ILLINOIS INDEPENDENT TAX TRIBUNAL

MICHAEL ROTHMAN and JENNIFER ROTHMAN, Petitioners, v. ILLINOIS DEPARTMENT OF REVENUE, Respondent.	))))))))	18 TT 30 and 18 TT 132 Judge Brian Barov

DEPARTMENT'S RESPONSE TO PETITIONERS' MOTION TO QUASH SIX SUBPOENAS *DUCES TECUM*

NOW COMES the Department of Revenue ("Department"), by its duly authorized representatives, and states in response to Michael Rothman and Jennifer Rothman ("Petitioners" and/or "Rothmans") Motion to Quash Six Subpoenas *Duces Tecum* ("Motion") as follows:

I. Introduction

Petitioners' Motion seeks to quash the Department's six subpoenas seeking the credit reports for Michael Rothman and Jennifer Rothman should be denied as it is not supported by the case law cited by the Petitioners and is contrary to the authority granted to the Tax Tribunal pursuant to the Illinois Independent Tax Tribunal Act of 2012, 35 ILCS 1010 *et seq*, and corresponding Illinois administrative rules found at 86 Ill. Adm. Code 5000 as set forth below.

II. Argument

A. The Fair Credit Reporting Act Does Not Prohibit the Release of Credit Reports.

Petitioners claim that the Department is prohibited from seeking the credit reports of Michael Rothman and Jennifer Rothman and rely upon *Perill* v. *Equifax Info. Services*, 205 F. Supp. 3d 869 as authority for that claim. Specifically, Petitioners claim, in their Motion to Quash,

that *Perrill* stands for the proposition that the "Texas Comptroller obtained unauthorized access and disclosure of a consumer's credit report for purposes of collecting a tax debt, which constituted an invasion of privacy and concrete harm sufficient for standing to sue." *See,* Page 4 of Petitioner's Motion to Quash. Petitioners have misinterpreted the holding of the court in the *Perrill* matter. First, the plaintiffs in *Perrill* were consumers who were the subject of the credit reports and the credit reporting agency was Equifax Information Services ("Equifax"). The consumers sued Equifax because Equifax released their credit reports in violation of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. Sec. 1681b and Section 1681e, because tax collection does not constitute a permissible purpose under the FCRA.

The court acknowledged that there was scant authority on this issue. *Perrill* at 877. But then the court went on to address that the only authority on point was the Federal Trade Commission's ("FTC") 40 Years of Experience with the FCRA, an FTC Staff Report with Summary of Interpretations" (July 2011)(FTC Report) which states: "A tax collection agency does not have a permissible purpose to obtain a consumer report to collect delinquent tax accounts because the FCRA applies only to 'credit' accounts." *Perrill* at 877. The Court's conclusion states in relevant part:

> The FTC Report is not binding and does not have the force and effect of regulations or statutory provisions. [citation omitted]. Further, the FTC is no longer the entity with the 'primary regulatory and interpretative roles under the FCRA' since the Consumer Financial Protection Act (CFPA) delegated those powers to the Consumer Financial Protection Bureau (CFPB). [citation omitted]. The FTC's Report serves to only assist the CFPB in making its own, independent interpretations of the statute. [citation omitted]. The Court cannot conclude from this *non-binding report* (emphasis added), standing alone that Equifax 'ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless."

Perrill at 877.

The Court went on to hold that Equifax's interpretation of the statute was at least

objectionably reasonable. *Perrill* at 877. Therefore, not only did the *Perrill* court disallow the plaintiffs' case, but this very holding supports the Department's position that the credit reports can be released based upon the same FCRA provision that was at issue in this case. Moreover, there was no mention or holding in the *Perrill* case that suggests the Texas Comptroller "obtained unauthorized access and disclosure of a consumer's credit report" as argued by the Rothmans in their Motion to Quash. What the *Perrill* case does illustrate is that credit agencies are well equipped to deal with this issue of release of credit reports and can make their own determination of what can or cannot be released when requested by a third party.

