IN THE ILLINOIS
INDEPENDENT TAX TRIBUNAL

Michael Rothman and Jennifer Rothman,	)	
	)	
Petitioners,	)	
	)	
v.	)	Nos. 18 TT 30 & 18 TT 132
	)	
Illinois Department of Revenue,	)	Judge Brian F. Barov
	)	
Respondent.	)	

Petitioners' Reply to Department's Response ("Response") to
Petitioners' Motion to Quash Six Subpoenas Duces Tecum ("Motion")

I. The Department fails to document the need for the six subpoenas.

The Tax Tribunal's August 19, 2021 Order directed the parties to address: **A.** "whether the Department may seek, through third-party subpoenas, evidence in the possession of non-parties that has or could be obtained through discovery on the petitioners, or, **B.** "whether there is any irregularity or gap in the information provided by the Petitioners, or the information is otherwise unavailable from the Petitioners, so as to justify pursuing nonparties for the same information."

A. Regarding the first question, while discovery may encompass information calculated to lead to the discovery of admissible information, that "is not intended as an invitation to invent attenuated chains of possible relevancy." *Carlson v Jerousek*, 2016 IL App (2d) 151248, ¶ 37. The protections of Illinois Supreme Court Rule 201(c), with regard to proportionality, "apply to discovery directed to parties and nonparties alike." *Id.*, at ¶ 30. In addition, the Supreme Court does "not view the discovery order involving a nonparty any

differently from one involving a party." *Lewis v. Family Planning Management, Inc.* 306 Ill. App. 3d 918, 924-25(1999). Seeking information from a non-party that was already obtained from another source, or that could be more easily obtained from a party, would fall within the purview of R. 201(c)(3) for the prevention of abusive discovery. In such an instance, "the likely burden or expense of the proposed discovery . . . outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues in the litigation, and the importance of the requested discovery in resolving the issues." Ill. S. Ct. R. 201(c)(3). The "importance of the requested discovery" is the crux of the second question in the Tax Tribunal's August 19th Order.

B. Regarding the second question, the Response fails to identify any information – other than the credit report itself – regarding which "there is any irregularity or gap in the information provided by the Petitioners, or the information is otherwise unavailable from the Petitioners, so as to justify pursuing nonparties for the same information."

Petitioners did not have a credit report responsive to the Department's request to produce, nor were Petitioners required to request one in response to the Department's discovery.[1] When Petitioners offered to request and provide a credit report to the Department as a Rule 201(k) resolution, Rule 201(k) allowed for negotiation encompassing a set of conditions on use of the credit reports with any witness, in light of the inherent and judicially acknowledged unreliability of credit reports. The Department refused to consider any parameters. The Department's taunt at page 8 of its Response, that testifying about the credit

[1] Petitioners referred in 201(k) discussions to a current 2021 credit report for one Petitioner from one reporting agency. The Department seeks six reports, for a given tax period, from three reporting agencies.

reports would allow the Rothmans the opportunity to correct any errors in the reports, is hardly a justification to issue subpoenas. The FCRA has a process in place to make such corrections of record for FCRA purposes. The Department instead offers to waste deposition time correcting its understanding of documented hearsay.[2]

Since 2018, the Petitioners have produced 2,367 pages of documents in response to the Department's requests to produce, have responded to Interrogatories, and have engaged in two 201(k) conference processes, in 2019 and 2021. The Department filed no motion regarding any of Petitioners' objections to discovery. As requested by the Department, the Tax Tribunal also issued a subpoena *duces tecum* to HEARN Co.'s corporate office in Chicago regarding "the entity known as SMS Assist LLC" and demanding "[a] copy of [Petitioners'] Building pass or access or key card . . . [and] a copy of the Building's daily entry or access logs . . . for the period January 1, 2014 through December 31, 2015." The Department did not provide Petitioners any responsive information received from HEARN Co. The Department also used administrative third-party audit subpoenas to obtain information about the Petitioners.

The Response does not identify a single item received from Petitioners that has any – let alone, material - irregularity or gap, or that was requested and has proved unavailable from the Petitioners. The August 19th Order offered the Department the opportunity to show its need for the six subpoenas. The Response does not document that need.

