

**IN THE ILLINOIS
INDEPENDENT TAX TRIBUNAL**

Michael Rothman and Jennifer Rothman,	)	
Petitioners,	)	
	)	Case Nos. 18-TT-30
	)	18 TT 132
v.	)	
	)	Individual Income Tax
ILLINOIS DEPARTMENT OF REVENUE,	)	TYE: 12/31/2014 and 12/31/2015
Respondent.	)	

NOTICE OF FILING

TO: See attached Certificate of Service

PLEASE TAKE NOTICE that on March 23, 2020 Petitioner, Michael Rothman and Jennifer Rothman, through their counsel Jones Day, filed by electronic mail with the Illinois Independent Tax Tribunal their **Motion for Protective Order**, in the above-captioned matter, true copies of which are attached hereto and herewith served upon you.

Dated: March 23, 2020

Respectfully submitted,

/s Michael J. Wynne

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CERTIFICATE OF SERVICE

I, Douglas A. Wick, one of the undersigned attorneys for the Petitioners, Michael Rothman and Jennifer Rothman, hereby certify that on March 23, 2020, I caused a copy of our **Motion for Protective Order**, in the above-captioned matter, to be served on all parties of record in this cause by electronic mail addressed to the attorneys on March 23, 2020:

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By: /s Douglas A. Wick

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Petitioners,	)	
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ILLINOIS DEPARTMENT OF REVENUE,	)	TYE: 12/31/2014 and 12/31/2015
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PETITIONERS' MOTION FOR PROTECTIVE ORDER

Petitioners Michael Rothman and Jennifer Rothman, through their attorneys, JONES DAY, hereby move pursuant to Illinois Supreme Court Rule 201(c)(1) for a protective order regulating discovery to prevent the Illinois Department of Revenue (“the Department”) from sharing documents produced in this matter with other parties for purposes of unrelated audits, litigation, or other matters. A copy of the proposed protective order is enclosed as **Exhibit 1**. In support of their motion, Petitioners state as follows:

1. Petitioners intend to produce certain tax returns and related documents, and other confidential personal and financial records evidencing their Florida residency (collectively, “Records”) to the Department in response to the Department’s July 3, 2019 First Request for Production in the above-captioned Protest (“Protest”).

2. Illinois Supreme Court Rule 201(c)(1) states that “[t]he court may at any time on its own initiative, or on motion of any party or witness, make a protective order as justice requires, denying, limiting, conditioning, or regulating discovery to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or oppression.”

3. Rule 201(c) gives the trial court broad discretion to prevent abuses of the liberal discovery afforded under the rules. *See* Ill. Sup. Ct. R. 201(c), Committee Comments (Rev. June 1, 1995).

4. “There is ample precedent for the entry of a protective order preventing dissemination of sensitive discoverable materials to third parties *or for purposes unrelated to the lawsuit.*” *May Centers, Inc. v. S.G. Adams Printing & Stationery Co.*, 153 Ill. App. 3d 1018, 1021 (5th Dist. 1987) (emphasis added). The Department has “no constitutional right to disseminate information made available only for purposes of trying his suit.” *Id.* at 1023.

5. In fact, the Illinois Supreme Court ruled that a protective order may be appropriate when one party wishes to share documents acquired in discovery with a tax auditor concerning another matter. *See Statland v. Freeman*, 112 Ill. 2d 494 (1986). There, the Court held that the trial court did not abuse its discretion in entering a protective order under Rule 201(c) because the “court was informed of the nature of the discovered material, and that the plaintiff intended to use it in another proceeding.” *Id.* at 499.

6. Here, good cause exists for this Court to enter a protective order preventing the Department from disseminating or otherwise using the Records or any other confidential information acquired over the course of discovery for purposes unrelated to this Protest. Discovery serves to “educate the parties” and “expedite [the] ascertainment of the truth and ultimate disposition of the lawsuit.” *May Centers*, 153 Ill. App. 3d at 1022. Information gathered in discovery for this Protest should not be used for purposes unrelated to those ends, and particularly should not be used to penalize Petitioners’ for seeking to vindicate their rights. *See id.*

7. Petitioners are under audit by the Department for years unrelated to the present Protest. Documents produced and information acquired over the course of this Protest should not be shared with the Department's Audit Bureau. Audit procedures dictate that the Audit Bureau should instead request information relevant to that audit from Petitioners directly.

