

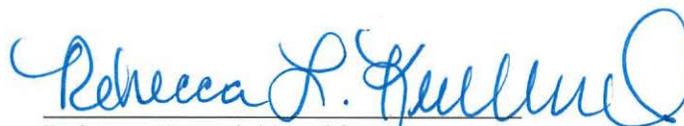
ILLINOIS INDEPENDENT TAX TRIBUNAL

TYLER R. and TALBOT DEBUTTS CAIN,)	
)	
Petitioner,)	
v.)	No. 15 TT 63
)	
ILLINOIS DEPARTMENT OF REVENUE)	Judge James Conway
)	
Respondent.)	

CERTIFICATE OF SERVICE

Rebecca L. Kulekowskis certifies that she is a Special Assistant Attorney General of the State of Illinois duly appointed by Lisa Madigan, Attorney General of the State of Illinois; that she is authorized to make this certificate; that on **June 2, 2015**, before the hour of 5:00 p.m. (C.S.T) she served a true and exact copy of the foregoing instruments entitled **RESPONDENT'S ANSWER TO PETITION** on the above Taxpayer/Petitioner by sending same as an attachment to an electronic mail message addressed to the following individuals at their designated email addresses:

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IN THE ILLINOIS
INDEPENDENT TAX TRIBUNAL

TYLER R. and TALBOT DEBUTTS)	
CAIN,)	
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Petitioners,)	
)	
v.)	No. 15-TT-63
)	
THE ILLINOIS DEPARTMENT OF)	
REVENUE,)	
)	
Respondent.)	
)	

RESPONDENT’S ANSWER TO PETITION

NOW COMES the Department of Revenue of the State of Illinois (“Department”), through its attorney, Lisa Madigan, Attorney General of and for the State of Illinois, and for its Answer to Taxpayer’s Petition respectfully pleads as follows:

Allegations Common to All Counts

1. On July 16, 2012, the Illinois Appellate Court, First District, First Division, ended 6 years of hard-fought litigation between the Petitioners and the Respondent with a final decision that Tyler R. Cain and Talbot Debutts Cain (the “Cains”) were, for purposes of the Illinois Income Tax Act (“IITA”) [35 ILCS 5/101, *et seq.*] for the tax years 1996 through 2004, not residents of Illinois and were instead residents of Florida and therefore the Cains had overcome the Department of Revenue’s (the “Department”) Notice of Deficiency and the Department had failed to carry its burden of proof. *Cain v. Hamer*, 2012 IL App (1st) 111283 (July 16, 2012).

See Exhibit A.

ANSWER: The allegations in Paragraph 1 concern tax years prior to the tax year ending December 31, 2007 (“Tax Year at Issue”). Therefore, the facts alleged are not material allegations of fact, and therefore, no answer is required pursuant to Rule 310(b)(2). Further the

Department asserts that the case cited and attached as Exhibit A to the Taxpayers' Petition in Paragraph 1 speaks for itself.

2. During the *Cain v. Hamer* litigation, the Department of Revenue took the sworn deposition of Tyler Cain, and of his accountant, Mr. Robert Jacobson, and the Department retained transcript of these depositions.

ANSWER: The allegations in Paragraph 2 concern tax years prior to the Tax Year at Issue. Therefore, the facts alleged are not material allegations of fact, and therefore, no answer is required pursuant to Rule 310(b)(2). Department admits that its counsel, the Illinois Attorney General, took the depositions of Tyler Cain and Robert Jacobson in a case docketed as 06-L-050986 in the Circuit Court of Cook County. Department denies that Department retained transcripts of the depositions. The Department will make a diligent search for referenced transcripts.

3. Through the 2008 deposition of Tyler Cain, the Department elicited testimony under oath.

ANSWER: The allegations in Paragraph 3 concern tax years prior to the Tax Year at Issue. Therefore, the facts alleged are not material allegations of fact, and therefore, no answer is required pursuant to Rule 310(b)(2). Department admits that its counsel, the Illinois Attorney General, took the deposition of Tyler Cain in docket number 06-L-050986 in the Circuit Court of Cook County.

4. Mr. Cain testified that he was retired at the time of the deposition, December 22, 2008, and during 1995.

ANSWER: The allegations in Paragraph 4 concern tax years prior to the Tax Year at Issue. Therefore, the facts alleged are not material allegations of fact, and therefore, no answer is required pursuant to Rule 310(b)(2). Petitioner did not attach the transcript of testimony to which it refers in Paragraph 4, or otherwise identify the transcript by date, or provide a reference to the page and line number of the transcript for the testimony alleged. Therefore, the Department lacks sufficient information to either admit or deny the factual allegations in Paragraph 4.