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[2] Where information is manifestly irrelevant – "the legal equivalent of stepping back on the court to shoot free throws to increase their score after the game buzzer had sounded and the winning team had returned to the locker room" – a trial court's order to quash a subpoena for such information will be affirmed. *Parkway Bank & Trust Co. v Korzen*, 2013 IL App (1st) 130380, ¶ 63. The Department has failed to identify a single troublesome item of discovery responsive to the second inquiry in the Order of August 19th. Issuing unenforceable subpoenas (see **II**, *infra*), simply adds delay and cost for Petitioners.

II. The Department ignores Separation of Powers Limitations.

A. Separation of Powers

The Department acknowledges that "Like any other state agency the [Independent Tax Tribunal] is also a state agency [.]" Response, p. 4. Relying heavily on the statement in the Illinois Independent Tax Tribunal Act [the "ITTA" or "Tax Tribunal Act"] that the Tax Tribunal "has all the powers necessary or convenient to carry out the purposes and provisions of this Act [,]" the Department elevates the order of a state administrative agency to the status of "the order of a court having jurisdiction to issue such an order" under 15 USC 1681b(a)(1). To agree with the Department one must ignore applicable laws and constitutions.

Petitioners' cited *Bd. of Educ. v. Ill. Labor Rels. Bd.*, 2013 IL App (1st) 12247, ¶ 29 which explicitly rejected the argument "equating arbitral subpoenas with court orders" for purposes of the Illinois Student Records Act. The Response does not address the precedent that an administrative agency order is not - and a court will not treat it as - a judicial order. Unable to distinguish precedent, the Response simply ignores it.

The Department instead argues that "[t]hrough the broad enabling language in Section 1-15 [of the ITTA], the [Independent Tax Tribunal] 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 subpoenas through the Office of the Illinois Attorney General . . . similar to other state agencies with subpoena powers. 35 ILCS 1010/1-15)." This is whistling past the graveyard.

First, the Department does not reconcile its claim of a power found in the "broad enabling language" of Section 1-15 of the ITTA with the express contrary direction in Section

1-15 itself. Section 1-15 states, "The Tax Tribunal shall have the powers and duties enumerated in this Act, together with such others conferred upon it by law." 35 ILCS 1010/1-15(a). Reading the entirety of the Tax Tribunal Act, there is no process or power enumerated to seek the aid of the judiciary. The "broad enabling language" argument is a Department plea for the Tax Tribunal to rewrite the Tax Tribunal Act. *See, e.g., "Hines v Department of Public Aid,* 221 Ill. 2d 222, 230 (2006)(court must enforce the statute as written and may not annex new provisions or substitute different ones, or read into the statute exceptions, limitations, or conditions which the legislature did not express). For us to do so would contravene basic principles of separation of powers. *People ex rel Sherman v. Cryns,* 203 Ill. 2d 264, 297 (2003)." *Vincent v. Alden-Park Strathmoor, Inc.,* 241 Ill.2d 495, 506 (2011)

Second, there is no mention of the Attorney General in Section 1-15, in addition to there being no enumerated process to enlist the judiciary in which the Attorney General would play a role. The General Assembly specifically mentions the Illinois Attorney General in ITTA Section 1-67 to move to stay proceedings related to pending criminal cases and in Section 1-80 for representation of the Department of Revenue. If it had intended to do so, the Legislature could have mentioned the Attorney General in the "broad enabling language" of Section 1-15. Moreover, the Legislature could have included the Attorney General anywhere else in the ITTA where it could also have provided for invoking the aid of the circuit court. The Legislature did not choose either option.

The Department is asking for more than the interpretive inclusion of a missing word; it is asking for the inclusion of a Constitutional officer and his or her power as defined in the Illinois Constitution. Ill. Const. 1970 Art. V, § 15 ("The Attorney General . . . shall have such

duties and powers as may be prescribed by law."). The Department cited no provision of the *Attorney General Act* that authorizes the Attorney General to file actions in circuit court to enforce administrative subpoenas either *sua sponte* or where requested by an issuing agency that lacks such a process in its enabling statute. *See*, 15 ILCS 205-.01, et seq.

