

IN THE ILLINOIS INDEPENDENT TAX TRIBUNAL

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

**PEPSICO’S RESPONSE TO THE DEPARTMENT’S
MOTION TO STRIKE THE CERTIFICATION OF CHARLES MUELLER**

Pursuant to the Tax Tribunal’s Order, dated April 22, 2022, Petitioner, PepsiCo, Inc. and Affiliates (“PepsiCo”), hereby responds to Respondent’s, the Illinois Department of Revenue (“Department”), Motion to Strike the Certification of Charles Mueller. The Motion to Strike must be denied. The Department’s claim that Mr. Mueller’s “testimony in the Certification contradicts the facts in the record” is false. Nothing set forth in Mr. Mueller’s Certification is in conflict with the existing factual record stipulated by the parties in connection with the classification of Frito-Lay North America, Inc. (“FLNA”) as an 80/20 Company. Mr. Mueller’s Certification does set forth additional facts detailing his direct and personal knowledge of PepsiCo’s state tax compliance practices generally, as well as actions taken in connection with the classification of FLNA as an 80/20 Company for Illinois tax purposes. The Department’s attempt to contradict Mr. Mueller’s factual statements by reference to the Tax Tribunal’s legal conclusions is inappropriate. The facts set forth in Mr. Mueller’s Certification are critical to the reasonable cause penalty abatement petition currently before the Tax Tribunal. The Department’s Motion to Strike Mr. Mueller’s Certification in whole or in part is inappropriate and must be denied.

I. The Department’s Statement That Mr. Mueller’s Certification Contradicts The Facts In The Record Is False

The Department erroneously states that Mr. Mueller’s “testimony in the certification contradicts the facts in the record ...” *See* Motion to Strike, Page 4. The Department’s Motion fails to note a single statement in support of its claim. This is because nothing in Mr. Mueller’s Certification contradicts the existing factual record.

Rather, in fact, the Certification statements identified by the Department as being problematic are directly supported by the Joint Stipulations of Fact, as signed by the parties on January 20, 2020 (“Joint Stipulation”). More specifically, the Department calls Mr. Mueller’s statements “unsupportable” when, in fact, these statements are directly drawn from the stipulated factual record the parties spent *over two years* investigating and developing. For example, the Department moves to strike Certification ¶ 36 as “conclusory, self-serving, and lacking any foundation” and “contradicts the findings of this Tribunal” *despite the fact that this statement recites Joint Stipulation, ¶ 58 word-for-word*. The Department’s Motion to Strike consists of similar baseless attacks on Mr. Mueller’s statements. *See, e.g.*, Certification ¶¶ 41-45 (Joint Stip. ¶¶ 81-85 and Exhibit 17 (PEP00004814-4827)), Certification ¶¶ 48-49 (Joint Stip. ¶¶ 27, 47, 54-56, 58, 86), and Certification ¶¶ 73-74 (Joint Stip. ¶¶ 62 (amended), 92, 103-105, 112). Mr. Mueller’s Certification offers no new facts related to the merits of the legal determination of whether FLNA is an 80/20 Company for Illinois tax purposes and is fully consistent with the Joint Stipulation.

II. Mr. Mueller’s Certification Relies On His Personal Knowledge And Is Directly Relevant To The Penalty Abatement Issue Before The Tax Tribunal

The sole inquiry presented by the parties’ cross-motions for summary judgment is whether PepsiCo “exercised ordinary business care and prudence” in determining that FLNA qualified as an 80/20 Company for Illinois tax purposes. 86 Ill. Admin. Code § 700.400. Given Mr. Mueller’s role and responsibilities as Vice President of State and Local Tax during the years at issue, his direct personal knowledge regarding the facts surrounding the protocols, processes, and activities related to PepsiCo’s tax compliance generally, and its determination regarding FLNA specifically, is directly relevant to the question of penalty abatement.

The Department misstates Illinois Supreme Court Rule 191 (“Rule 191”) in moving to strike Mr. Mueller’s Certification. Under Rule 191, affidavits “shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all documents upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto.” *See also Geary v. Telular Corp.*, 341 Ill. App. 3d 694, 699 (1st Dist. 1993) (affidavits must contain “evidentiary facts which the affiant is capable of testifying.”).