5. Mr. Cain testified that his income was from interests, dividends and capital gains, and that, as an example, he had sold "a hundred shares of Abbott Laboratories, not in these

partnerships, in my name.” Mr. Cain had prior in the deposition testified that he had multiple “family partnerships set up over a period of time . . . for the purpose of transferring assets from my name to our children’s name,” and responded affirmatively that “it would be fair to say that’s – they were created mostly for estate planning purposes.”

ANSWER: The allegations in Paragraph 5 concern tax years prior to the Tax Year at Issue. Therefore, the facts alleged are not material allegations of fact, and therefore, no answer is required pursuant to Rule 310(b)(2). Petitioner did not attach the transcript of testimony to which it refers in Paragraph 5, or otherwise identify the transcript by date, or provide a reference to the page and line number of the transcript for the testimony alleged. Therefore, the Department lacks sufficient information to either admit or deny the factual allegations in Paragraph 5.

6. Mr. Cain testified that one of his entities, TRC Trading Inc. is “an S corporation” formed “back when I joined the CBOE [Chicago Board of Options Exchange] . . . in the mid 1970s.”

ANSWER: The allegations in Paragraph 6 concern tax years prior to the Tax Year at Issue. Therefore, the facts alleged are not material allegations of fact, and therefore, no answer is required pursuant to Rule 310(b)(2). Petitioner did not attach the transcript of testimony to which it refers in Paragraph 6, or otherwise identify the transcript by date, or provide a reference to the page and line number of the transcript for the testimony alleged. Therefore, the Department lacks sufficient information to either admit or deny the factual allegations in Paragraph 6.

7. Mr. Cain testified that he did not, since retirement in 1990, perform any personal services for TRC Trading.

ANSWER: The allegations in Paragraph 7 concern tax years prior to the Tax Year at Issue. Therefore, the facts alleged are not material allegations of fact, and therefore, no answer is required pursuant to Rule 310(b)(2). Petitioner did not attach the transcript of testimony to which it refers in Paragraph 7, or otherwise identify the transcript by date, or provide a reference to the page and line number of the transcript for the testimony alleged. Therefore, the Department lacks sufficient information to either admit or deny the factual allegations in Paragraph 7.

8. When asked by the Department if he was “aware that TRC Trading was taking deductions for contributions to your pension plan?” Mr. Cain responded “Yes.”

ANSWER: The allegations in Paragraph 8 concern tax years prior to the Tax Year at Issue. Therefore, the facts alleged are not material allegations of fact, and therefore, no answer is

required pursuant to Rule 310(b)(2). Petitioner did not attach the transcript of testimony to which it refers in Paragraph 8, or otherwise identify the transcript by date, or provide a reference to the page and line number of the transcript for the testimony alleged. Therefore, the Department lacks sufficient information to either admit or deny the factual allegations in Paragraph 8.

9. Mr. Cain testified that since retaining Bob Jacobson as his accountant it was Mr.

Jacobson's decision to not take the pension deduction on the TRC Trading returns.

ANSWER: The allegations in Paragraph 9 concern tax years prior to the Tax Year at Issue. Therefore, the facts alleged are not material allegations of fact, and therefore, no answer is required pursuant to Rule 310(b)(2). Petitioner did not attach the transcript of testimony to which it refers in Paragraph 9, or otherwise identify the transcript by date, or provide a reference to the page and line number of the transcript for the testimony alleged. Therefore, the Department lacks sufficient information to either admit or deny the factual allegations in Paragraph 9.

10. The Department elicited testimony from Mr. Robert Jacobson under oath on February 17, 2009.

ANSWER: Department admits that its counsel, the Illinois Attorney General, took the deposition of Robert Jacobson in a case docketed as 06-L-050986 in the Circuit Court of Cook County. However, the information sought at deposition concerned tax years prior to the Tax Year at Issue.

11. Mr. Jacobson testified that "TRC Trading, Inc. was originally formed as an Illinois corporation, and "being a corporation, did not follow the investment partnership rules, so it had no choice but to file in Illinois."

ANSWER: The allegations in Paragraph 11 concern tax years prior to the Tax Year at Issue. Therefore, the facts alleged are not material allegations of fact, and therefore, no answer is required pursuant to Rule 310(b)(2). Petitioner did not attach the transcript of testimony to which it refers in Paragraph 11, or otherwise identify the transcript by date, or provide a reference to the page and line number of the transcript for the testimony alleged. Therefore, the Department lacks sufficient information to either admit or deny the factual allegations in Paragraph 11.

12. Mr. Jacobson testified that TRC Trading Inc. "was originally where he [Mr. Cain] did all of his active trading when he held a seat on one of the exchanges."

ANSWER: The allegations in Paragraph 12 concern tax years prior to the Tax Year at Issue. Therefore, the facts alleged are not material allegations of fact, and therefore, no answer is required pursuant to Rule 310(b)(2). Petitioner did not attach the transcript of testimony to which it refers in Paragraph 12, or otherwise identify the transcript by date, or provide a reference to the page and line number of the transcript for the testimony alleged. Therefore, the Department lacks sufficient information to either admit or deny the factual allegations in Paragraph 12.

