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 TO MOTION TO COMPEL

The Department's Response to Petitioners' Motion To Compel (the "Response") can be dealt with succinctly, as follows:

A. **Freedom of Information Act.** The April 27, 2021, Order asked the parties to "discuss the relationship between the Illinois Freedom of Information Act and the Illinois Supreme Court Rules governing discovery in the trial court, in light of the circuit Court decision in *Tax Analysts v. Illinois Dep't of Revenue, 18-MR-001018 (Sangamon Cty., Dec. 18, 2019).*" The Department has offered nothing on that issue.

The leading case remains *People ex rel. Birkett v. City of Chicago*, 184 Ill.2d 521 (1998). There, the Court was asked, and it declined, to recognize a common-law "deliberative process privilege" to protect certain advice and discussions between government officials on the formulation of decisions and policy. The Court observed that "courts considering this question under the federal FOIA have held it unsound to equate FOIA exemptions to similar discovery privileges. (Citations omitted.)" *Id*,, at 529. For Illinois, specifically, the Court noted that "The drafters of the Illinois FOIA also acknowledged a distinction, observing that the FOIA was 'more in the interest of citizen involvement in public records' and that 'litigation, depositions,

request for documentation' were all 'far beyond the range' of the bill. (citation omitted)". *Id.* The Court ultimately concluded that "adoption of a privilege shielding predecisional opinions and recommendations . . . would undoubtedly operate to hinder the fact-finding process in many of these cases" and "[w]e do not believe that our General Assembly intended such a result in the creation of FOIA exemption" provisions. *Id.* . Particularly apt for this case, was the Courts statement that "where the government is a party to the litigation, and more importantly, has been charged with malfeasance[,] . . . [i]t is unjust to afford the government the benefit of withholding relevant evidence while requiring the opponent to adhere to the established rules of open discovery." *Id.* at 530.

The Court has since observed that "This court in *Birkett* recognized that the creation of a new privilege in Illinois is 'presumptively a legislative task[.]" *Harris v. One Hope United, Inc.*, 2015 IL 117200, ¶ 27. The Illinois FOIA provides no basis in civil litigation for a claim of privilege in discovery.

B. The Disputed Discovery. Page 6 of the Response concludes the meandering and occasionally inaccurate recollection of the proceedings. After page 6, when the Department addresses the motion, the following issues become evident:

1. Emails. The Department agrees it has an email problem and needs to cure "perceived deficiencies." Not having searched for all responsive emails, it now says that it "has reached out to its Information Technology Department who will be conducting an agency wide computer search of all emails related to the audit files at issue" and that it is "currently working on a search query for the emails associated with the Audit files." But the Department again proposes a closed system for its search. Collaborating with opposing counsel to identify possible custodians of records whose email will be searched, and on search terms, are particularly apt

steps where the 201(k) process already disclosed individuals involved in the audit not disclosed in previous answers to interrogatories. The Response still fails to acknowledge or illuminate where the last six months of the Audit Log could be found. Without the log, we are piecing together Audit events and participants from emails disclosed through the 201(k) process.

2. Privilege Log. The Department knows it has a privilege log problem. The May 15, 2019 privilege log has only the following entry:

Bates Number	Type	Date	Subject	Authors	Recipients	Privilege
IDOR Audit File 1243, 1244, 1255	Copy of Emails	6/7/17-8/22/17	Subpoena Content	Brian Fliflet, Deputy General Counsel	Greg Nelson, Revenue Auditor	Attorney-Client Privilege, Attorney Work Product

This is not responsive to Petitioner's April 1, 2020, 201(k) letter, regarding its Requests to Produce Nos. 4 & 5 setting forth that "The Department did not produce a privilege log for communications, records, or portions of the Department's audit manual which it asserted were privileged." Under Rules 213(i) and 214(d) there is an ongoing obligation to supplement discovery. The privilege log provided March 8, 2021, with the Department's supplemental 201(k) production, still fails to assert privilege for the portions of the Audit Manual not produced, such as the parts of Audit Manual Chapter 49 referenced in DOR 001714 and 001717, and the portions pertinent to the application of negligence penalties.[1] Also, while it lists

