light Co.*, 336 Ill.App.3d at 227 ("The party seeking the exemption bears the burden of clearly and conclusively proving it is entitled to the exemption."). Such evidence must be in the form of documentation. *Mel-Park Drugs, Inc. v. Department of Revenue*, 218 Ill.App.3d 203, 217, 577 N.E.2d 1278 (1991). In considering tax

exemptions, all debatable questions must be decided in favor of taxation. *United Airlines*, 84 Ill. 2d at 455; *Central Illinois Light Co.*, 336 Ill.App.3d at 227.

To determine whether IBM has met its burden of establishing each element of the tax exemption, we must first consider what the 80/20 Business Activity Test requires.

i. Illinois' 80/20 Business Activity Test

The definition of a Unitary Business Group in the IITA (35 ILCS 5/101 et seq.) provides the foundation for the 80/20 business activity test. Section 1501(a)(27)(A) provides:

(A) The term "unitary business group" means ***
The 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**; for purposes of this paragraph and clause (a)(3)(B)(ii) of Section 304, business activity within the United States shall be measured by means of the factors ordinarily applicable under subsections (a), (b), (c), (d), or (h) of Section 304 except that, in the case of members ordinarily required to apportion business income by means of the 3 factor formula of property, payroll and sales specified in subsection (a) of Section 304, including the formula as weighted in subsection (h) of Section 304, such members shall not use the sales factor in the computation and the results of the property and payroll factor computations of subsection (a) of Section 304 shall be divided by 2 (by one if either the property or payroll factor has a denominator of zero). . . .

35 ILCS 5/1501(a)(27).

Department Regulation 100.9700(c) provides additional guidance.

(c) The 80-20 U.S. business activity test for prospective members
The factors to be used in determining whether 80% or more of a person's business activity is conducted outside the United States shall be gross figures without eliminations premised on the person's membership in any unitary business group. However, the factors should relate to the common taxable year, as defined in Section 100.5265 of this Part, of the unitary business group of which the person being tested could become a member were the person's business activity found to be less than 80% outside the United States. The factors to be used are as follows:

- 1) persons required to apportion business income under IITA
Section 304(a) will use property and payroll, ***.

86 Ill. Admin. Code § 100.9700(c). The IITA defines both the property factor and the payroll factor. 35 ILCS 5/304(a). Section 304(a) provides:

(1) Property factor.

(A) The property factor is a fraction, the numerator of which is the average value of the person's real and tangible personal property owned or rented and used in the trade or business in this State during the taxable year and the denominator of which is the average value of all the person's real and tangible personal property owned or rented and used in the trade or business during the taxable year.

(2) Payroll factor.

(A) The payroll factor is a fraction, the numerator of which is the total amount paid in this State during the taxable year by the person for compensation, and the denominator of which is the total compensation paid everywhere during the taxable year.

35 ILCS 5/304(a). For purposes of the 80/20 Business Activity Test the phrase “in this State” is replaced with “in the United States.” IDOR, Sch. UB Instructions, Section D (2007)¹. Thus, the property factor, for purposes of the 80/20 business activity test, is:

¹ Instructions to Schedule UB for 2007 provide:

Section D — Attach a list of all persons excluded due to the 80/20 rule and all other persons not listed in Sections A through C. *** A unitary business group may not include any person whose business activity outside of the United States is 80 percent or more of its total business activity (the 80/20 rule). To determine whether a potential member is excluded by the 80/20 rule, you must use the factors normally required to use to apportion business income (under IITA, Section 304), with three exceptions. First, the numerator of each factor will include business activity in the U.S. (the 50 states and D.C.) rather than in Illinois alone. Second, if you use the single sales factor formula in IITA 304(a) to apportion your business income, you do not use the sales factor in applying the 80/20 rule. Instead, you must use only your payroll and property factors, computed in the same manner as these factors were computed for tax years ending prior to December 31, 2000. For example, if 85 percent of your property and 95 percent of your payroll is outside the United States, then 90 percent of your business activity is conducted outside the United States (85 percent plus 95 percent, divided by 2) and you cannot be included in a unitary business group even if 100 percent of your sales are made in the United States. Third, to determine the relevant apportionment factors, you should use gross figures without eliminations for transactions with other members of your group. Foreign corporations filing U.S. Form 1120F, will meet the 80/20 test because only their domestic property and payroll figures

(A) The property factor is a fraction, the numerator of which is the average value of the person's real and tangible personal property owned or rented and used in the trade or business in **the United States** during the taxable year and the denominator of which is the average value of all the person's real and tangible personal property owned or rented and used in the trade or business during the taxable year.