13. Mr. Jacobson testified as follows with respect to the salary and defined benefit plan expenses incurred by TRC Trading Inc.:

BY MR. WYNNE:

Q: And to your understanding TRC Trading was the S corp he had when he had a seat on the exchange here?

A: Yes, that's correct.

Q: Now, you also said he was paid a salary by TRC Trading?

A. Correct.

Q: Do you know whether or not that salary continued to be paid?

A. No. The salary stopped.

Q: And why was that, do you know?

A: Well, it appeared that he kept paying the salary because that's what he always did and he thought he had to. He was incurring payroll taxes on it. But he thought he always had to pay himself a salary.

When I told him back in '02, this was before I started working on his personal return, and I believe my conversation was with the other accountant, I said, Why are you continuing to issue payroll? **All he is doing is lending his company money to turn around and pay him. And they realized that they should be putting a stop to it. There was no purpose to be issuing payroll.**

Q: You are familiar with the defined benefit plan Deduction the S corp was taking?

A: Yes.

Q: Do you know if that continued?

A: It continued through '03 or '04. I believe it was '04.

Q: Do you know the reasons why it stopped?

A: Yes. I consulted with him, and I don't know whether the prior accountant just left or whether I was working with him on it. **There was no reason to keep that liability going. There was no business going on anymore,** that it should be closed, and they closed it. (Emphasis added).

ANSWER: The allegations in Paragraph 13 concern tax years prior to the Tax Year at Issue. Therefore, the facts alleged are not material allegations of fact, and therefore, no answer is required pursuant to Rule 310(b)(2). Petitioner did not attach the transcript of testimony to which it refers in Paragraph 13, or otherwise identify the transcript by date, or provide a reference to the page and line number of the transcript for the testimony alleged. Therefore, the Department lacks sufficient information to either admit or deny the factual allegations in Paragraph 13.

14. With respect to the trading activities of TRC Trading after Mr. Cain's retirement, Mr.

Jacobson's sworn testimony was that:

BY MR. WYNNE

Q: When you reviewed the returns of TRC Trading Inc. did you get a sense of the trading activity that the entity conducted?

A: Yes. It was minimal amounts of trading.

For example, there may be only, from '99, when I looked through the returns, from '99 through 2004, I think the highest number of sales of stock was ten for the whole year.

Before that I didn't have a copy of the Schedule D to tell you, but there was not active trading going on.

Q: **And to your knowledge TRC Trading has never traded for anybody other than Mr. Cain's accounts?**

A: **That's correct.** (Emphasis added)

ANSWER: The allegations in Paragraph 14 concern tax years prior to the Tax Year at Issue. Therefore, the facts alleged are not material allegations of fact, and therefore, no answer is required pursuant to Rule 310(b)(2). Petitioner did not attach the transcript of testimony to which it refers in Paragraph 14, or otherwise identify the transcript by date, or provide a reference to the page and line number of the transcript for the testimony alleged. Therefore, the Department lacks sufficient information to either admit or deny the factual allegations in Paragraph 14.

15. With respect to his working interaction with Mr. Cain, Mr. Jacobson testified as follows:

BY MR. WYNNE

Q: In your dealings with Mr. Cain, how does he normally contact you?

A: Phone and e-mail.

Q: Is that communication exclusively from Florida?

A: No. He can call me or phone me or e-mail from anywhere in the world.

Q: Do you know him to travel frequently?

A: Yes. He travels quite extensively.

ANSWER: The allegations in Paragraph 15 concern tax years prior to the Tax Year at Issue. Therefore, the facts alleged are not material allegations of fact, and therefore, no answer is required pursuant to Rule 310(b)(2). Petitioner did not attach the transcript of testimony to which it refers in Paragraph 15, or otherwise identify the transcript by date, or provide a reference to the page and line number of the transcript for the testimony alleged. Therefore, the Department lacks sufficient information to either admit or deny the factual allegations in Paragraph 15.

16. In addition to the sworn testimony of Mr. Cain and of Mr. Jacobson which the Department obtained during the *Cain v. Hamer* proceedings, upon the close of discovery the Department also entered into a Stipulation of Facts with the Cains.

ANSWER: Department admits that Department, through its attorney, entered into a stipulation of facts regarding the years 1996 through 2004 in docket number 06-L-050986 in the Circuit Court of Cook County.

17. In the Stipulation of Factual Matters in the *Cain v. Hamer* litigation, which was relied on by the parties and the Circuit and Appellate courts, the Department and the Cains “agreed and stipulated” to the following facts (emphasis added):

58. During the Relevant Period, Mr. Cain did not perform any personal services for TRC Trading, Inc.

59. TRC Trading, Inc., an S corporation under the federal Internal Revenue Code, had no paying clients at any time during the Relevant Period.

