

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.)	

**PETITIONER PEPSICO, INC. AND AFFILIATES’
MOTION FOR CORRECTION**

Petitioner, PepsiCo, Inc. and Affiliates (“PepsiCo”), by and through its counsel, moves the Illinois Independent Tax Tribunal (the “Tax Tribunal”) to correct its Order on Petitioner’s Motion for Summary Judgment entered in this matter on April 13, 2021 (the “Order”). The Order contains certain procedural deficiencies requiring correction before a final, appealable order may be entered in the above-captioned matters. In this regard, PepsiCo states:

**Procedural Deficiency #1
The Tax Tribunal Order Is Not A Final Order Subject To Appeal
Under Tax Tribunal Rule 315(e)**

1. The Tax Tribunal’s Order purports to be “a final order subject to appeal under section 3-113 of the Administrative Review Law ...” Order, Page 35. But this is in conflict with Illinois Tax Tribunal Rule 315(e).

2. More specifically, Illinois Tax Tribunal Rule 315(e) provides that “[a]n order by an administrative law judge on any motion that does not finally determine all matters and issues contained in the petition, for purposes of review by the Appellate Court, shall not be deemed final and conclusive until the administrative law judge shall have rendered a determination on the remaining matters and issues.” Ill. Admin. Code tit. 86, § 5000.315(e) (“Finality of

Orders”).

3. PepsiCo filed its first petition on April 29, 2016, Case No. 16 TT 82 (the “First Petition”). The First Petition contained ten (10) separate counts (Counts I through X) covering PepsiCo’s 2010 and 2011 tax years.

4. PepsiCo filed its second petition on February 8, 2017, Case No. 17 TT 16 (the “Second Petition”). The Second Petition contained fifteen (15) separate counts (Counts I through XV) covering PepsiCo’s 2012 and 2013 tax years.

5. On August 8, 2017, the Tax Tribunal entered an order resolving Counts II, IV, VI, VII, and VIII of the First Petition and Counts II and IV of the Second Petition. The August 2017 order resolved seven (7) of the twenty-five (25) counts at issue in the First Petition and Second Petition. As such, eighteen (18) counts remained at issue.

6. From the outset, the Parties agreed to resolve “Count I [the FLNA 80/20 Company issue] based on either cross-motions for summary judgment or through a stipulated record with some live witnesses.” Discovery Letter From Department Opposing Counsel to PepsiCo Counsel (Jul. 19, 2018) (attached as Exhibit C to PepsiCo’s Reply Memorandum In Support of Its Motion for Summary Judgment (Oct. 19, 2020)). As to everything else, the Parties agreed to hold all matters other than Count I of the First Petition and Count I of the Second Petition in abeyance, as stated in an agreed draft pre-trial order transmitted to the Tax Tribunal on October 27, 2019 (“The Parties agree that this Final Pretrial Order relates solely to the 80/20 Company Claim and further agree to hold all remaining counts and claims in abeyance pending resolution of the 80/20 Company Claim.”).

7. On April 17, 2020, PepsiCo moved for summary judgment on Count I of the First Petition and Count I of the Second Petition (*i.e.*, the FLNA 80/20 Company issue).

Specifically, PepsiCo’s Motion for Summary Judgment requested “that the Tax Tribunal enter an order (1) granting it summary judgment on Count I of the First Petition; [and] (2) granting it summary judgment on Count I of the Second Petition.” *See* Petr. Motion for Summary Judgment, Page 2 (Apr. 17, 2020).

8. PepsiCo’s Motion for Summary Judgment explained the situation with respect to the counts of the petitions that were not susceptible to resolution based on that motion: “The parties are in agreement Counts III, V, IX, X of the First Petition and Counts III, V-XII of the Second Petition shall be held in abeyance pending resolution of this Motion for Summary Judgment on Count I of each petition.” *See* Petr. Motion for Summary Judgment, Page 2 - fn. 2 (Apr. 17, 2020). Likewise, the Illinois Department of Revenue’s (the “Department”) briefs filed in response to PepsiCo’s Motion for Summary Judgment solely addressed Count I of the First Petition and Count I of the Second Petition, without reference to any of the sixteen (16) remaining counts.

9. Notwithstanding these unresolved counts, the Tax Tribunal’s Order states “the only unresolved matter is the FLNA 80/20 issue for tax years 2011 through 2013.” Order, Page 1.

10. Given the issues/counts remaining to be resolved, the Tax Tribunal’s Order cannot be a “final order” subject to appeal (Ill. Admin. Code tit. 86, § 5000.315(e)) and must be withdrawn or modified to correct that it is not “a final order subject to appeal under 3-113 of the Administrative Review Law” and set the matter for further proceedings and resolution of PepsiCo’s remaining protested issues.