Illinois courts routinely uphold affidavits where factual statements derive from the direct personal knowledge of the affiants. For example, in *Kreczko v. Triangle Package Machinery Co.*, the Illinois Appellate Court refused to strike the affidavit of a corporate officer because “Rule 191 is satisfied where, viewed as a whole, the affidavit relies on personal knowledge and there is a reasonable inference the affiant could competently testify to its contents at trial.” 2016 IL App (1st) 151762 at ¶ 18; *see also, e.g., Allerton, Inc. v. Nueva*

Iacos, S.A. de C.V., 283 Ill. App. 3d 40, 46 (1st Dist. 1996) (“affidavits will not be stricken for technical deficiencies, for, where ‘it appears that an affidavit is based on the personal knowledge of the affiant and a reasonable inference is that the affiant could competently testify to the contents of the affidavit at trial, there is no requirement that the affiant specifically attest to these facts.’”); and *Andrews v. Northwestern Memorial Hospital*, 184 Ill. App. 3d 486, 492 (1st Dist. 1989) (“The affidavit should not have been stricken for failure to attach documents because it appears Helman is competent to testify.”).

Mr. Mueller’s statements are precisely the type of testimony permitted under Rule 191, which all relate to the operations of PepsiCo’s tax department and PepsiCo’s decision making process in determining that FLNA was an 80/20 Company under Illinois law and related authorities -- all facts clearly within Mr. Mueller’s direct personal knowledge and experience as the former Vice President of State and Local Tax -- including: 14 (describing facts related to Mr. Mueller’s personal experience managing PepsiCo’s state / local tax function); 15 (describing facts related to PepsiCo’s best business practices as required under The Sarbanes–Oxley Act of 2002); 16-18, 20 (describing facts related to Mr. Mueller’s personal knowledge of PepsiCo’s historic state / local tax compliance history and relationship with the Department); 22 (describing facts related the complexity of PepsiCo’s Illinois corporate income tax return); and 26 (stating the fact that prior Illinois compliance issues were resolved in the audit without further litigation prior to the 2011-2013 tax years).

Accordingly, there is no basis to strike Mr. Mueller’s Certification. Rather, the proper course of action here is for the Tax Tribunal to weigh Mr. Mueller’s statements against the evidentiary record for purposes of determining whether or not reasonable cause penalty abatement is proper. See *Kutner v. De Massa*, 96 Ill. App. 3d 243, 247 (1st Dist. 1981) (under

Rule 191, “a court may receive and weigh affidavits ...”).

III. The Tax Tribunal’s Decision Does Not Contain Any Factual Findings And, Thus, Cannot Serve As A Basis To Contradict Mr. Mueller’s Factual Statements

The FLNA 80/20 Company issue was presented to the Tax Tribunal via cross-motions on a fully stipulated record. As such, by definition, the Tax Tribunal’s decision purely addresses a question of law and does not contain or reflect any factual findings or determinations. Regardless, the Department repeatedly references the Tax Tribunal’s decision in an inappropriate attempt to contradict Mr. Mueller’s Certification. *See, e.g.*, Motion to Strike, Page 3 (stating Cert. ¶¶ 36, 41-45, 48-49 must be stricken because they “contradict[] the findings of this Tribunal ...”).

The Department’s claims are false and meritless. Mr. Mueller’s Certification addresses PepsiCo’s actions and decision making process in determining that FLNA was an 80/20 Company for purposes of computing its Illinois tax liability. As evidenced by Mr. Mueller’s Certification, PepsiCo’s determination was reasonable based on the facts and law available at the time the returns were filed. The Tax Tribunal’s legal determination regarding an underlying return position in no way informs the facts surrounding PepsiCo’s actions and decision making process conducted over ten years ago.

The Department’s repeated reference and reliance on the Tax Tribunal’s decision in opposition to PepsiCo’s reasonable cause abatement request is inappropriate. The mere existence of the reasonable cause abatement provisions clearly demonstrate that the Tax Tribunal’s decision neither controls, nor informs the reasonable cause penalty abatement analysis. There would be no need for penalty abatement if PepsiCo’s original return position was consistent with the Tax Tribunal’s decision. The Department’s Motion to Strike lacks merit and must be dismissed. To hold otherwise would eliminate the opportunity for any

taxpayer to obtain reasonable cause penalty abatement after an adverse determination by the Tax Tribunal.