[1] Notably, in the 2019 Audit Manual produced, the leading precedent on Illinois income tax residency =, *Cain v. Hamer*, 2012 IL App (1st) 128333 - is referenced without discussion simply advising of its inclusion in Chapter 49, (DOR 001714), that was no produced, and the *Grede* case, 2013 ILApp(2nd) 120731-U, is misdescribed (DOR 001718) as involving a contract for 2 years in Singapore when that decision never mentions Singapore and discloses it involved a 3 year contract in Hong Kong. This bolsters Petitioners' good faith belief (i) that the Audit Manual in use when the audit took place in 2017 may, when produced, show it incorrectly stated what the law is and how it is applied, or, (ii) that Auditor Nelson (also the auditor in the *Cain* case) made idiosyncratic determinations unmoored in the Audit Manual, the regulations, and case law.

multiple emails to persons identified as attorneys, one email (DOR 001688) involves none of the listed individuals.

3. Audit Manual. The Department agrees it has an Audit Manual problem, as it "will re-review the previously produced residency section of the audit manual and supplement its production response, if necessary." It is necessary. The Response refuses to acknowledge that the Department produced portions of a version of the Audit Manual dated ***after*** the audit was concluded. The current production, and any further production from its re-review, of the 2019 manual are wholly non-responsive. Petitioners cannot use a 2019 Audit Manual to gain insight into the rationale, or to develop auditor questioning, for an audit conducted in 2017.

In addition, Petitioners First Request for Production No. 4 served in both 2014-2015 cases – one dealing with the assessment of negligence penalties and one dealing with the denial of a claim for tax and interest --asked for "all documents provided to auditors guide or instruct them in residency audits, including, but not limited to, sections of the Department's audit manual that addresses the determination of residency in an audit for income tax purposes." The Department imposed a negligence penalty in a residency audit. Department audit manual sections addressing the penalty standards and processes are within the scope of Petitioner's request.

4. 2013-2016 Information / Audit Files. The Department stands on its objection regarding relevancy for 2013 and 2016 on the basis that "it cannot be argued that the period of 2013 and 2016 are only relevant when Petitioners ask for documents but not relevant when the Department requests documents for the same period."

First, 2013 is intrinsically legally relevant once the Department applied its regulation looking to whether an individual is a resident in the preceding year to then look to the days of the

taxable year spent in Illinois and one other state. 86 Ill. Admin. Code § 100.3020(f)(2). To make its application of the regulation *prima facie* true and correct for 2014, the Department had to make a determination regarding the Rothmans residency in 2013. To our knowledge from emails thus far, without an audit of 2013, all the Department had to *lock in* residency for 2013, and to thereby support its yet to be issued notice for 2014, was the plan to coerce a payment through imposition of negligence penalty for 2014. Everything about that determination for the then unaudited 2013 year is unquestionably relevant to the legal effect of the 2014 notices.[2]

Second, when Petitioners objected to discovery about 2013 and 2016, the Department was conducting an audit for those years and thereby had independent means to gather facts without the aid of discovery in the Tax Tribunal. But, that was ***before*** the Department's Rule 201(k) document production disclosed to Petitioners that the method and manner for conducting the 2014 and 2015 audit were intrinsic steps in a scheme to lock in liability for 2013 and 2016 before initiating an audit for those years. Concluding the Rothmans were residents for 2013 was *necessary* to apply the regulatory presumption of residency for 2014, but it was also arbitrary since it was made before an audit of 2013 initiated. In a November 16, 2017 email The Auditor instructed Audit Management on the intention of the out-of-sequence audit scheme:

> "I say let them take their chances with the BOA. Since we have other cases pending/sandwiched on either side, the abatement would lock us in. <u>We lose our leverage</u>. . . . If you agree Negligence is appropriate, we shouldn't be

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[2] "If the taxpayer calls into question the method employed by the [Illinois] Department [of Revenue] to calculate the amount of tax due, then the record must show the techniques and assumptions that the Department used met some minimum standard of reasonableness." *Chak Fai Hau v. Dept. of Rev.* 2019 Il App (1st)172588 ¶ 46. The statutory *prima facie* case ordinarily dispenses with producing the testimony of the auditor to support that case, but "the Illinois Supreme Court has suggested that, when it is called into question, the method employed by the Department in correcting a taxpayer's return must meet some minimum standard of reasonableness. (citation omitted) The reasonableness standard is based upon the statutory provision which requires that the Department's corrected returns be made "according to its best judgment and information. (citation omitted)". *Masini v Department of Revenue*, 60 Ill. App. 3d 11, 14 (1978), citing, *Grand Liquor Co. v. Department of Revenue*, 36 Ill. App. 3d 277 (1976), aff'd, 67 Ill. 2d 195 (1977). Without an audit of 2013, the Department wanted to *lock in* residency in 2013 through the penalty-coerced payment by the Rothmans of liability for 2014 and 2015. That is not a minimum standard of reasonableness for 2013 liability, nor to establish 2013 residency in order to apply the regulation for 2014.

