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' MOTION TO QUASH SIX SUBPOENAS *DEUCES TECUM*

Petitioners, Michael Rothman and Jennifer Rothman, pursuant to Illinois Section 2-1101 of the Code of Civil Procedure, move to quash the six subpoenas *deuces tecum* (the "Subpoenas") issued by the Tax Tribunal at the request of the Illinois Department of Revenue (the "Department") on July 21, 2021. The Subpoenas were issued to Equifax, Experian, and Trans Union for "a copy of the credit report" of Michael Rothman and Jennifer Rothman "for the period 1/1/2013 through 12/31/2016." By order of June 17, 2021, the Tax Tribunal provided that the Subpoenas would "request targeted information" and that it would stay service of the Subpoenas pending the disposition of a motion to quash if one was filed by Petitioners; this is the motion to trigger that stay of service of the Subpoenas.

In support of their motion to quash the Subpoenas, Petitioners state as follows:

A. Fair Credit Reporting Act (FCRA): 15 USC § 1681b, § 1681e, and § 1681f

1. § 1681b: Congress specified the "permissible purpose of consumer reports" in 15 USCS § 1681b, providing that a "consumer reporting agency may furnish a consumer report

under the following circumstances **and no other.**" (Emphasis added). [1] The Department's subpoenas fit **no** permissible purpose set forth in section 1681b.

A report may be furnished:

1. In response to a court order, or a Federal grand jury subpoena.[2]

2. As directed in writing by the consumer to whom the report relates.

3. To a person the reporting agency has reason to believe intends to use the information:

- *A.* in connection with a credit transaction involving the extension of credit, or review or collection of an account of, the consumer; or,
- *B.* for employment purposes;
- *C.* in connection with the underwriting of insurance involving the consumer; or,
- *D.* in connection with the determination of the consumer's eligibility for a license or other government benefit that requires the consideration of the applicants financial ability or status; or,
- *E.* in connection with a valuation of, or an assessment of the credit, or prepayment risks associated with, an existing credit obligation; or,
- *F.* for a legitimate business need in connection with (i) a transaction initiated by a consumer; or (ii) to review an account to determine whether the consumer continues to meet the terms of the account; or
- *G.* executive departments and agencies in connection with government-sponsored charge cards that are individually billed.

4. In responding to the head of a State or local child support enforcement agency.

5. To an agency administering a State plan for child and spousal support.

6. To the FDIC or the National Credit Union Administration.

A tax dispute is <u>not</u> a listed permissible purpose under FCRA section 1681b.

2. **§ 1681e:** A subpoena recipient subject to the FCRA is under statutory notice that,

> "No consumer reporting agency may furnish a consumer report to any person if it has reasonable grounds for believing that the consumer report will not be used for a purpose listed in section 1681b of this title." 15 USC § 1681e.

[1] See full text of all FCRA provisions cited herein attached as ***Exhibit 1***.

[2] See **B.**, *infra* at p. 5

The Subpoenas fail to alert each of the three consumer reporting agencies of a permissible purpose they serve under section 1681b. *See*, *e.g.*, *Hansen v. Morgan*, 582 F.2d, 1214, 1219-20 (9th Cir. 1978), "Obtaining a consumer report in violation of the terms of the statute without disclosing the impermissible [sic] purpose for which the report is desired can constitute obtaining consumer information under false pretenses." [3] A federal court will not issue a subpoena for a purpose not permissible under 15 USC § 1681b. See, *e.g.*, *Booth v. TRW Credit Data*, 557 F. Supp. 66, 70 (1982), "The court concludes that aiding in a private investigation of a suspected counterfeiter does not constitute a permissible purpose for acquiring a credit report pursuant to 15 U.S.C. § 1681b(3)(F)." The Subpoenas fail to identify the permissible purpose they serve, and, fail to disclose the impermissible purpose, *i.e.*, for use in a tax assessment dispute.[4]

For instance, the Texas Comptroller's contract with Equifax for credit information did not defeat a class action against Equifax for unauthorized disclosures made pursuant to that contract. *Perrill v. Equifax Info. Servs. LLC*, 205 F. Supp. 3d 869 (W.D. Tex. 2016); *see* ***Exhibit 2*** In *Perrill*, the Texas Comptroller obtained credit reports from Equifax for corporate officers of a company delinquent in a tax-debt settlement agreement with the Comptroller. The court noted the Federal Trade Commission's "40 Years of Experience with the Fair Credit Reporting Act, AN FTC Staff Report with Summary of Interpretations (July 2011)", which stated: "A tax collection agency does not have a

[3] A "person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses" is liable for fines and /or a maximum two year prison sentence. 15 U.S.C. § 1681q.