8. Petitioners would be prejudiced if the Records and information were shared with the Audit Bureau outside of normal audit procedures. The tax years at issue for the audit against Petitioners (2013 and 2016) are not the same as the tax years at issue for this Protest (2014 and 2015). "Income taxes are levied on an annual basis. Each year is the origin of a new liability and a separate cause of action." *Commissioner v. Sunnen*, 333 U.S. 591, 597–598 (1948) (internal citation omitted); *see also* 35 ILCS 5/102 (generally conforming the Illinois Income Tax Act to the Internal Revenue Code). Determinations made in one tax year should not be used against taxpayers for other tax years when the facts are not identical. *See Burrows Co. v. Hollingsworth*, 415 Ill. 202, 213 (1953) (res judicata and collateral estoppel "have been tempered in their application to tax cases" because it would result in inequitable treatment of taxpayers) (citing *Comm'r v. Sunnen*, 333 U.S. 591 (1948)). While Petitioners were residents of Florida in each year under audit and in each year in this litigation, the facts are not identical in each tax year. If the documents produced in this case are allowed to be used for purposes other than this lawsuit, Petitioners may face an inequitable conflation of distinct tax years. The proposed protective order would prevent this issue from arising.

9. The Department, conversely, will not be prejudiced by the entry of the proposed protective order, as it leaves untouched the Department's ability to conduct meaningful discovery for this Protest, or to audit Petitioners for other tax periods. *See May Centers*, 153 Ill.

App. 3d at 1022 (noting that “defendant’s ability to gather information in discovery is unfettered by the protective orders in question”).

WHEREFORE, Petitioners pray that this Court grant Petitioners’ motion by entering a protective order which prevents the Department from using Records and information gleaned from this Protest for any purpose unrelated to this Protest, or any other relief that furthers the ends of justice.

Respectfully submitted,

Michael Rothman
Jennifer Rothman

/s Michael J. Wynne

Counsel for Defendants

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EXHIBIT 1

**IN THE ILLINOIS
INDEPENDENT TAX TRIBUNAL
COOK COUNTY, ILLINOIS**

Michael Rothman and Jennifer Rothman,	)	
Petitioners,	)	
	)	Case Nos. 18-TT-30
	)	18 TT 132
v.	)	
	)	
ILLINOIS DEPARTMENT OF REVENUE,	)	Judge Brian F. Barov
Respondent.	)	

PROTECTIVE ORDER

The Illinois Independent Tax Tribunal (“Tribunal” or “Court”) hereby enters this Protective Order with the following terms that will govern the proceedings of the above-captioned protest (“Protest”):

1. As used in this Protective Order, “documents” shall be interpreted broadly and expansively and in accordance with the definition of “documents” referenced in Illinois Supreme Court Rule 201(b)(1).

2. As used in this Protective Order, “Confidential Information” means documents designated as “Confidential” after the execution of this Protective Order. Any such Confidential Information shall be deemed and marked “Confidential” by the producing party that falls within one or more of the following categories:

- a) Information prohibited from disclosure by statute;
- b) Information that reveals trade secrets;
- c) Information that the party has maintained as confidential and the release of

which is reasonably likely to cause economic harm (e.g., bank account numbers, credit card numbers);

- d) Personal identity information (i.e. social security numbers, dates of birth); and
- e) Personnel or employment records of a person who is not a party to this matter.

3. All Confidential Information, including any notes or records regarding the contents of such information, may not be used for any purpose other than for the purpose set forth herein and may be disclosed only to the following persons:

- a) Any Court having jurisdiction over the Protest and its respective judicial officials, and court personnel;
- b) Parties to the Protest, Counsel for Petitioner, and Counsel for Respondent, but not any non-attorney employees of Respondent;
- c) Employees of Petitioner's attorney or the Illinois Department of Revenue assigned to assist in the litigation preparation of the Protest;
- d) Auditors, audit supervisors, and audit management of the Illinois Department of Revenue as reasonably needed with litigation of this Protest but not for any other Department purpose; forbidden purposes include but are not limited to audits of Petitioners for other tax periods;
- e) Independent experts, consultants, accountants, translators, and others who are not employees of any Party to the Protest but who have been retained specifically to perform work for attorneys in connection with the prosecution or defense of the Protest "Retained Experts";
- f) Persons whose names appear on those documents as authors or recipients thereof; and
- g) Deposition or trial witnesses in the Protest where, before a Party shows a document containing

Confidential Information to any witness, there exists a good faith belief that the witness will be questioned about such document.

4. Under no circumstance, other than those specifically provided for in this Protective Order, shall any person receiving Confidential Information voluntarily disclose it to persons other than the persons identified in paragraph 3 above.