Likewise, the payroll factor is:

The payroll factor is a fraction, the numerator of which is the total amount paid in **the United States** during the taxable year by the person for compensation, and the denominator of which is the total compensation paid everywhere during the taxable year.

The Department's regulations provide further guidance on what items are included in the property factor and the payroll factor, respectively.

Property factor

Regulation 100.3350, entitled Property Factor, provides: "a) The property factor of the apportionment formula for each trade or business of a person shall include all **real and tangible personal property** owned or rented by such person and used during the tax period in the regular course of such trade or business." 86 Ill. Admin. Code § 100.3350(a). (Emphasis added.)

Regulation 100.3350 further provides:

e) Valuation of owned property. Property owned by the person shall be valued at its original cost. As a general rule "original cost" is the basis of property for federal income tax purposes at the time of acquisition and will not reflect any federal adjustments thereafter for deductions for depreciation, depletion, amortization and the like.

f) Valuation of rented property

1) Property rented by the person is valued at eight times the net annual rental rate. The net annual rental rate for any item of rented property is the annual rental rate paid by the person for such property, less the aggregate annual subrental rates paid by subtenants of the person. (**See Section 100.3380(a) for special**

will be used in the "everywhere" denominators, rather than worldwide "everywhere" figures.

rules where the use of such net annual rental rate produces a negative or clearly inaccurate value or where property is used by the person at no charge or rented at a nominal rental rate.) ***

86 Ill. Admin. Code § 100.3350(f). (Emphasis added.) Regulation 100.3380(a) was amended in 2008. 32 Ill. Reg. 10170, effective June 30, 2008. However, Regulation 100.3350 has not been amended since 2002. 26 Ill. Reg. 13237, effective August 23, 2002. Therefore, what was subsection (a) of Regulation 100.3380 is now subsection (b). Subsection (b) of Regulation 100.3380 provides:

b) Property Factor. The following special rules are established in respect to the property factor in IITA Section 304(a)(1): 1) *** 2) If property owned by others is used by the person at no charge or rented by the person for a nominal rate, the net annual rental rate for the property shall be determined on the basis of a reasonable market rental rate for such property.

86 Ill. Admin. Code § 100.3380(b).

Payroll factor

Department Regulation 100.3360 ("Payroll Factor") describes the items comprising the payroll factor. Subsection (a) of Regulation 100.3360 provides: "a) In general. 1) The payroll factor of the apportionment formula for each trade or business of an employer shall include the total amount paid by the employer in the regular course of its trade or business for compensation during the tax period." 86 Ill. Admin. Code § 100.3360(a). "Compensation" is defined in the IITA and the Department's regulations. IITA Section 1501(a)(3) defines compensation as: "wages, salaries, commissions and any other form of remuneration paid to employees for personal services." 35 ILCS 5/1501(a)(3). In addition to the above, Department Regulation 100.3100 ("Compensation") provides that:

(b) Employee. Compensation is defined as remuneration for personal services performed by an "employee". If the employer-

employee relationship does not exist, remuneration for services performed does not constitute "compensation." The term "employee" includes every individual performing services if the relationship between him and the person for whom he performs such services is the legal relationship of employer and employee. The term has the same meaning under the Illinois Income Tax Act as under 26 U.S.C. Section 3401(c) and 26 CFR 31.3401(c)-1.

86 Ill. Admin. Code § 100.3100(b).

Treasury Regulation Section 31.3401(c)-1 provides a detailed description of the term "employee." Treas. Reg. § 31.3401(c)-1 (1960) (hereinafter cited as 26 CFR 31.3401(c)-1).

Employee.

(a) The term employee includes every individual performing services if the relationship between him and the person for whom he performs such services is **the legal relationship of employer and employee.**

(b) Generally the relationship of employer and employee exists when the person for whom services are performed **has the right to control and direct the individual who performs the services**, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, **it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so.** The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are **the furnishing of tools and the furnishing of a place to work** to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is not an employee.

(c) Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are not employees.

(d) Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

(e) If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like.

(f) All classes or grades of employees are included within the relationship of employer and employee. Thus, superintendents, managers and other supervisory personnel are employees.

Generally, an officer of a corporation is an employee of the corporation. However, an officer of a corporation who as such does not perform any services or performs only minor services and who neither receives nor is entitled to receive, directly or indirectly, any remuneration is not considered to be an employee of the corporation. A director of a corporation in his capacity as such is not an employee of the corporation.

(g) The term employee includes every individual who receives a supplemental unemployment compensation benefit which is treated under paragraph (b)(14) of § 31.3401(a)-1 as if it were wages.