Third, despite arguing that the Tax Tribunal Act's "broad enabling language" provides all the necessary authority, the Department cited (but did not quote) provisions where the General Assembly *expressly* provided different ways for given agencies to enlist the aid of the circuit courts to enforce administrative subpoenas. *See, e.g.*, 35 ILCS 200/16-175[3], 235 ILCS 5/3-12[4], 775 ILCS 5/8-104[5], and 820 ILCS 305/16.[6] The power exists when the Legislature expressly says so, rather than tacitly, as the Department contends here.

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[3] *Property Tax Appeal Board:* "In case of disobedience to a subpoena, the [Property Tax Appeal] Board may petition any circuit court of the State for an order requiring the attendance and testimony of witnesses." (Emphasis added).

[4] *Liquor Control Commission, at (a)(8):* "Any circuit court may by order duly entered, require the attendance of witnesses and the production of relevant books subpoenaed by the State Commission and the court may compel obedience to its order by proceedings for contempt." (Emphasis added).

[5] *Illinois Human Rights Commission, at 8-104(E):*

> "(1) When anyone fails or refuses to obey a subpoena, the Commission, through a panel of 3 members, shall authorize Commission staff to prepare and file a petition for enforcement in the circuit court of the county in which the person to whom the subpoena was directed resides or has his or her principal place of business.
> (2) Not less than five days before the petition is filed in the appropriate court, it shall be served on the person along with a notice of the time and place the petition is to be presented.
> (3) Following a hearing on the petition, the circuit courts shall have jurisdiction to enforce subpoenas issued pursuant to this Section." (Emphasis added).

[6] *Illinois Workers' Compensation Commission:* "In case any person refuses to comply with an order of the Commission or subpoenas issued by it or by any member thereof, or any Arbitrator designated by the Commission or to permit an inspection of places or premises, or to produce any books, papers, records or documents, or any witness refuses to testify to any matters regarding which he or she may be lawfully interrogated, the Circuit Court of the county in which the hearing or matter is pending, on application of any member of the Commission or any Arbitrator designated by the Commission, shall compel obedience by attachment proceedings, as for contempt, as in a case of disobedience of the requirements of a subpoena from such court on a refusal to testify therein." (Emphasis added).

The Legislature did not use cookie-cutter language to enlist the aid of the circuit courts, or of specific circuit courts, in the provisions cited by the Department. Yet, the Department contends the Tax Tribunal may infer what the Legislature *would have* specified, while offering no guidance by which the Tax Tribunal should glean the standards and details the Legislature intended. [7] And, the Department offers no reason why the Legislature was unable to provide terms or believed the Tax Tribunal to be better equipped to do so. [8]

Further, the Department proposes that "because the Tribunal Act does not explicitly prohibit the [Independent Tax Tribunal] from seeking the aid of the circuit courts through the Attorney General, by the terms of the statute it must be allowed." Response, p. 5, emphasis added. That eviscerates the Separation of Powers provision in the Constitution. Ill. Const. 1970, Art. II, § 1. No matter how wise it would be for the Legislature to provide for the Tax Tribunal to enlist the aid of the judiciary, the Tax Tribunal cannot infer the absence of such a provision is a delegation for the Tax Tribunal to arrogate such a power to itself.[9]

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[7] "Proper delegation of authority must provide sufficient standards to guide the administrative body in the exercise of its functions. [Citations] However, '[a]bsolute criteria where every detail necessary in the enforcement of the law is anticipated need not be established by the General Assembly. The constitution merely requires that intelligible standards be set to guide the agency charged with enforcement. [Citation]" *East St. Louis Federation of Teachers, Local 220*, 178 Ill. 2s 399, 423 (1997).

[8] "The scope of permissible delegation must be measured in terms of the complexity and diversity of the conditions which will be encountered in the enforcement of the statute. . . . [T]he legislature may authorize others to do things which it might properly, but cannot understandingly or advantageously, do itself." *Dept. of Public Works & Bridgs. v. Lanter,* 413 Ill. 581, 590 (1953). The examples cited by the Department show that the Legislature is capable of devising administrative subpoena enforcement measures.