[4] Disclosure of the impermissible purpose is important to protect consumers and reporting agencies, because an officer or employee of a consumer reporting agency can be liable for fines and / or a maximum two year prison sentence for knowingly and willfully providing consumer information "to a person not authorized to receive that information[.]" 15 U.S.C. § 1681r.

permissible purpose to obtain a consumer report to collect delinquent tax accounts because [§ 168b(a)(3)(A)] applies only to 'credit' accounts. FTC Report, 2011 WL 3020575, at *38 (2011)." Id. at 877. The district court concluded 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 a concrete harm sufficient for standing to sue.[5] The Subpoenas are indistinguishable from those in *Perrill* and should be quashed.

3. **§ 1681f:** Outside of disclosures authorized by FCRA section 1681b, the FCRA allows a *limited* disclosure to a government agency for "identifying information respecting any consumer limited to his name, address, former addresses, places of employment, or former places of employment." 15 U.S.C. § 1681f. All but two types of information the Subpoenas seek here exceed the bounds of section 1681f.

4. **The Subpoenas:** The Subpoenas exceed the bounds of all statutorily authorized disclosures. Each of the Subpoenas seek:

> *A copy of the credit report for **[Petitioner]** with Social Security Number **XXX-XX-XXXX** in effect for the period 1/1/2013 through 12/13/2016, which includes the following information.*
>
> *a. Current and prior addresses.*
> *b. Telephone and Utility account information.*
> *c. Credit Card Information.*
> *d. Mortgage/Loan Information.*
> *e. Employer Information.*
> *f. Lien Information.*
> *g. Civil Suites & Judgment Information.*

[5] *Also see*, *Oneal v. First Tennessee Bank, 2018 WL 1352519, *10 (U.S. Dist. Ct. E.D. Tenn. Mar. 15, 2017),* distinguishing *Perrill*, and finding no actionable invasion of privacy in the case before it because "*Perrill* featured the disclosure of a credit report to a third party – a government agency holding taxing power over the plaintiff" which it concluded resulted in alleged injuries "far more substantial – even if intangible – than the amorphous notion of an 'invasion of privacy' standing alone."

The Subpoenas are legally deficient because:

i. For a government agency, such as the Tax Tribunal and the Department, only *a* and *e* are within the limited disclosure scope of 15 U.S.C. § 1681f. The Department has type *a* and *e* information from other sources. *See* **C.**, *infra*.

ii. Type *b, c, d, f* and *g* information are entirely outside the permissible limited disclosure to government agencies under 15 U.S.C. § 1681f.

iii. Type *a* through *g* information are not linked in the Subpoenas to <u>any</u> identified permissible purpose for disclosure under 15 U.S.C. § 1681b.

<u>None</u> of the information the Subpoenas seek is subject to disclosure. Additionally, the Tax Tribunal cannot compel compliance with the Subpoenas. (See **B.,** following).

B. Ill. Const. 1970, Art. VI, § 1

4. "The judicial power is vested in a Supreme Court, an Appellate Court and Circuit Courts." Ill. Const. 1970, Art. VI, § 1. The Illinois Independent Tax Tribunal is "an independent administrative tribunal [.]" 35 ILCS 1010/1-5. "The jurisdiction of the Tax Tribunal is limited to Notice of Tax Liability, Notices of Deficiency, Notices of Claim Denial, and Notices of Penalty Liability" above a specified jurisdictional amount. 35 ILCS 1010/1-45(a). The Tax Tribunal is not a <u>judicial</u> court under Article VI, section 1 of the Illinois Constitution and it therefore lacks jurisdiction to issue an enforceable order sufficient under 15 USC § 1681b(a)(1).