5. The Parties will not designate as “confidential” any document or material which has previously been disclosed or publicly known outside the Protest without confidential restrictions. Illinois Department of Revenue audits are confidential and thus documents submitted during such audits were not “disclosed or publicly known outside the Protest without confidential restrictions.”

6. If Confidential Information is inquired about during a deposition, the portion of the transcript where the information was provided shall be treated as Confidential Information.

7. The Confidential Information may be disclosed and discussed with the persons identified in paragraph 3 only on the condition that, prior to disclosing the Confidential Information to any person pursuant to paragraph 3, counsel shall:

- a) Apprise that person of the confidential nature of the documents;
- b) Apprise that person that this Protective Order prohibits the use of such documents, or their contents, by such person for any purpose other than the Protest, and prohibits the disclosure of such documents or their contents to any third Party;
- c) Apprise that person that a violation of this Protective Order may result in a civil action for damages, including sanctions.

8. In the event counsel for any Party to the Protest determines to file with, or submit to, the Court any Confidential Information contained therein or derived therefrom, by way of

pleadings, motions, briefs, responses or any other papers containing or attaching such materials or information, such documents shall either be filed under seal or have the confidential information redacted therefrom such that members of the public cannot ascertain the confidential information.

9. The provisions of this Protective Order, insofar as they restrict the disclosure and use of Confidential Information, shall have a continuing effect beyond the termination of this Protective Order or the conclusion of the Protest, unless the Confidential Information otherwise becomes public knowledge. All knowledge of Confidential Information shall be kept confidential within the meaning of this Protective Order in perpetuity, unless the Confidential Information otherwise becomes public knowledge. All documents produced by Petitioner in the course of this Protest shall be used solely for purposes of this Protest.

10. Nothing contained in this Protective Order shall preclude any Party from using its own documents in any manner it sees fit, or from revealing its own documents to whomever it chooses. The documents produced by Petitioners during any audits of Petitioners by the Department do not qualify as the Department's "own documents" for these purposes.

11. Inadvertent or unintentional production of documents or information containing Confidential Information, which are not designated "Confidential" shall not be deemed a waiver in whole or in part of a claim for confidential treatment, provided that the Producing Party takes prompt action to designate the information as "Confidential."

12. At the conclusion of the work of any Retained Experts, as defined herein, all Confidential Information and all reports, reliance materials, copies, prints, negatives, notes, information derived therefrom, and summaries thereof shall be returned to the attorneys who retained the Retained Experts and who provided access to the Confidential Information. Materials

containing Confidential Information shall be returned to the party producing them or destroyed within thirty (30) days of a final unappealable order in this matter. If materials containing Confidential Information are destroyed, counsel shall certify in writing to the designating party that destruction has occurred. Notwithstanding the above requirements to return or destroy documents, counsel may retain (1) attorney work product, including an index that refers or relates to designated Confidential Information so long as that work product does not duplicate verbatim substantial portions of Confidential Information, and (2) one complete set of all documents filed with the Tribunal including those filed under seal. Any retained Confidential Information shall continue to be protected under this Protective Order. An attorney may use his or her work product in subsequent litigation, provided that its use does not disclose or use Confidential Information.

13. No waiver by any Party of any default or breach of any obligation under this Protective Order shall operate as a waiver of any continuing or future default or breach.

14. Should any provision in this Protective Order be held by a court of competent jurisdiction to be illegal, invalid or unenforceable, the remaining provisions of this Protective Order shall not be affected or impaired thereof.

15. At any time after the delivery of Confidential Information, counsel for the Party or Parties receiving the Confidential Information may challenge the confidential designation of all or any portion thereof by providing written notice thereof to counsel for the Producing Party. If after reasonable and good faith efforts, the Parties are unable to agree as to whether the confidential designation of Confidential Information is appropriate, the Party or Parties receiving the Confidential Information shall certify to the Producing Party that the Parties cannot reach an agreement as to the confidential nature of all or a portion of the Confidential Information.

Thereafter, within 5 business days of such a certification, the Producing Party shall file a motion for protective order. The Producing Party shall have the burden of establishing that the disputed Confidential Information are entitled to confidential treatment. All Confidential Information are entitled to confidential treatment pursuant to the terms of this Protective Order until and unless the Parties formally agree in writing to the contrary, or a contrary determination is made by the Court as to whether all or a portion of Confidential Information are entitled to confidential treatment. If a Producing Party does not prevail on a motion for continued protection of Confidential Information pursuant to this paragraph, the Producing Party shall have a reasonable time after entry of the order denying the motion to seek expedited appellate relief.

IT IS SO ORDERED:

DATED this ____ day of _____ 2020.

Judge Brian F. Barov, Illinois Independent Tax Tribunal