[9] An administrative body '"exercises purely statutory powers and must find within the enabling statute the authority to exercise the power it claims." *Sibley v. Health & Hospitals Governing Com.* 22 Ill. App. 3d 632, 634 (1974). Where the intent of the legislature is clear, a legislative mistake such as providing that the county clerk rather than a county treasurer should deposit certain fees can be interpreted *by a court* to comport with the intent. *See, e.g., Gill v. Miller*, 94 Ill. 2d 52, 56-57 (1983) . . . [T]hat kind of "exceptional construction," when "exercised with due caution . . . is not judicial legislation, but it is simply a method of arriving at legislative intent defectively expressed. (Citation omitted)." *Id.* The Department asks for more than "exceptional construction." *See, e.g., Chirikos v. Yellow Cab Co.,* 87 Ill. App. 3d 569, 575-76 (1980) (courts have no legal power to correct what amounts to errors in judgment by the legislative body).

B. Jurisdiction

The Department posits that "the FCRA does not designate its 'order' as an 'enforceable order'" and that "[t]he FCRA simply requires an order of a court having jurisdiction to issue an order." Response, p. 6. According to the Department, "the authority to issue subpoenas is a separate and distinct issue from the enforcement of the subpoena." *Id.* The Department says enforcement under Section 1-60(d) of the ITTA "need not be only by judicial enforcement." *Id.*

Section 1-60(d) provides the Tax Tribunal "may enforce its order on discovery and other procedural issues, among other means, by deciding issues wholly or partly against the offending party." 35 ILCS 1010/1-60. It is disingenuous for the Department to rely on Section 1-60(d) to argue that the Tax Tribunal has "other means" to enforce a subpoena against a non-party. The Department fails to identify any means of enforcement against a non-party. [10]

"The authorities teach that jurisdiction is, at bottom, power." *Knightsbridge Realty Partners Ltd.-75 v. Rudolph*, 106 Ill. App. 3d 354 (1st Dist. 1982). The Tax Tribunal's power does not derive from the Judiciary article of the Constitution, as "judicial power is vested in a Supreme Court, an Appellate Court and Circuit Courts." Ill. Const. 1970, Art. VI, § 1. The Tax Tribunal's quasi-judicial power derives solely from the Legislature, through the Tax Tribunal Act. The Tax Tribunal Act fails to provide for enforcement of a subpoena against a non-party, judicially or otherwise. That failure forecloses any possibility the Tax Tribunal's subpoena, or

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[10] Cleaving the power to issue a subpoena from the power to enforce a subpoena frustrates the intent of Congress in the FCRA. Congress provided Section 1681f of the FCRA specifically so that a "government agency" can access limited specific information about a consumer, *i.e.* name, address, and employment. Under the Department's argument, a government agency can simply style its request as an "order" to obtain all the information available under Section 1681b pursuant to a court order. Words have meaning; what distinguishes an "order" from a request is the power to enforce. Courts issue orders, not suggestions. Congress knew that, and provided accordingly.

its order enforcing such a subpoena, can be considered "an order from a court having jurisdiction to issue the order" for purposes of Section 1681b(a)(1) of the FCRA. The Department cites no case law or other authority saying that Congress intended the phrase "order from a court" to include anything less than an order enforceable by the judiciary of the federal or state governments.

III. The Tax Tribunal is "not a potted plant."[11] A recipient of a subpoena is not the one who determines whether the subpoena is lawful.

The Response takes inconsistent stances. The Department argues that "Courts would not issue orders and subpoenas if it [sic] could not enforce them; it would be a waste of time and render a court order meaningless." Response, p. 5. But the same section of the Response waffles, arguing, "the FCRA does not designate its 'order' as an 'enforceable order;' it then invites the Tax Tribunal to distinguish between the authority to issue and to enforce a subpoena. *Id,* at p. 6. Ultimately, the Department wants the Tax Tribunal to shirk any inquiry altogether –essentially, be as a potted plant - because "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." *Id.*, at p. 3.