(h) Although an individual may be an employee under this section, his services may be of such a nature, or performed under such circumstances, that the remuneration paid for such services does not constitute wages within the meaning of section 3401(a).

26 CFR 31.3401(c)-1. (Emphasis added.)

In summary, the statutory and regulatory scheme provides that “business activity” for purposes of the 80/20 Business Activity Test consists of two factors: property and payroll.² The numerator of each factor is the property/payroll within the water’s edge of the United States. The denominator is the property/payroll everywhere. 35 ILCS 5/1501(a)(27). Property includes real and tangible personal property used by the taxpayer during the tax year. 35 ILCS 5/304(a)(1)(A). The value of the property is determined by either its original cost, rental rate, or, if used at no charge or for only a nominal charge, the reasonable market rental rate. 86 Ill. Admin. Code §§ 100.3350, 100.3380(b)(2). Payroll includes remuneration for personal services performed by a person with the legal relationship of employee. 86 Ill. Admin. Code § 100.3360(a), 100.3100; 26

² In most cases the only factors will be property and payroll. However, some taxpayers may be required to use the sales factor, or other factors designated in the IITA. 35 ILCS 5/1501(a)(27); 35 ILCS 5/304.

CFR 31.3401(c)-1. Employees include officers, unless the taxpayer can show (1) the officer performs no services or only minor services, and (2) the officer neither receives nor is entitled to receive remuneration for the services performed. 26 CFR 31.3401(c)-1.

- ii. IBM has not provided sworn testimony or documentation showing it meets each element of the 80/20 Business Activity Test

During her audit, the auditor requested several kinds of information including written descriptions and documentation. Affidavit of A. Morgan, ¶¶4, 6, 8, Exhibit 2 to Dept's Response. IBM failed to provide sufficient information and documentation to satisfy the auditor that WTC met the 80/20 business activity test. IBM failed to provide documentation of real or tangible personal property used by WTC's 20 employees it admits were based in the U.S. Affidavit of A. Morgan, ¶8. IBM refused to provide any documentation of the remuneration of the officers of WTC. Affidavit of A. Morgan, ¶7. Because incomplete information was provided during the audit regarding WTC's property and payroll, the Department's auditor used the best information available to her in determining that IBM failed to demonstrate that more than 80% of WTC's activities were conducted outside the United States. Affidavit of A. Morgan, ¶¶10, 11.

IBM has yet to provide this information. IBM has not attached an affidavit to its Motion attesting to each element of the 80/20 Business Activity Test. Nor has IBM attached any supporting documentation showing the amount of WTC's payroll factor and property factor. In both its Petition and Motion, IBM asserts that more than 80% of WTC's business activity was located outside the United States. However, IBM has not provided any sworn testimony to support its allegations. More importantly, IBM has not attached any documentation evidencing the total compensation of all WTC employees, the duties of WTC's officers, the remuneration of WTC's officers, the duties of any foreign-based employee who performed services in the U.S.,

the compensation of any foreign-based employee who performed services in the U.S., the real and tangible personal property utilized by WTC, the cost or reasonable rental rate of WTC's real and tangible property everywhere, the real and tangible personal property utilized by WTC in the U.S., or the cost or reasonable rental rate of WTC's real and tangible personal property located in the U.S.³

Because IBM has not attached an affidavit to its Motion attesting to each element of the 80/20 Business Activity Test and has not attached any supporting documentation showing the amount of WTC's payroll factor and property factor, IBM has failed to meet its burden of establishing by "clear and convincing evidence" that it is entitled to the 80/20 Business Activity exemption from IITA Section 304(a). 35 ILCS 5/1501(a)(27); *United Airlines*, 84 Ill. 2d at 455; *Zebra Technology Corporation*, 344 Ill.App.3d 474, 483, 799 N.E.2d 725 (1st Dist. 2003). Until IBM shows that WTC meets the 80/20 Business Activity Test, the Department's authority to impute property and payroll is not an issue.

c. **Department v. Shanghai, IT 01-2 was overruled by Zebra Technologies**

In support of its contention that the Department has no authority to "impute property and payroll" to WTC, Petitioner relies on an administrative decision that has been overruled. IBM relies on the Department's Office of Administrative Hearings Decision, *Ill. Dep't of Revenue v. Shanghai, Inc.*, IT 02-1 (Office of Admin. Hearings Feb. 2, 2002), to support its argument that, as a matter of law, the Department may not impute property and payroll of IBM to WTC. What IBM fails to mention is that *Shanghai* was overruled one year later by the Illinois First District Appellate Court's decision in *Zebra Technology Corporation v. Topinka*, 344 Ill.App.3d 474, 483, (1st Dist. 2003).