Procedural Deficiency #2
The Tax Tribunal’s Order Denying PepsiCo’s Motion for Summary Judgment
Is Interlocutory and Not A Final Judgment Subject to Appeal

11. The denial of PepsiCo’s Motion for Summary Judgment is an interlocutory order

that is not appealable as a “final order” under Illinois law.

12. More specifically, “the denial of a summary judgment motion is not appealable standing alone. This is because a final judgment or decision is generally a prerequisite to appellate jurisdiction ... and an order denying summary judgment is interlocutory.” *Arangold Corp. v. Zehnder*, 187 Ill. 2d 341, 358-59 (1999).

13. “An exception to this rule has been recognized where cross-motions for summary judgment have been filed on the same claim and one party’s motion is granted while the opposing motion is denied, thereby disposing of all issues in the case.” *In re Estate of Funk*, 221 Ill. 2d 30, 85-86 (2006).

14. Here, however, the only matter at issue was PepsiCo’s Motion for Summary Judgment on Count I of the First and Second Petitions, *i.e.*, the FLNA 80/20 Company issue; although the Department responded (and objected) to PepsiCo’s Summary Judgment Motion, it did not file its own cross-motion for summary judgment. *See* Order, Page 9 (“In the present case, PepsiCo has filed its Motion for Summary Judgment, a Memorandum in Support of its Motion for Summary Judgment, and a Reply Memorandum. The Department has filed a Brief in Response to PepsiCo’s Motion for Summary Judgment and a Surreply in Response to PepsiCo’s Reply Memorandum.”).

15. The title of the Tax Tribunal Order is further evidence of the sole motion/issue to be decided – “Order on Petitioner’s Motion for Summary Judgment.”

16. As fully explained in PepsiCo’s Reply Memorandum, given the only motion before the Tax Tribunal was PepsiCo’s Motion for Summary Judgment, the options available to the Tribunal were: 1) grant PepsiCo’s Motion for Summary Judgment; or 2) deny PepsiCo’s Motion for Summary Judgment and set the matter for further proceedings. *See* 735 ILCS 5/2-

1005 and Ill. Sup. Ct. R. 191; *see also* PepsiCo's Reply Memorandum In Support of Its Motion for Summary Judgment at Pages 3-9 (Oct. 19, 2020).

17. Despite the lack of any motion from the Department, the Tax Tribunal Order purports to affirm the Department's Notices of Deficiency, as they pertain to the FLNA 80/20 issue. *See* Order, Page 35. But there is no legal basis for issuing a decision in favor of the Department on the merits of Count I of the First or Second Petitions in the absence of a Department cross-motion for summary judgment.

18. In the absence of such a motion, the Tax Tribunal must set this matter for further proceedings and must consider all the evidence which is required to render a final judgment subject to appeal. *See In re Estate of Funk*, 221 Ill. 2d at 86.

19. Accordingly, the Tax Tribunal's Order on PepsiCo's Motion for Summary Judgment is interlocutory and not a "final judgment" on the 80/20 issue under Illinois law. The Tax Tribunal's Order must be withdrawn or modified and the matter set for further proceedings, including factual development of the questions/issues raised by the Tax Tribunal in its Order.

Procedural Deficiency #3

Any Deemed Cross-Motion for Summary Judgment Must Be Evaluated Separately and the Evidentiary Contentions Therein Must Be "Strictly Construed" Against the Department

20. Even if the Tax Tribunal were to deem the Department to have filed a cross-motion for summary judgment, the factual questions identified by the Tax Tribunal in its Order are disputed by PepsiCo and prevent a summary judgment ruling on the merits in favor of the Department.

21. In a summary judgment proceeding, the evidence is construed against the moving party and in favor of the non-movant. *See In re Marriage of Halas*, 173 Ill. App. 3d 218, 223

(1st Dist. 1988) (“In determining whether a moving party is entitled to summary judgment, the court will construe the evidence presented strictly against the movant and liberally in favor of the opponent.”).

22. When both parties move for summary judgment (or, here, are deemed to have moved for summary judgment) that analysis doesn’t change -- that is, i) facts and inferences must be considered separately for each party’s motion; ii) each motion must stand on its own; and iii) each motion must be analyzed and ruled upon separately. “On review of cross-motions for summary judgment, we view all facts and inferences in the light most favorable to the nonmoving party *on each motion.*” *Lalowski v. City of Des Plaines*, 789 F.3d 784, 787 (7th Cir. 2015) (emphasis added); *see also Fair Hous. Council v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001) (“In fulfilling its duty to review each cross-motion separately, the court must review the evidence submitted in support of each cross-motion.”).