60. During the Relevant Period, TRC Trading, Inc. never offered or provided services to the public.

...

64. Mr. Jacobson recommended that Mr. Cain's pension plan be terminated in 2004 when he began preparing TRC Trading, Inc.'s tax returns, since there was no business activity taking place and there is no reason to have such liability. TRC Trading, Inc. did not file any amended federal income tax returns for any tax years in the Relevant Period.

ANSWER: The allegations in Paragraph 17 concern tax years prior to the Tax Year at Issue. Therefore, the facts alleged are not material allegations of fact, and therefore, no answer is required pursuant to Rule 310(b)(2). Department admits that Department, through its attorney, entered into a stipulation of facts regarding the years 1996 through 2004 in docket number 06-L-050986 in the Circuit Court of Cook County.

18. The Appellate Court's discussion of the many facts pertaining to the tax residency issue, taking into account all facts of record, commented that "Although plaintiffs owned companies during the relevant period, they had limited involvement in those companies." *Cain v. Hamer*, 2102 IL App (1st) 112833, ¶ 9.

ANSWER: Department admits the existence force and effect of the case law cited in Paragraph 18. That case law speaks for itself.

19. Section 1501(a)(1) of the IITA, in pertinent part, provides that "The term "business income" means all income that may be treated as apportionable business income under the Constitution of the United States." 35 ILCS 5/1501(a)(1).

ANSWER: Department admits the existence force and effect of the statute cited in Paragraph 19. That law speaks for itself.

20. Section 1501(a)(13) of the IITA provides that "The term "nonbusiness income" means all income other than business income or compensation." 35 ILCS 5/1501(a)(13).

ANSWER: Department admits the existence force and effect of the statute cited in Paragraph 20. That law speaks for itself.

21. Section 301(c)(2) of the IITA, in pertinent part provides as follows:

Sec. 301. General Rule.

(a) Residents. . . .

(b) Part-year residents. . . .

(c) Other persons.

(1) In general. Any item of income or deduction which was taken into account in the computation of base income for the taxable year by any person other than a resident and which is referred to in Section 302, 303 or 304 (relating to compensation, nonbusiness income and business income, respectively) shall be allocated to this State only to the extent provided by such section.

(2) Unspecified items. Any item of income or deduction which was taken into account in the computation of base income for the taxable year by any person other than a resident and which is not otherwise specifically allocated or apportioned pursuant to Section 302, 303 or 304 (including, without limitation, interest, dividends, items of income taken into account under the provisions of Sections 401 through 425 of the Internal Revenue Code, and benefit payments received by a beneficiary of a supplemental unemployment benefit trust which is referred to in Section 501(c)(17) of the Internal Revenue Code):

(A) in the case of an individual, trust, or estate, shall not be allocated to this State; and

(B) in the case of a corporation or a partnership, shall be allocated to this State if the taxpayer had its commercial domicile in this State at the time such item was paid, incurred or accrued.

ANSWER: Department admits the existence force and effect of the statute cited in Paragraph 21. That law speaks for itself.

22. With respect to nonbusiness income, section 303 of the IITA, in pertinent part, provides as follows:

Sec. 303. (a) In general. Any item of capital gain or loss . . . to the extent such item constitutes nonbusiness income, together with any item of deduction directly allocable thereto, shall be allocated by any person other than a resident as provided in this Section.

(b) Capital gains and losses.

....

(3) Intangibles. Capital gains and losses from sales or exchanges of intangible personal property are allocable to this State if the taxpayer had its commercial domicile in this State at the time of such sale or exchange.

ANSWER: Department admits the existence force and effect of the statute cited in Paragraph 22. That law speaks for itself.

23. Section 1501(a)(2) of the IITA provides that “The term "commercial domicile" means the principal place from which the trade or business of the taxpayer is directed or managed.” 35 ILCS 5/1501(a)(2).

ANSWER: Department admits the existence force and effect of the statute cited in Paragraph 23. That law speaks for itself.

24. Section 1501(a)(20) limits the term “resident” to individuals, trusts and estates. 35 ILCS 5/1501(a)(20).

ANSWER: Department admits the existence force and effect of the statute cited in Paragraph 24. That law speaks for itself.

25. All material facts established through the testimony of Mr. Cain and Mr. Jacobson, and through the Stipulation of Factual Matters, remained substantially unchanged with respect to the 2007 Illinois income tax year.

ANSWER: Department denies the factual allegations in paragraph 25.

26. At some point during 2007, Mr. Cain sold stock in Abbott Laboratories which Mr. Cain had contributed as capital to TRC Trading, Inc. upon its formation, the title of which remained registered to Tyler R. Cain, resulting in capital gain income to TRC Trading, Inc.

ANSWER: Department admits the factual allegations in paragraph 26.