IV. Documentary Evidence Relied Upon / Available To Charles Mueller Regarding Certification Paragraphs 73 and 74

The Tax Tribunal's April 22nd Order makes specific reference to Paragraphs 73 and 74 of Mr. Mueller's Certification wherein Mr. Mueller states that based upon his discussions with subject matter experts from PepsiCo's global mobility transformation project team, he determined that PepsiCo Global Mobility, LLC ("PGM LLC") had business purpose (Paragraph 73) and economic substance (Paragraph 74) and orders PepsiCo to:

"provide all documentary evidence, if any, in PepsiCo's possession that was relied on or was available to Charles Mueller in making those determinations that addressed the particular issues of whether or not PGM LLC could be viewed as lacking economic substance or as a sham transaction, as this Court decided in its order of May 4, 2021, including any documentation that addressed the issues or risks that PGM LLC was potentially subject to a substance over form, lack of business purpose, and/or sham transaction arguments/disputes with state taxation agency/departments or state courts."

PepsiCo states that the entire factual and documentary record admitted into evidence as part of the Joint Stipulation was available to Mr. Mueller in making his determinations set forth in Paragraphs 73 and 74 of his Certification. The principal documents establishing the facts on which Mr. Mueller made his determinations are:

- **PepsiCo Global Mobility, LLC - Background to the Change in Entity (Sept. 2010) (Joint Stip., ¶ 158 - Exhibit 6 (PEP00002880-2888))** - PGM LLC was necessary to resolve HR / legal compliance issues related to PepsiCo's expatriate employment structure.
- **PepsiCo Global Mobility Transformation Plan (Jan. 2011) (Joint Stip., ¶ 158 - Exhibit 17 (PEP00004813-PEP00004831))** - A comprehensive global mobility transformation project team was formed to align / improve PepsiCo's expatriate program operations in accordance with industry best practices.
- **PepsiCo Global Mobility Transformation Plan (Jan. 2011) (Joint Stip., ¶ 158 - Exhibit 17 (PEP00004813-PEP00004831))** - PepsiCo's global mobility transformation project team consisted of a wide-range of business perspectives, including human resources,

compensation and benefits, talent development, etc.

- **PGM LLC expatriate secondment agreements (Joint Stip., ¶ 158 - Exhibit 25, e.g., PGM LLC and Frito-Lay Trading Co GmbH (Switzerland) (PEP00001642 - PEP00001651))** - PGM LLC was intended to operate as the common law employer of expatriates seconded outside the U.S.
- **PGM LLC letters of understanding / contracts of employment (Joint Stip., ¶ 158 - Exhibit 26, e.g., Jennifer [redacted] (PEP00000001 - PEP00000010))** - PGM LLC was intended to operate as the common law employer of expatriates seconded outside the U.S.
- **The PepsiCo Corporate Group's U.S. Benefits Plans (Joint Stip., ¶ 158 - Exhibit 29, e.g., The PepsiCo Savings Plan (Dec. 31, 2010) (PEP00003617-PEP00003850))** - PGM LLC was intended to operate as the common law employer of expatriates seconded outside the U.S.
- **Certificate of U.S. Social Security Coverage (Joint Stip., ¶ 158 - Exhibit 39, e.g., Michael [redacted] (PEP00000140 - PEP00000141))** - PGM LLC was intended to operate as the common law employer of expatriates seconded outside the U.S.
- **Foreign Country Employment / Work Permits (Joint Stip., ¶ 158 - Exhibit 40, e.g., Michael [redacted] (PEP00000142 - PEP00000146))** - PGM LLC was intended to operate as the common law employer of expatriates seconded outside the U.S.
- **PGM LLC Form W-2/W-2c (Joint Stip., ¶ 158 - Exhibit 27 (PEP00000186-209 (2011) PEP00000222-245 (2012); and PEP00000257-296 (2013))** - PGM LLC was treated as the common law employer for US payroll and tax reporting purposes.
- **PGM LLC Form 941, Employer's Quarterly Federal Tax Returns (Joint Stip., ¶ 158 - Exhibit 28 (PEP00001872-1883 (2011); PEP00001860-1871 (2012); and PEP00001652-1663 (2013))** - PGM LLC was treated as the common law employer for US payroll and tax reporting purposes.
- **Global Mobility HR Function Employee List (Joint Stip., ¶ 158 - Exhibit 8 (PEP00002531))** - Management and support functions for the expatriates were carried out for PGM LLC through a team of human resource personnel, referred to as the "Global Mobility HR Function."
- **Global Mobility HR Function Cost Summary (Joint Stip., ¶ 158 - Exhibit 9 (PEP00004921))** - Management and support functions for the expatriates were carried out for PGM LLC through a team of human resource personnel, referred to as the "Global Mobility HR Function."
- **Global Mobility Progress Toward Transformation (Mar. 2011) (Joint Stip., ¶ 158 - Exhibit 18 (PEP00001337-1362))** - Management and support functions for the expatriates were carried out for PGM LLC through a team of human resource personnel, referred to as