23. In this case, the Order states that PepsiCo’s Motion for Summary Judgment is denied because “PepsiCo has failed its burden to prove it is entitled to claim PGM LLC as an 80/20 Company.” Order, Page 35. Such a ruling cannot serve as a basis to grant a “deemed” Department cross-motion for summary judgment as all factual disputes/deficiencies must be construed against the moving party. *See In re Marriage of Halas*, 173 Ill. App. 3d at 223.

24. The Tax Tribunal’s Order repeatedly highlights certain perceived factual deficiencies that are essential to its reasons for denying PepsiCo’s Motion for Summary Judgment, including:

- “Even while the PepsiCo human resource group provided human resource functions for the expatriates, there is nothing in the record to suggest that anyone in that group was authorized or given the right to control the expatriates in a management/supervisory capacity.” Order, Page 32.
- “[T]here is nothing in the record to suggest anyone was designated or had the

authority to act on behalf of PGM LLC to terminate any expatriate's employment or adjust the duration of any overseas assignment of any expatriate." Order, Page 33 - fn. 17.

25. The foregoing points were discussed at length during oral argument on PepsiCo's Motion for Summary Judgment and refuted by counsel for PepsiCo.

26. For example, a discussion regarding the role and responsibility of the H.R. employees authorized to act on behalf of PGM LLC in connection with terminations lead to the following exchange:

Judge Conway: Well, they're involved in the communications maybe, but they are not involved in the overall decision.

Mr. Clarke: I disagree with that, your Honor.

Transcript at Page 13, Lines 6 – 9.

27. Similarly, the following exchange further highlights the factual dispute and perceived lack of relevant evidence:

Judge Conway: They don't have any authority whatsoever to do that, do they?

Mr. Clarke: I would – I don't –

Judge Conway: There's nothing in the record I've seen.

Mr. Clarke: Well again I don't think –

Judge Conway: If you can point to something.

Mr. Clarke: I don't think that point specifically has been built out...

Transcript at Page 11, Lines 11-18.

28. And again:

Judge Conway: Are you telling me there's somebody in the HR function who's going to be part of the conversation at PepsiCo to fire or hire someone?

Mr. Clarke: 100 percent. 100 percent there would be. 100 percent. These are senior HR –

Judge Conway: Where's that in the record?

Mr. Clarke: I don't think we have that in the record, your Honor. I don't think we thought that that was particularly important, but that is – if that's important we can absolutely get that.

Transcript at Page 12, Lines 2-10.

29. In the end, counsel for PepsiCo offered to further develop any additional factual areas the Tax Tribunal found relevant or determinative; however, the Tax Tribunal declined PepsiCo's invitation to do so stating that was not necessary. As evidenced by the transcript –

Mr. Clarke: And if that's something that we need to build up, we can absolutely build that up.

Judge Conway: No, you don't need to.

Transcript at Page 13, Lines 13 - 17.

30. As noted above, in a summary judgment proceeding, the evidence is strictly construed against the moving party and in favor of the non-movant. *See In re Marriage of Halas*, 173 Ill. App. 3d at 223. As such, while contested facts may be construed against PepsiCo for purposes of its own motion for summary judgment, those same contested facts must be construed against the Department in analyzing its deemed cross-motion.

31. Simply put, for purposes of the Department's unfiled but deemed cross-motion, the Tax Tribunal is required to "construe the evidence presented strictly against the movant [the Department] and liberally in favor of the opponent [PepsiCo]." *See In re Marriage of Halas*, 173 Ill. App. 3d at 223.

32. Accordingly, the Tax Tribunal must redirect this matter for further proceedings for purposes of developing the facts deemed relevant in the Tax Tribunal's Order but absent from the current record.

WHEREFORE, for the reasons set forth above, Petitioner requests that the Tax Tribunal enter an order (1) granting this Motion for Correction; (2) withdrawing the Order in full or, at a minimum, modifying the Order such that it is no longer characterized as “a final order subject to appeal under Section 3-113 of the Administrative Review Law”; (3) reinstating the above-captioned matters for further proceedings and factual development; and (4) providing any such additional relief as the Tax Tribunal deems just and proper.

Respectfully submitted,

PepsiCo, Inc. and Affiliates

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

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 **PETITIONER PEPSICO, INC. AND AFFILIATES' MOTION FOR CORRECTION** was served on April 16, 2021 by email 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 Joeseph.Kasiak@illinois.gov	

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