27. In 2007, TRC Trading, Inc. distributed to Tyler R. Cain the proceeds from the 2007 sale of stock.

ANSWER: Department admits the factual allegations in paragraph 27.

28. TRC Trading Inc. filed an original return reporting the capital gain on the sale of stock as business income on the IL 1120-ST for TYE 12/31/2007.

ANSWER: Department admits the factual allegations in paragraph 28.

29. More than three years after the filing of the original IL 112-ST return, TRC Trading Inc. filed an amended return reporting the capital gain on the sale of stock as nonbusiness income, but the amended return did not seek a refund of the resulting overpayment of tax to Illinois.

ANSWER: Department admits the factual allegations in paragraph 29.

30. After the Department lost the *Cain v. Hamer* case after a six year legal battle during which, sadly, Talbot D. Cain deceased, on October 10, 2013 the Department issued a Notice of Audit Initiation for the 2007 tax year to TRC Trading, Inc.

ANSWER: Department admits the factual allegations in paragraph 30.

31. Notwithstanding the above alleged deposition testimony of Mr. Cain and Mr. Jacobson and the above alleged Stipulation of Factual Matters in the *Cain v. Hamer* litigation, just six days after the Notice of Audit Initiation was sent to TRC Trading, Inc. on October 16, 2013, the Department issued to Tyler R. Cain and Talbot D. Cain a Notice of Proposed Deficiency for the 2007 tax year proposing to assess tax of \$64,304, and penalty of \$19,291, plus interest, for the

2007 tax year because the amended return “is out of statute and the treatment of income as ‘Nonbusiness’ income is improper.”

ANSWER: Department admits the factual allegations in paragraph 31.

32. Mr. Cain, through his counsel, advised the Department on October 29, 2013, as follows:

... We believe that if the Department issues a Notice of Deficiency the Department will be taking a position contrary to judicially established facts that it is collaterally estopped from litigating yet again, without reasonable cause to do so (*i.e.*, the development of any new information), and it will expose itself to a claim for attorney fees under Section 10-55(a) of the Administrative Procedure Act and Section 7 of the Taxpayers’ Bill of Rights Act if we have to protest and defeat this position.

ANSWER: Department admits the factual allegations in paragraph 32.

33. On February 5, 2015, the Department issued a Notice of Deficiency to the Cains assessing a personal income tax deficiency for the 2007 Illinois income tax year of \$118,761.00 (tax, penalty and interest) because, as the Department’s Informal Conference Board concluded in November 26, 2014, “Tyler R. Cain’s distribution from TRC Trading Inc. is business income and should be sourced to Illinois.” (Emphasis added). See **Exhibit B** (Notice of Deficiency) and **Exhibit C** (Informal Conference Board, Action Decision).

ANSWER: Department admits the factual allegations in paragraph 33.

COUNT I

The Department is collaterally estopped from establishing, contrary to the sworn testimony and the Stipulation of Factual Matters in the *Cain v. Hamer* case, that TRC Trading Inc. had a commercial domicile for purposes of IITA section 1501(a)(2). Therefore the NOD cannot establish the *prima facie* case under IITA section 904(c) that the 2007 distribution by TRC Trading Inc. of capital gain income to Mr. Cain was of Illinois source business income.

34. Plaintiff repeats and realleges the allegations in paragraphs 1 through 33 hereof as though fully set forth herein.

ANSWER: Department realleges and incorporates herein its Answers to paragraphs 1 through 33.

35. The deposition testimony of Mr. Cain and of Mr. Jacobson, and the Department's Stipulation of Factual Matters in the *Cain v. Hamer* litigation established conclusively that TRC Trading, Inc. was not engaged in a trade or business carried during 1996 through 2004.

ANSWER: Paragraph 35 contains a legal conclusion, not a material allegation of fact. Additionally, the allegations in Paragraph 35 concern tax years prior to the Tax Year at Issue. Therefore, no answer is required pursuant to Tribunal Rule 310(b)(2).

36. Because TRC Trading Inc. is a corporation it is not a "resident" for purposes of sections 301(a) and 1501(a)(20) of the IITA.

ANSWER: Paragraph 36 contains a legal conclusion, not a material allegation of fact. Therefore, no answer is required pursuant to Tribunal Rule 310(b)(2).

37. Because TRC Trading Inc. had no trade or business during 1996 through 2004 it had no "commercial domicile" within the meaning of that term in section 301(c)(2).

ANSWER: Paragraph 37 contains a legal conclusion, not a material allegation of fact. Additionally, the allegations in Paragraph 37 concern tax years prior to the Tax Year at Issue. Therefore, no answer is required pursuant to Tribunal Rule 310(b)(2).

38. The Department is collaterally estopped from asserting that capital gain income earned by TRC Trading, Inc. in 2007 arose from an active trade or business engaged in by TRC Trading, Inc.