> abating the lesser penalties. . . .I think if we assess Negligence, they'll try to settle and ask to just pay LP . . . Either way . . . this locks them into residency in the middle years, making it that much harder to argue non-residency, especially in '13,"

IDOR 001637, emphasis in original. The entire scheme – encompassing audit files for 2013 through 2016 – is relevant to whether the notices of deficiency and of denial for 2014-2015 forfeited the presumption of administrative regularity and the statutory *prima facie* case. [3]

Too, the volume of the Department's discovery belies its claim that 2013 and 2016 are irrelevant. The discovery is grossly disproportionate to the 2014-2015 case, involving 152 requests for production, and 30 interrogatories, for a two-year penalty amount of $18,337 (18 TT 30), and a two-year tax amount of $55,672 (18 TT 132).[4]

C. Department's Response to Introduction. Pages 1 and 2 of the Response are a revisionist reconstruction of the facts. Paragraph 64 of Petitioners' Original Petition alleged that the Rothmans filed 1040X amended returns claiming refunds for 2014 and 2015. Petitioners' counsel advised the Department of that by email on May 15, 2018, when Petitioners received the Department's motion to dismiss. See attached, DOR 001700. The Department's motion to dismiss mistakenly asserted that in response to the Department's motion the Petitioners needed to file amended returns that were already on file. Once that prior filing was confirmed, the motion to dismiss did not proceed.

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[3] Taking tax years out of cycle for audit is irregular, as well as illogical and unreasonable when prior year residence is needed under the regulation for IDOR to presume residence in the following year. It has needlessly complicated the legal issues and the discovery in this case. The Department says Petitioner's exposition of the scheme they reveal is "false, highly inflammatory, and wholly inappropriate, and should be stricken." Response p. 6. The emails speak for themselves; they are authentic. What the emails describe is inflammatory but, those are the facts. What was revealed is inappropriate government conduct. Striking the motion won't change the facts. This should not happened, so the Department should not be rewarded with a *prima facie* effect for its notices.

[4] "[R]equests that are disproportionate in terms of burden or expense . . . should be avoided[,]" and a court may determine whether that burden or expense "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(a) and (c)(3).

Pages 3-4 of the Response are fictional too. Petitioner's 201(k) letter about the Department's 152 production requests explained that portions of the Department's Verified Answer "appear to not have been informed by the omitted portions of the audit file despite being verified by the auditor who requested and maintained or accessed the information received from Petitioners and other subpoena recipients." See, Exhibit, at p. 2. Despite sworn verification by the auditor, the Department would have to correct its Answer. Petitioners took the opportunity to amend their petition to streamline allegations in illusory hope of reducing the number of the Department's production requests.

D. Outstanding Discovery. In the confusing pleadings and document production process, Petitioners acknowledge losing track of whether they filed answers to Interrogatories. Petitioners advised the Department of that before the Response was filed, and filed their Answers to the Department's Interrogatories on July 8, 2021. On July 6, 2021, Petitioners also completed their review and production relating to the 53 items in the Department's 12 page 201(k) letter regarding Petitioners responses to 138 requests for production.

Dated: July 9, 2021

Respectfully submitted,

/s/ Michael J. Wynne

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From: Wynne, Michael J. [mailto:mwynne@jonesday.com]
Sent: Tuesday, May 15, 2018 4:09 PM
To: Budzileni, Susan <Susan.Budzileni@Illinois.gov>
Cc: Kulekowskis, Rebecca <Rebecca.Kulekowskis@Illinois.gov>; Wick, Douglas A. <dwick@jonesday.com>
Subject: [External] RE: Rothman v. DOR: 18-TT-30

Hi Susan,

Paragraph 64 of the Petition alleges that the Rothmans filed 1040-X returns for 2014 and 2015. Your motion does not mention that and says they need to file amended returns.

Does the Department have amended returns on file, whether processed or not, for the Rothmans?