As Equifax argued in the *Perrill* case, the consumer reporting agency can release a consumer report to a person which it has reason to believe intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status. *See,* FCRA 1681(a)(3)(D). In the instant case, the Rothmans are seeking the benefit of being deemed non-residents by the State of Illinois in order to reduce their tax obligations. The ability of the Petitioners to take advantage of the various provisions of the Illinois Income Tax Act, 35 ILCS 5/101 *et seq*. to reduce their tax burden is a benefit granted to them by the Illinois law. Therefore, credit agencies can release the information sought in the subpoenas as it fits the required provisions of the FCRA. Moreover, it is not the parties to this litigation or the Tribunal who is obligated to make a permissible use determination, but it is the credit agency itself. The Rothmans are attempting to make a preemptive strike and thwart the issuance of the subpoenas before the consumer agency itself can review and make its own independent judgment as to the permissible release of the credit reports. The process should take its course just as it did in the *Perrill* case and allow the agency in charge of consumer credit reporting decide the permissible

use.

B. <u>The Illinois Independent Tax Tribunal Has the Authority to Issue Orders and Subpoenas and Seek Enforcement of Them.</u>

Petitioners allege that the Department's subpoenas fit no permissible purpose set forth in Section 1681b of the Fair Credit Reporting Act ("FCRA") (15 USC 1681b). This is incorrect. The first sentence in Section 1681b(a)(1) of the FCRA allows a credit reporting agency to furnish a credit report "[i]n response to the order of a court having jurisdiction to issue such an order." 15 USC 1681b(a)(1). On June 17, 2021, Judge Barov entered an Order for the issuance of the Department's six (6) subpoenas, however, simultaneously, stayed the subpoenas pending Petitioners' Motion. As part of Petitioners' Motion, they now advocate that the ITT's existence is non-authoritative with non-binding powers and the Orders it enters are not Orders in any judicial sense. With one swipe of their non-legislative hand, Petitioners want to deprive the Tribunal of its existence and powers and prevent it from carrying out its enumerated duties identified in the Illinois Independent Tax Tribunal Act of 2012 (35 ILCS 1010) ("Tribunal Act" or "IITA"). The Department emphatically objects to Petitioners' position.

What Petitioners fail to recognize is that the enabling language of ITT under Section 1-15 of the Tribunal Act grants the ITT broad powers to carry out the purposes and provisions of the Tribunal Act. 35 ILCS 1010/1-15. Like any other state agency, the ITT is also a state agency and it is "separate from the authority of the Director of Revenue and the Department of Revenue." <u>Id</u>. Further, the ITT "has all of the powers necessary or convenient to carry out the purposes and provisions of this Act." 35 ILCS 1010/1-15(b). The ITT has the power to issue orders and subpoenas. 35 ILCS 1010/1-60. Through the broad grant of authority of the enabling language in Section 1-15, the ITT has all of the powers necessary and convenient to it, one of them being

able to seek the aid of a circuit court to enforce its subpoenas through the Office of the Illinois Attorney General ("Attorney General") similar to other state agencies with subpoena powers. 35 ILCS 1010/1-15. See also, generally 35 ILCS 200/16-175 (Property Tax Appeal Board); 235 ILCS 5/3-12 (Liquor Control Commission) 775 ILCS 5/8-104 (Illinois Human Rights Commission); 820 ILCS 305/16 (Illinois Workers' Compensation Commission). Additionally, because the Tribunal Act does not explicitly prohibit the ITT from seeking the aid of the circuit courts through the Attorney General, by the terms of the statute it must be allowed. Additionally, it would be superfluous for the Illinois legislature to grant the ITT authority to issue orders and subpoenas without the power to enforce them. Courts would not issue orders and subpoenas if it cannot enforce them; it would be a waste of time and render a court order meaningless. Accordingly, an Order issued by the ITT is an "order of a court having jurisdiction to issue such an order", which is a permissible purpose under the FCRA. 15 USC 1681(b)(a)(1).

Further, Petitioners blanket argument that "[a] tax dispute is <u>not</u> a listed permissible purpose under FCRA section 1861b" is inconsequential. *See,* last sentence of ¶ 1 of the Motion. A "court order" without an additional description is a listed permissible purpose under FCRA section 1681b(a)(1). <u>Id</u>.

Petitioners are confusing subpoenas issued by the Department with subpoenas issued by the ITT. *See,* ¶ 5 of the Motion. In this matter, the six subpoenas were requested by the Department but *issued* by the ITT, not the Department. If Petitioners are referring to the Department issued subpoena during the audit, then Petitioners are correct in that the ITT cannot hear any challenge to an administrative subpoena issued by the Department 35 ILCS 1010/1-45(e)(6). Accordingly, Petitioners' reliance on Section 1-45(e)(6) for the subpoenas the Department requested during this matter is misplaced.