ANSWER: Paragraph 38 contains a legal conclusion, not a material allegation of fact. Therefore, no answer is required pursuant to Tribunal Rule 310(b)(2). Department denies the allegations in paragraph 38.

39. Because TRC Trading Inc. did not have a commercial domicile in this, or any other, State, the capital gain of TRC Trading, Inc. cannot be allocated to this State under IITA Section 303(b)(3).

ANSWER: Paragraph 39 contains a legal conclusion, not a material allegation of fact. Therefore, no answer is required pursuant to Tribunal Rule 310(b)(2). Department denies the allegations in paragraph 39.

40. Because TRC Trading Inc. did not have a commercial domicile in this, or any other, State, the capital gain of TRC Trading, Inc. cannot be allocated to this State under IITA section 301(c)(2)(B).

ANSWER: Paragraph 40 contains a legal conclusion, not a material allegation of fact. Therefore, no answer is required pursuant to Tribunal Rule 310(b)(2). Department denies the allegations in paragraph 40.

41. Because the 2007 capital gain income of TRC Trading Inc. could not be allocated to this State under section 303(b)(3) nor under section 301(b)(3), its distribution of the income to Mr. Cain was not a distribution of Illinois source income.

ANSWER: Paragraph 41 contains a legal conclusion, not a material allegation of fact. Therefore, no answer is required pursuant to Tribunal Rule 310(b)(2). Department denies the allegations in paragraph 41.

42. Having been adjudged by the Illinois courts to be a resident of Florida, and a nonresident of Illinois, in 2007 Mr. Cain was only subject to tax under the IITA with respect to distributions of Illinois source income made to him by TRC Trading, Inc.

ANSWER: Paragraph 42 contains a legal conclusion, not a material allegation of fact. Therefore, no answer is required pursuant to Tribunal Rule 310(b)(2). Department denies the allegations in paragraph 42.

WHEREFORE, Department prays that the Tax Tribunal enter an order declaring that: (1) Petitioner cannot establish a case of collateral estoppels because the Notice of Deficiency at issue concerns tax year ending December 31, 2007; and (2) that the NOD establishes the statutory *prima facie* case under IITA section 904(c) that that the 2007 distribution of capital gain income to Mr. Cain from TRC Trading, Inc. was a distribution of Illinois source business income.

COUNT II

In the alternative, either as business income, or as nonbusiness income, TRC Trading Inc.'s distribution of income to Mr. Cain was properly allocated to Mr. Cain's state of residence, Florida.

43. Plaintiff repeats and realleges paragraphs 1 through 33 hereof as though fully set forth herein.

ANSWER: Department realleges and incorporates herein its Answers to paragraphs 1 though 33.

44. The Department's IITA Regulations, in pertinent part concerning Special Apportionment, provides as follows:

§ 100.3380. Special Rules (IITA Section 304)

(c) Sales Factor. The following special rules are established in respect to the Sales Factor in IITA Section 304(a)(3):

....
4) Where business income from intangible property cannot readily be attributed to any income producing activity of the person, the income cannot be assigned to the numerator of the sales factor for any state and shall be excluded from the denominator of the sales factor.

86 Ill. Admin. Code § 100.3380(c)(4).

ANSWER: Department admits the existence force and effect of the regulation cited in Paragraph 44. That law speaks for itself.

45. Even if the capital gain from the sale of stock held by TRC Trading is presumed by the IDOR to have generated business income, there was no income producing business activity of TRC Trading Inc. identified by the Department to which the capital gain could be readily attributed to in order to allocate the income as Illinois source income of TRC Trading, Inc.

ANSWER: Paragraph 45 contains a legal conclusion, not a material allegation of fact. Therefore, no answer is required pursuant to Tribunal Rule 310(b)(2). Department denies the allegations in paragraph 45.

46. The Department's IITA regulation addressing business and nonbusiness income, 86 Ill. Admin. Code. § 100.3010, provides no guidance for sourcing nonbusiness capital gain income from the disposition of *intangible* assets, and refers to IITA section 301(c)(2) for "rules for the allocation by these persons [persons other than residents] of unspecified items of nonbusiness income."

ANSWER: Department admits the existence force and effect of the regulation cited in Paragraph 46. That law speaks for itself.

47. Under IITA section 301(c)(2) unspecified items of nonbusiness income “in the case of a corporation” can only be sourced to Illinois if the corporation had its commercial domicile in Illinois.

ANSWER: Department admits the existence force and effect of the statute cited in Paragraph 47. That law speaks for itself.

48. TRC Trading, Inc. had a legal domicile in Illinois but no commercial domicile within the meaning of IITA section 1501(a)(2) and 86 Ill. Admin. Code § 100.3210, and thus the capital gain could not be allocated to Illinois under IITA section 301(c)(2)(B)

ANSWER: Paragraph 48 contains a legal conclusion, not a material allegation of fact. Therefore, no answer is required pursuant to Tribunal Rule 310(b)(2). Department denies the allegations in paragraph 48.