The Department can be cavalier because it is the Tax Tribunal, not the Department, who will be the defendant in an action by a reporting agency to quash the subpoena. The Department contends the Tax Tribunal is a court, so it should not dispute that, generally, a court is duty-bound to examine its own jurisdiction even if the parties do not question it. *See,*

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[11] "Well, sir, I'm not a potted plant. I'm here as a lawyer. That's my job." Brandon Sullivan, as counsel for Oliver North, before the 1987 Joint House-Senate Iran-Contra Committee, responding to Sen. Daniel Inouye admonishing Sullivan for objecting to questions posed to North.

e.g., Andrews v. E.I. Du Pont Nemours and Co., 447 F.3d 510, 514 (7th Cir. 2006)("While neither party raised the matter of jurisdiction, we have an independent obligation to ensure that jurisdiction exists."); *Loman v. Freeman,* 229 Ill. 2d 104 (2008) ("Nevertheless, we have a duty to consider *sua sponte* whether the Court of Claims has exclusive jurisdiction with respect to the conversion claim. *Eastern v. Canty* 75 Ill. 2d 566, 570 . . . (1979)(explaining that a court has a duty to examine its jurisdiction even if no question is raised by the parties"). The Tax Tribunal will be the defendant in any action to quash the subpoena, so, given the mandate of the Separation of Powers clause of the Illinois Constitution it is prudent and appropriate for the Tax Tribunal to determine whether it is a judicial court that can issue "the order of a court having jurisdiction to issue such an order" for purposes of Section 1681b(a)(1) of the FCRA.

Lastly, the Department accuses the Petitioners of misrepresenting the holding in *Perrill v. Equifax Info. Services,* 205 F. Supp. 3d 869 (2016). *Perrill* concluded that Equifax had an 'objectively reasonable' belief that "a taxpayer does initiate a credit transaction with the Comptroller merely by electing to do business in Texas or by signing a settlement agreement to defer payment of delinquent taxes." *Id.* at 877. The court did not find that it was not a violation of the FCRA to disclose consumer records to a tax collection agency. Rather, it found that Equifax had an objectively reasonable belief to the contrary which was sufficient to avoid "a claim for a willful violation under § 1681b(a)(3)(A) of the FCRA." Id. at 878 (emphasis added). Notably, the Rothmans are not business taxpayers electing to do business in Illinois, and are not parties to any settlement agreement with a tax agency. For the Rothmans as individual nonresident taxpayers, the FTC report identified in *Equifax,* while not binding and not having the force of a regulation, is persuasive authority that "A tax collection agency does

not have a permissible purpose to obtain a consumer report to collect delinquent tax accounts because [§ 1681b(a)(3)(A)] applies only to credit accounts. FTC Report, 2011 WL 3020575, at *38 (2011)." *Id.* at 877.

IV. Conclusion

The Response does not document a need for the six subpoenas, and that is sufficient basis for the Tax Tribunal to quash the subpoenas. In addition, the Department has failed to establish that a Tax Tribunal subpoena, or an order enforcing its subpoena, is "an order from a court having jurisdiction to issue the order" for purposes of Section 1681b(a)(1) of the FCRA.

Respectfully submitted,

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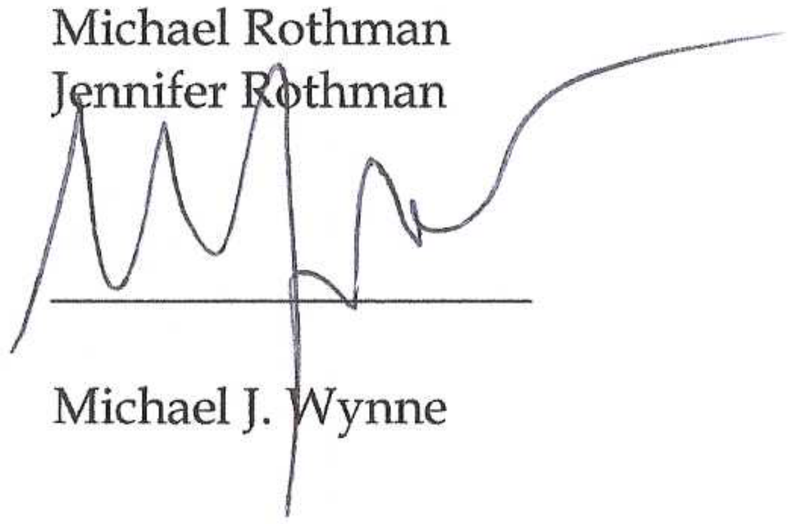
By: 

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