Additionally, Petitioners, in ¶ 4 of the Motion, seem to suggest that the 'order' must be an 'enforceable order.' Petitioners failed to define 'enforceable order.' An 'enforceable order' can have more than one definition. An 'enforceable order' can mean one that is final and appealable, which is the indication that the case is over with the possibility of an appeal or collection activity to follow. In the alternative 'enforceable order' can mean an order in which a party is seeking the court's aid in fulfilling. Nevertheless, the FCRA does not designate its 'order' as an 'enforceable order.' The FRCA simply requires "an order of a court having jurisdiction to issue the order." 15 USC 1681b(a)(1). In this case, the ITT has jurisdiction over this matter and has the statutory authority to enter an Order and issue the six subpoenas, which it did on June 17, 2021. However, even if an 'enforceable order' under the latter definition is required, as shown above, the ITT has all the powers necessary and convenient to it, one of them being able to seek the aid of a circuit court to enforce its Order through the Attorney General.

Furthermore, Petitioners argue that because the Tribunal has no authority to enforce its own orders it cannot also *issue* orders. The authority to issue subpoenas is a separate and distinct issue from the enforcement of the subpoena. Enforcement mechanisms can come in several forms. Enforcement of a subpoena need not be only by judicial enforcement. Moreover, the IITA does not specifically prohibit judicial enforcement as Section 1-60d specially states "among other means" leaving enforcement open to other avenues as well.

C. How the Department May Use the Information Contained in the Credit Reports in Further Proceedings in this Matter is Premature and Not Ripe for Determination.

"It is well established that discovery is to be 'a mechanism for the ascertainment of truth, for the purpose of promoting either a fair settlement or a fair trial.' To this end, the object of all discovery procedures is disclosure, *** however, that right is limited to disclosure regarding

matters relevant to the subject matter of the pending action. Nevertheless, great latitude is allowed in the scope of discovery." *Pemberton v. Tieman*, 117 Ill.App.3d 502, 504 (1st Dist. 1983) (Internal citations omitted).

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

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

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

In the instant matter, the Department requested subpoenas for Petitioners' credit reports from three (3) well known credit reporting agencies, namely Trans Union, Experian and Equifax. Credit reports contain personal information (ex. current and past addresses, phone numbers and employers), credit account information (ex. a list of credit cards, loan, mortgages, insurance companies), and bankruptcies/court actions ("Second Tier Information"). The credit reports are relevant because they contain information that may lead to admissible evidence at trial and may prove or disprove something in issue and it is the discovery standard.

This matter is currently in the discovery phase. If the Department decides to introduce Petitioners' credit report into evidence at hearing, at that point in time, Petitioners will have the

opportunity to raise their objection(s). However, at this time, Petitioners many evidentiary objections are inappropriate and premature.

The Department, in its request for production of documents, asked Petitioners to produce their current credit report. In response, Petitioners claim the credit reports are irrelevant to the subject matter of this controversy. Petitioners advised the Department that they have a copy of their credit reports but will only voluntarily produce them to the Department if the Department agrees not to use the credit report with a witness in any transcribed proceeding. *See,* ¶ 7 of the Motion. The Department rejected this agreement because, during the discovery phase (i.e. during a deposition), the Department should be able to ask the party witness about the veracity of information contained in his/her credit reports. Petitioners complain that credit reports may contain inaccuracies. If so, what better way to correct misinformation than to ask the person to whom the information relates. Petitioners have not identified any plausible reason(s) for withholding their credit reports. Also, it is premature for Petitioners to argue that the credit reports are hearsay.

D. Subpoenas are Discovery Methods Available to the Parties and Require No Particular Sequence for the Timing of Issuance.

The issue raised by the Tribunal is the issuance of subpoenas for documents during discovery. As the Tribunal's rules state, discovery is governed by Section 1-60 of the IITA, the Illinois Supreme Court Rules and the Illinois Code of Civil Procedure, 735 ILCS 5. *See,* 86 Ill. Adm. Code 5000.325. Section 5000.335 specifically allows for the issuance of subpoenas for production of documentary evidence. *See,* 86 Ill. Adm. Code 5000.335.

Illinois Supreme Court Rule 201(a) and 204 outline the various methods of discovery available to the parties. *See*, Sup. Ct. Rule 201(a) and Sup. Ct. Rule 204. The use of subpoenas

for discovery is one of the many avenues available to the parties to obtain information and documents through the discovery process. *See*, Sup. Ct. Rule 201 and 204. Sup. Ct. Rule 201(e) also states that *no particular sequence* [emphasis added] is necessary when conducting discovery. Therefore, the parties, unless otherwise ordered by the Tribunal, can choose which form of discovery they want to use and in what order they choose to conduct that discovery. The rules also provide that a duplication of discovery shall be avoided. *See*, Sup. Ct. Rule 201(a).