49. Under IITA section 301(c)(2)(A), unspecified items of nonbusiness income “in the case of an individual, trust, or estate, shall not be allocated to this State.”

ANSWER: Department admits the existence force and effect of the statute cited in Paragraph 49. That law speaks for itself.

50. Mr. Cain was adjudged to be a nonresident of Illinois, and thus the distribution of capital gain income from TRC Trading, Inc. could not be allocated to Illinois under IITA section 301(c)(2)(A).

ANSWER: Paragraph 50 contains a legal conclusion, not a material allegation of fact. Therefore, no answer is required pursuant to Tribunal Rule 310(b)(2). Department denies the allegations in paragraph 50.

WHEREFORE, Defendant prays that the Tax Tribunal enter an order declaring that the 2007 capital gain distributed to Mr. Cain by TRC Trading Inc. is allocable to Illinois as Illinois source income under the IITA either as business or nonbusiness income.

COUNT III

The Department's NOD, contrary to the testimony and the Stipulation of Factual Matters in *Cain v. Hamer* and without reasonable cause, makes the untrue assertion that Mr. Cain received a distribution of Illinois source business income from TRC Trading Inc. Therefore, the Department has subjected itself to the payment of the reasonable expenses, including reasonable attorney's fees, actually incurred by Mr. Cain in defense of the action initiated by the NOD.

51. Plaintiff repeats and realleges paragraphs 1 through 33 hereof as though fully set forth herein.

ANSWER: Department realleges and incorporates herein its Answers to paragraphs 1 through 33 as if fully set forth here.

52. Section 10-55 of the Administrative Procedure Act ("APA"), in pertinent part, provides as follows:

Sec. 10-55. Expenses and attorney's fees.

(a) In any contested case initiated by any agency that does not proceed to court for judicial review and on any issue where a court does not have jurisdiction to make an award of litigation expenses under Section 2-611 of the Civil Practice Law, any allegation made by the agency without reasonable cause and found to be untrue shall subject the agency making the allegation to the payment of the reasonable expenses, including reasonable attorney's fees, actually incurred in defending against that allegation by the party against whom the case was initiated. A claimant may not recover litigation expenses when the parties have executed a settlement agreement that, while not stipulating liability or violation, requires the claimant to take correction action or pay a monetary sum.

5 ILCS 100/10-55(a).

ANSWER: Department admits the existence force and effect of the statute cited in Paragraph 52. That law speaks for itself.

53. The Department was warned by Mr. Cain's counsel, in writing, prior to issuing the NOD that the liability the Department was proposing would be contrary to established, adjudicated facts, without reasonable cause to do so, and would expose itself to potential liability for costs and fees under the APA.

ANSWER: Paragraph 53 contains an allegation of fact that is immaterial to the issues to be decided by this Tribunal. Department admits that Petitioner sent Department a letter threatening to request attorneys' fees if the Department issued its Notice of Deficiency.

54. Ignoring the testimony and Stipulation of Factual Matters in *Cain v. Hamer*, ignoring the submissions by Mr. Cain's accountant and Mr. Cain's counsel that there was no reasonable basis for the proposed assessment of liability, and ignoring Mr. Cain's counsels admonition that the Department may trigger liability for reasonable expenses and fees Mr. Cain would incur to defend against a proposed assessment, the Department issued the NOD that is the subject of this contested case proceeding.

ANSWER: Department admits that it issued the Notice of Deficiency for tax year ending December 31; 2007. Tax year 2007 was not a year at issue in the *Cain v. Hamer* case.

55. The General Assembly has failed to amend Section 10-55 of the APA to reflect that Civil Practice Law has been replaced by the Illinois Code of Civil Procedure, and to reflect that Supreme Court Rule 137 [Ill. S. Ct. R. 137] preempted former Section 2-611 of the Civil Practice Law. There is currently no Section 2-611 of the Code of Civil Procedure [735 ILCS 5/Art I, *et seq.*]. The Tax Tribunal therefore does not have jurisdiction to make an award of expenses under

Section 2-611 of the Civil Practice Law, and thus Section 10-55 of the APA is applicable to this contested case proceeding.

ANSWER: Paragraph 55 contains a legal conclusion, not a material allegation of fact. Therefore, no answer is required pursuant to Tribunal Rule 310(b)(2). Department denies the allegations in paragraph 55.

WHEREFORE, Department prays that the Tax Tribunal enter an Order declaring that because the Petitioner failed to cooperate with the Department's audit process, the Department's issuance of the NOD was reasonable, and the NOD is *prima facie* correct.