³ This is only an example of some evidence which IBM could provide to prove the claimed exemption by clear and convincing evidence. This is not an exhaustive list.

In *Zebra*, the court held that Zebra's subsidiaries were not entitled to the 80/20 business activity exemption because Zebra failed to sustain its burden of proving that Zebra's subsidiaries should have been excluded from its Illinois unitary group. *Zebra*, 344 Ill.App.3d at 483. In *Zebra*, the trier of fact found that all property owned by the subsidiaries was located in Bermuda. *Id.* at 484. However, a considerable amount of business activity relating to development, protection, and quality control of the intellectual property used by the subsidiaries was conducted by Zebra's employees in the United States. *Id.* The court found that "[b]ecause taxpayer knew the extent to which this activity was conducted in the United States, it could have calculated the percentage of the activities conducted within and without the United States such that it could show compliance with the exemption requirements in section 1501(a)(27) of the [Illinois Income Tax] Act." *Id.* at 484. However, Zebra failed to make such calculation. *Id.* The court stated that "taxpayer was the only one able to produce the evidence necessary to show that it was entitled to the exclusion under the 80/20 rule, it chose to stand on the evidence it produced about the property and . . . salary and nothing more." *Id.* Because Zebra failed to introduce evidence of its activities conducted on behalf of the subsidiaries, the court held that "taxpayer failed to sustain its burden on the threshold issue of qualifying to exclude [the subsidiaries] from its unitary business group under section 1501(a)(27) of the Act." *Id.* at 485. Thus, *Zebra* held that personal services performed in the U.S. on behalf of the alleged-80/20 subsidiary must be included in the property and payroll factors for purposes of determining U.S. business activity under the 80/20 business activity test. *Id.*

Shanghai is also factually distinguishable from the case at bar. In *Shanghai*, the ALJ considered whether the taxpayer's subsidiary met the 80/20 business activity test and concluded that the taxpayer's subsidiary did meet the 80/20 Business Activity Test. *Shanghai, Inc.*, IT 02-1,

p. 30-31. However, the facts upon which the ALJ based his decision for the taxpayer do not exist in the instant case. In *Shanghai*, the parties stipulated that the subsidiary did not have any employees. Therefore, the administrative law judge found that the payroll factor numerator and denominator were zero. *Id.* at p. 24. The parties also stipulated that taxpayer owned no real or tangible personal property. The ALJ found that the subsidiary had no rental property in the U.S. and that property in the U.S. used by parent to perform services on behalf of subsidiary could not be allocated to subsidiary. *Id.* at p. 24-28.

In the case at bar, there are no stipulations. Additionally, there are no facts in the record showing the number of WTC's U.S. employees, including officers, and their respective compensation, and foreign employees who were compensated for work performed in the U.S. Moreover, there are no facts in the record showing WTC's U.S. real and tangible personal property and the cost or reasonable rental rate of that property.

Most importantly, the holding in *Shanghai* was overruled by *Zebra Technology Corporation*. *Zebra Technology Corporation v. Topinka*, 344 Ill.App.3d 474, 483, 799 N.E.2d 725 (1st Dist. 2003). The *Zebra* holding established the Department's right to allocate property and payroll to the alleged 80/20 subsidiary when personal services are performed on behalf of that subsidiary in the U.S. *Zebra*, 344 Ill.App.3d at 485. Therefore, if this Tribunal finds the issue raised by Petitioner's motion is a purely legal issue, this Tribunal should deny IBM's Motion for Summary Judgment.

d. Material Facts are Disputed and Department is Entitled to Discovery of IBM's alleged facts

The true issue in this case – whether WTC is exempt from IBM's Illinois unitary business group because at least 80% of WTC's business activity (as defined by the 80/20 Business Activity

Test) was conducted outside the water's edge of the United States in the Years at Issue – is a mixed question of law and fact. *Zebra*, 344 Ill.App.3d at 485 (holding that taxpayer failed to establish sufficient facts to show subsidiary qualified for the 80/20 business activity exemption). The Department asserts that material issues of fact exist which prevent this Tribunal from granting summary judgment in favor of the Petitioner. Pursuant to Illinois Supreme Court Rule 191(b) the Department incorporates affidavits in support of its contention that material issues of fact are disputed. Exhibit 2 to Department's Response.