Given this backdrop for the rules of discovery, the Department is seeking the issuance of subpoenas for the Rothmans' credit reports. The Department acknowledges that the subpoenas are seeking information that the Department requested in its written production request to the Rothmans. However, the Rothmans have refused to provide the credit reports. In fact, at a 201(k) conference to discuss the missing credit reports, the Rothmans had in their possession one credit report but still refused to turn over such report unless the Department agreed to conditions limiting the use of the report. Since the Rothmans failed to provide the credit reports, the Department sought the use of a subpoena, a proper discovery method allowed by the Illinois Supreme Court Rules, to obtain the credit reports. The Department is not obligated to any sequence in how it obtains information and documents, so it chose to use a subpoena to secure the credit reports that the Rothmans refused to provide. There is no risk of any duplication of discovery, as once the Department receives the credit reports through the lawfully issued subpoena, the Department will no longer have to continue to pursue the credit reports through its production request. Moreover, the credit reports will no longer be an issue for any Motion to Compel the Department may choose to file. The Department will have streamlined and expedited the discovery process for the Tribunal as it will have eliminated an issue in dispute for any Motion to Compel. Until such time as this Tribunal sets a discovery cut off date as provided in Sup. Ct. Rule 218(c), both parties can utilize

any and all discovery methods available to them as set forth in the IITA, the Illinois Supreme Court Rules and the Illinois Code of Civil Procedure. As the Rothmans have refused to provide the credit reports, the issuance of the subpoenas shall be allowed so the Department can obtain the credit reports through another lawful discovery method.

As set forth above in Section C, the Department shall be permitted to question the veracity of the information provided by the Rothmans. Attorneys are to provide zealous representation and advocacy on behalf of their client. The Department's counsel's obligation to its client is no less than any other attorney, whether in public service or the private sector, who shall as part of their due diligence, vigorously and thoroughly review and vet information in search of the facts and preparation for an administrative hearing on all issues in dispute.

III. Conclusion

The credit reports the Department is requesting is a reasonable and readily available document that can be used to obtain information/documents for discovery purposes. Under Section 1-60(b), the Department is permitted to request subpoenas and "[a] administrative law judge . . . shall issue subpoenas." 35 ILCS 1010/1-60(b).

If Petitioners truly, in fact, changed their domicile and residency from Illinois to Florida, the Second Tier Information from the credit reports will help aid Petitioners in demonstrating their intent in abandoning their Illinois residency and moving to Florida with the intent to remain there permanently. Petitioners' reluctance to produce their credit reports is suspect.

As stated above, the Tribunal has jurisdiction over the Notice of Claim Denial, The Tribunal has the authority to issue orders and subpoenas. The Tribunal, through its broad enabling language *has all the powers necessary or convenient* to carry out the purposes and provisions of the Tribunal Act, which means subpoena enforcement can be achieved through the aid of the

Attorney General. Petitioners hearsay argument for evidentiary purposes is premature. The Department's request for subpoenas, through the order of the Tribunal, meets a permissible purpose under Section 1681b(a)(1) of the Fair Credit Reporting Act. The information contained in Petitioners' credit reports may lead to admissible information and/or may tend to prove or disprove something at issue all of which is within the realm of the discovery standard. Alternatively, the subpoena process should take its course just as it did in the *Perrill* case and allow the credit reporting agency in charge of consumer credit information decide whether the subpoena complies with the permissible use under the Fair Credit Reporting Act.

WHEREFORE, for the foregoing reasons, the Department moves this Tribunal to:

1. Deny Petitioners Motion to Quash Six Subpoenas *Duces Tecum*;
2. Re-enter an Order issuing the six subpoenas requested by the Department, and;
3. Provide any other relief that may be just and equitable.

Respectfully submitted,
Illinois Department of Revenue,

By:

/s/Susan Budzileni
/s/Valerie Puccini
Special Assistant Attorney Generals

Susan Budzileni
Valerie Puccini
Illinois Department of Revenue
Office of Legal Services
100 W. Randolph St., 7-900
Chicago, IL 60601
312-814-1716
312-814-4558
Susan.budzileni@illinois.gov
Valerie.A.Puccini@illinois.gov

DATED: September 3, 2021