COUNT IV

In issuing an NOD without reasonable cause to take a position contrary to testimony and a Stipulation of Factual Matters in *Cain v. Hamer*, even after being advised that in so doing it would expose itself to an award for reasonable expenses and attorney's fees, the Department acted with intentional or reckless disregard of tax laws and regulations, subjecting itself to suit for damages under Section 5 of the Taxpayers' Bill of Rights.

56. Plaintiff repeats and realleges paragraphs 1 through 33 hereof as though fully set forth herein.

ANSWER: Department realleges and incorporates herein its Answers to paragraphs 1 through 33 as if fully set forth here.

57. The Taxpayers' Bill of Rights provides as follows:

Sec. 5. Taxpayer's suits. Taxpayers have the right to sue the Department of Revenue if such Department intentionally or recklessly disregards tax laws or regulations in collecting taxes. The maximum recovery for damages in such a suit shall be \$100,000. If a taxpayer's suit is determined by the court to be frivolous the court may impose a penalty on the taxpayer not to exceed \$10,000 to be collected as a tax.

20 ILCS 2520/5.

ANSWER: Department admits the existence, force, and effect of the statute quoted in paragraph 57. That statute speaks for itself.

58. The Department *deliberately chose* to proceed to issue a NOD against Mr. and Mrs. Cain after having been specifically cautioned that proceeding to assessment for the 2007 tax year on a basis factually contrary to the testimony and stipulated facts in *Cain v. Hamer* would expose the Department to potential damages under the Taxpayers' Bill of Rights. The Department *deliberately chose* to proceed to issue a NOD even though it had developed no new facts regarding the 2007 tax year (during which the Cains were locked in litigation with the Department) from those it had uncovered after more than 6 years of expensive litigation with the Cains in a failed effort to assess liability against them as Illinois residents under the IITA for the 1996 through 2004 tax years, which involved invasive and burdensome discovery of every aspect of Tyler and Talbot Cain's lives and even an illegal procurement of their credit report.

ANSWER: Department denies the allegations in paragraph 58.

59. During the course of the aforementioned proceedings in *Cain v. Hamer* the Department was advised by Mr. Cain's counsel in the litigation that Talbot D. Cain had died, before having received the full disbursement of funds due under the State Officers and Employees Money Disposition Act in *Cain v. Hamer*. Nevertheless the Department *deliberately chose* to include Talbot Cain in the NOD.

ANSWER: Department included Mrs. Talbot D. Cain on the NOD because Petitioners filed a joint income tax return for the tax year ending December 31, 2007.

60. The assessment of liability for the 2007 tax year against Tyler and Talbot Cain is the result of intentional or reckless disregard of the tax laws and regulations, for which Tyler Cain is entitled to the maximum amount of damages under the Taxpayers' Bill of Rights.

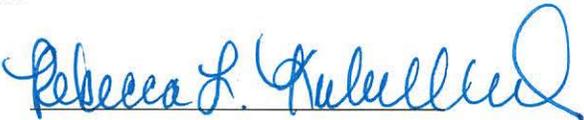
ANSWER: Department denies the allegations in paragraph 60.

WHEREFORE, Plaintiff prays that the Tax Tribunal enter an order holding that the Department acted reasonably and denying any award of damages to Tyler Cain pursuant to the Taxpayers' Bill of Rights.

Respectfully submitted,

Illinois Department of Revenue

By: LISA MADIGAN, Attorney General, State of Illinois

By: 

Rebecca L. Kulekowskis

Special Assistant Attorney General

Date: June 2, 2015

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STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

TYLER R. and TALBOT DEBUTTS CAIN

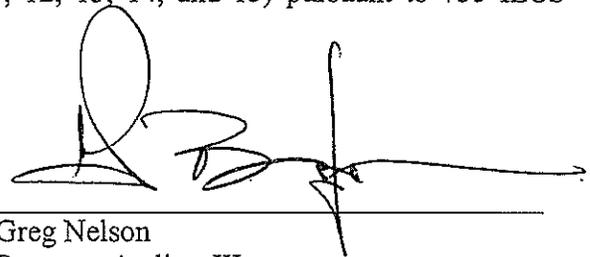
v.

ILLINOIS DEPARTMENT OF REVENUE

DOCKET NO. 15-TT-63

VERIFICATION AND AFFIDAVIT AS TO LACK OF SUFFICIENT KNOWLEDGE

Greg Nelson, being first duly sworn, deposes and says that he is an employee and duly authorized agent of the Illinois Department of Revenue (“Department”), that he has read the foregoing Respondent’s Answers to Petition, that he is well acquainted with its contents, and under penalties as provided by law pursuant to 735 ILCS 5/1-109 of the Illinois Code of Civil Procedure, he certifies that the statements set forth in that instrument are true and correct, except as to allegations claiming lack of sufficient knowledge (Paragraphs 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, and 15) pursuant to 735 ILCS 5/2-610(b), which he verily believes to be true.



Greg Nelson
Revenue Auditor III
Illinois Department of Revenue