5. The Tax Tribunal is an executive agency serving a quasi-judicial function. The Tax Tribunal is forbidden, for instance, from hearing "any challenge to an administrative subpoena issued by the Department." 35 ILCS 1010/1-45(d)(6). The Tax Tribunal Act provides no mechanism for the Tax Tribunal to enlist the aid of a circuit court to issue an

order compelling compliance with an administrative subpoena issued by the Tax Tribunal. The Appellate Court does not equate an administrative subpoena with a court order. *Bd. of Educ. v. Ill. Labor Rels. Bd.*, 2013 IL App (1st) 122447, ¶ 29: "[W]e decline to accept *amicus*'s position equating arbitral subpoenas with court orders for purposes of section 6(a)(5) of the Student Records Act." A Tax Tribunal subpoena is not a court order for Illinois purposes and, therefore, not for purposes of FCRA § 1681b(a)(1). The Tax Tribunal should not issue a subpoena it is powerless to enforce.

C. 735 ILCS 5/2-1101

6. Under § 2-1101 of the Code of Civil Procedure a court may quash a subpoena for good cause shown, and may decline to enforce an arbitrary, capricious, or oppressive administrative subpoena. *People v. McWhorter*, 112 Ill. 2d 374, 380 (1986). A subpoena is reasonable where (1) the document sought is relevant to the inquiry, and (2) the specification of the document to be produced is adequate but not excessive for the purpose of the relevant inquiry.[6] *People v. Jackson*, 116 Ill. App. 3d 430, 435-36 (1983). The scope of a subpoena is measured by the relevance of the information sought to the problem under investigation. *Heritage House of Glamour, Inc. v. Attorney General of the State of Illinois*, 179 Ill. App. 3d 336, 339 (1989).

7. Setting the legal barriers to disclosure aside, a credit report remains nothing more than hearsay within hearsay. The Business Records Certificate of Authenticity the Department would provide to the three credit reporting agencies would, at best,

[6] The Subpoenas *target* the entire credit report of each Petitioner, asking for "a copy of the credit report" - without limitation – that "includes the following information," and then listing of essentially all information types in a credit report.

authenticate the returned documents as what they are – Consumer Credit Reports. That falls short of a foundation for the documents to meet any exception to the hearsay rule. See, *e.g*., *In re Thistle*, 1988 WL 35412015, 1998 Bankr. LEXIS 2110, *12, sustaining an evidentiary objection to the proffer of a credit report for lack of foundation absent testimony from a creditor of how it transmitted information to Equifax that appeared on an Equifax credit report. Petitioners' pre-condition to voluntarily provide credit reports - that the Department agree not to use the reports with any witness in a transcribed proceeding - was reasonable because the Department would most likely be unable to provide the foundation lacking in *In re Thistle*.

8. Consumer credit reports are so prone to error and misuse that Congress has legislated strict limits on permissible disclosures and actionable penalties for unauthorized disclosures. *See, e.g*., *Mt. States Adjustments v. Winkler,* 2012 Colo. Dist. LEXIS 2842, *3: "There are no circumstantial guarantees of trustworthiness as to a credit report or Ms. Winkler's Experian credit report. To the contrary, the Court takes judicial notice of the fact that credit reports frequently contain inaccurate information including, but not limited to, incorrect addresses, employer information, and status of account payment information. Largely, a credit report relies on who reports and what is reported, which may or may not be accurate. The Court is not satisfied that the interests of justice or the rules of evidence will be best served by admission of the credit report."

9. At the initial status hearing for its original subpoena request the Department said it needed the credit reports to verify the scope of its discovery. Petitioners proposed a voluntary production of reports in exchange for an agreement to not use a credit report with a witness in any transcribed proceeding. The Department rejected that agreement,

signaling it will use the credit reports for purposes other than that originally stated; hence this motion. The Subpoenas articulate no purpose authorized for disclosure under FCRA sections 1681b and 1681f. Moreover, the dubious reliability of credit report information materially degrades their potential relevance. Lastly, the Department interpreted the Tax Tribunal's direction to seek "targeted" information as a direction to itemize all types of information in such reports for the relevant years. Under applicable federal statutes and interpretive case law, the Illinois Constitution, the Illinois Independent Tax Tribunal Act of 2012, and the Code of Civil Procedure, Petitioners have shown good cause to quash the six subpoenas issued July 21, 2021, to Equifax, Experian and TransUnion for the credit reports of Michael Rothman and Jennifer Rothman for the 2013 through 2016 calendar years.

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Respectfully submitted,

/s/ Michael J. Wynne

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