Mike

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> **From:** Budzileni, Susan <Susan.Budzileni@Illinois.gov>
> **Sent:** Tuesday, May 15, 2018 1:07 PM
> **To:** Barov, Brian <Brian.Barov@illinois.gov>
> **Cc:** Kulekowskis, Rebecca <Rebecca.Kulekowskis@Illinois.gov>; Wynne, Michael J. <mwynne@jonesday.com>; Wick, Douglas A. <dwick@jonesday.com>
> **Subject:** Rothman v. DOR: 18-TT-30
>
> Good afternoon Judge Barov:
>
> For filing, attached please find the Department's Motion to Dismiss. Please note, there are two sets of exhibits attached to the motion. The first set contains the unredacted exhibits and the second set contains the redacted version of the first set.
>
> Sincerely,
>
> Susan Budzileni
> Special Assistant Attorney General
> Illinois Department of Revenue
> Legal Services
> 100 W. Randolph Street, 7th Floor
> Chicago, Illinois 60601
> 312-814-1716

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JP023827

May 6, 2019

VIA E-MAIL

Rebecca Kulekowskis
Susan Budzelini
Valerie Puccini
Illinois Department of Revenue
100 W. Randolph, Suite 7-500
Chicago, IL 60601

Re: Rule 201(k) Letter

Dear Mses. Kulekowskis, Budzelini, and Puccini:

I'm writing pursuant to Illinois Supreme Court Rule 201(k). On May 2, 2019, the Department served a 152-part Request for Production (not including sub-parts or compound requests). Many of these Requests are duplicative of documents the Department already asked for and received during the audit.[1] For example:

- Request No. 1: the Department received copies of the Petitioners' federal tax returns for 2014 and 2015 on May 31, 2017 in response to an IDR.

- Request No. 7: the Department received copies of the Petitioners' voter registrations cards on April 28, 2017, in response to an IDR.

- Request No. 9: the Department received copies of the Petitioners' driver's licenses on April 28, 2017, in response to an IDR.

- Request Nos. 10–11: the Department received documents evidencing their ownership of property in the various states on April 28, 2017, in response to an IDR

[1] "Duplication of discovery methods to obtain the same information and discovery requests that are disproportionate in terms of burden or expense should be avoided." Ill. Sup. Ct. R. 201(a).

- EXHIBIT -

- Request No. 28 and 61: log and manifest documents already subpoenaed from Petitioners and EJM, for which Petitioner's already responded they are not the custodians and provided other information.

This is just a small sampling of the Department's Requests for documents it already requested and received.

The Department has already acknowledged upon receipt of Petitioners' discovery that it failed to produce significant portions of the audit file. That failure is further reflected in the Department's *verified* Answer, portions of which appear to not have been informed by the omitted portions of the audit file despite being verified by the auditor who requested and maintained or accessed the information received from Petitioners and other subpoena recipients. Viewing the discovery at face value, it is evident that the Department's 152-part Requests for Production were written before, but issued after, the Department's realization that there were significant omissions in the produced audit file. Given that, pursuant to Rule 201(k), I request that the Department withdraw its First Production Request.

The Department completed a full audit of Petitioners and obtained documents and information through voluminous IDRs and subpoenas which were more than sufficient to burst the presumptions available to the Department under its residency regulation. *See, e.g., Franciscan Sisters Health Care Corp. v. Dean*, 95 Ill. 2d 452 (1983). Lacking a presumption, the issuance of the Notice of Deficiency ("NOD") suggests the Department thought it had an adequate factual basis to support issuing the NOD. A 152-part Request for Production strongly suggests the contrary—that there may not have been a factually sufficient basis to issue the NOD. In a prior conversation we agreed that the Department should file a corrected Answer, and that the Department should produce the remainder of the audit file thus far withheld. Once it does so, the Department should also be in a better position to re-issue a narrower Request for Production that takes into account information in its possession and that is tailored to this specific lawsuit, as required by the Rules. As it stands, the Department's First Production Request is "disproportionate to the likely benefit"[2] and borders on vexatious.

Please let me know whether you agree with the approach outlined in this letter, or contact me to discuss a collaborative effort to resolve these discovery issues in the spirit of Rule 201(k).

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[2] Ill. Sup. Ct. R. 214(c).

Very truly yours,

/s Michael J. Wynne

Michael J. Wynne

Enclosure