Specifically, Department disputes that IBM provided W-2 Forms for all employees of WTC for the years at issue. IMB's MOL, pg. 3, #3. IBM did not provide W-2 Forms (or any other documentation of compensation) for the officers of WTC. Department disputes the number of foreign employees of WTC, and disputes that foreign "contractors" can be included in everywhere payroll. IMB's MOL, pg. 3, #4. Department disputes that IBM provided the Department's auditor with documentation that illustrated WTC's U.S. property for the Years at Issue. IMB's MOL, pg. 3, #5. Department disputes that the tax return documentation contained sufficient information to show WTC's everywhere property and payroll. IMB's MOL, pg. 3, #6. Department disputes that WTC qualified as an 80/20 Company, and disputes that IBM produced sufficient evidence, either at audit or since, to establish WTC's claimed 80/20 exemption. IMB's MOL, pg. 3, #7, 8, 12, 13. Department disputes that Department's sole basis for determining that WTC did not meet the 80/20 business activity test was the imputation of property and payroll from IBM to WTC. IMB's MOL, pg. 3, #12.

Department also asserts that the following factual issues must be developed in order to determine whether WTC is properly excludable from IBM's unitary business group:

1. What was the compensation (including stock options, employee benefits, etc.) of WTC's officers in 2007 and 2008, respectively?
2. Were any other individuals with whom WTC had a "legal relationship of employer and employee" excluded from the employees presented to the auditor (in the form of W-2 Forms) for 2007 and 2008?
 - a. Did any foreign-based WTC employees perform services in the U.S.?
 - b. Were any U.S.-based employees of WTC excluded because the individuals worked on foreign operations of WTC?
3. Where (street address, city, state) did WTC's employees and officers work in 2007 and 2008?
4. What property did WTC use in the U.S.? What was the cost or value of that property?
 - a. What is the cost, rent or reasonable market rental rate of WTC's U.S. headquarters in New York and any other real property in the U.S. utilized by WTC?
 - b. What is the cost, rent or reasonable market rental rate of the personal property (desks, chairs, computers, printers, cars, etc.) used by WTC in the U.S.?
5. Did any persons (individuals or entities) perform services on behalf of WTC in the United States that should be allocated to WTC to determine its U.S. business activity?
 - a. Who protected and enforced the intellectual property licensed by WTC?

Finally, the Department is entitled to investigate the veracity of IBM's allegations and discover any contradictory testimony and documents. Ill. Sup. Ct. Rules, Rule 201(b)(1) ("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.”); 35 ILCS 5/914⁴; 35 ILCS 5/501(a)⁵.

V. CONCLUSION

This Tribunal should treat IBM’s motion as a Motion for Judgment on the Pleadings, and deny its motion because a triable issue of fact was raised by the Department’s Answer. However, if this Tribunal treats IBM’s Motion as a Motion for Summary Judgment then all reasonable inferences from the pleadings, depositions, and any affidavits, must be drawn in the light most favorable to the Department. *Nordness v. Mitek Corp. Surgical Products, Inc.* 286 Ill.App.3d 761, 762 (1st Dist. 1997). When viewing the facts in the light most favorable to the Department this Tribunal should find that IBM has not provided sufficient evidence to overcome the Department’s prima facie case, nor has IBM proved by clear and convincing evidence that WTC meets the 80/20 business activity exemption. Also, when the facts are viewed in the light most favorable to the Department, material issues of fact exist that prevent summary judgment. Finally, this Tribunal should find that it is bound by the Illinois Appellate Court’s decision in *Zebra* and therefore, the *Shanghai* holding is not applicable or persuasive. For these reasons, the Department requests that Petitioner’s Motion for Summary Judgment be denied.

⁴ Section 914 of the Illinois Income Tax Act provides in relevant part: “For the purpose of administering and enforcing the provisions of this Act, the Department, or any officer or employee of the Department designated, in writing, by the Director may hold investigations and hearings concerning any matters covered by this Act that are not otherwise delegated to the Illinois Independent Tax Tribunal, and may examine any books, papers, records or memoranda bearing upon such matters, and may require the attendance of any person, or any officer or employee of such person, having knowledge of such matters, and may take testimony and require proof for its information.” 35 ILCS 5/914.

⁵ Section 501(a) provides: “In general. Every person liable for any tax imposed by this Act shall keep such records, render such statements, make such returns and notices, and comply with such rules and regulations as the Department may from time to time prescribe. Whenever in the judgment of the Director it is necessary, he may require any person, by notice served upon such person or by regulations, to make such returns and notices, render such statements, or keep such records, as the Director deems sufficient to show whether or not such person is liable for tax under this Act.”

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Respectfully submitted,

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