the “Global Mobility HR Function.”

- **Background to the Change in Entity (Sept. 2010) (Joint Stip., ¶ 158 - Exhibit 6 (PEP000002880-2888))** - After the need for PGM LLC was identified by HR / legal for all the non-tax reasons outlined above, PepsiCo’s corporate tax team was consulted and advised to organize PGM LLC as a DRE of FLNA, in part, for state tax savings.

Outside of the documentary evidence already admitted into the record as part of the Joint Stipulation previously agreed to by the parties, PepsiCo is unaware of any additional admissible documentary evidence responsive to the Tax Tribunal’s request.¹

Respectfully submitted,

PepsiCo, Inc. and Affiliates

Dated: May 26, 2022

By: /s/ Theodore R. Bots
Attorney for Petitioner

Theodore R. Bots (ARDC No. 6224515)
David A. Hemmings (ARDC No. 6307850)
BAKER & MCKENZIE LLP
300 E. Randolph Street, Ste. 5000
Chicago, IL 60601
Telephone: (312) 861-8845
Fax: (312) 698-2004
theodore.bots@bakermckenzie.com
drew.hemmings@bakermckenzie.com

¹ The Tax Tribunal’s April 22nd Order does not reference Mr. Mueller’s consultations with advisors at PwC (referenced in his Certification at Paragraphs 70 and 71) who confirmed Mr. Mueller’s view that FLNA qualified as an 80/20 Company under Illinois law. PepsiCo notes that PwC’s conclusions were ultimately memorialized into a memorandum that was obtained for the purpose of ASC 740 financial statement reporting. Mr. Mueller did not rely on the memorandum for purposes of determining whether or not PGM LLC had business purpose or economic substance. Because the memorandum summarized facts provided by PepsiCo regarding PGM LLC that PwC did not independently verify, the memorandum cannot be admitted into evidence to support or rebut any of those underlying facts. For all these reasons, the PwC memorandum is not “documentary evidence” or relevant to the issues of business purpose or economic substance.

George M. Clarke (ARDC No. 6331046)
BAKER & MCKENZIE LLP
815 Connecticut Avenue, NW
Washington, DC 20006
Telephone: (202) 835-6184
Fax: (202) 416-7184
george.clarke@bakermckenzie.com

*Attorneys for Petitioner,
PepsiCo, Inc. and Affiliates*

CERTIFICATE OF SERVICE

The undersigned counsel of record certifies that a copy of **PEPSICO’S RESPONSE TO THE DEPARTMENT’S MOTION TO STRIKE THE CERTIFICATION OF CHARLES MUELLER** was served on May 26, 2022 to the following persons:

Judge James M. Conway Chief Administrative Law Judge Illinois Independent Tax Tribunal 160 N. LaSalle Street, Room N506 Chicago, IL 60601 James.Conway@illinois.gov	Alan V. Lindquist Illinois Department of Revenue Special Assistant Attorney General 100 W. Randolph Street, 7th Floor Chicago, IL 60601 Alan.Lindquist@illinois.gov
Joseph T. Kasiak Illinois Department of Revenue 100 W. Randolph Street, Ste. 7-900 Chicago, IL 60601 Joeseeph.Kasiak@illinois.gov	Rebecca Kulekowskis Illinois Department of Revenue 100 W. Randolph Street, Ste. 7-900 Chicago, IL 60601 Rebecca.Kulekowskis@illinois.gov

/s/ Theodore R. Bots _____
Attorney for Petitioner,
PepsiCo, Inc. and Affiliates