

IN THE ILLINOIS INDEPENDENT TAX TRIBUNAL

CSX TRANSPORTATION, INC.)	
)	
Petitioner,)	19 TT 130
)	20 TT 135
v.)	21 TT 125
)	
THE ILLINOIS DEPARTMENT OF REVENUE,)	Chief Judge James M. Conway
)	
Respondent.)	

NOTICE OF ELECTRONIC FILING

To:

Nikki E. Dobay
Eversheds Sutherland (US) LLP
(312) 535-4445

Timothy J. McCaffrey
Eversheds Sutherland (US) LLP
(916) 302-9527

TimMcCaffrey@eversheds-sutherland.com NikkiDobay@eversheds-sutherland.com

PLEASE TAKE NOTICE that on the 30th day of November 2022, I electronically filed with the Illinois Independent Tax Tribunal (ITT.TaxTribunal@illinois.gov) and Chief Administrative Law Judge, James M. Conway (James.Conway@illinois.gov) 160 N. LaSalle Street, Room N506, Chicago, IL 60601, **Respondent's Response to Petitioner's Motion to Compel**, copies of which accompany this notice and is served on you herewith.

Respectfully submitted,

By: /s/ Sean P. Cullinan
One of Respondent's Attorneys

Sean P. Cullinan
Lori L. Jordan
Joseph Kasiak
Special Assistant Attorneys General
Illinois Department of Revenue
555 W. Monroe St., Ste 1100
Chicago, IL 60661
(312) 814-3078; (312) 814-3842; (312) 814-6012
sean.cullinan@illinois.gov; lori.jordan@illinois.gov; joseph.kasiak@illinois.gov

IN THE ILLINOIS INDEPENDENT TAX TRIBUNAL

CSX TRANSPORTATION, INC.)	
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THE ILLINOIS DEPARTMENT OF REVENUE,)	Chief Judge James M. Conway
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Respondent.)	

**RESPONDENT’S RESPONSE TO
PETITIONER’S MOTION TO COMPEL**

The Illinois Department of Revenue (“Respondent”) by and through its attorneys, Sean Cullinan, Lori Jordan and Joseph Kasiak responds to Petitioner CSX Transportation, Inc., (“Petitioner’s”), Motion to Compel and states as follows:

BACKGROUND

1. On or about November 1, 2022, while the parties were working toward settling this matter, Petitioner emailed Respondent requesting production of three items:
 - The audit narrative of the prior auditor Bob Ciofalo;
 - Complete correspondence from the e-mail string (see IDOR005416); and
 - The Settlement Agreement or Agreements referenced at IDOR005792 and IDOR005411. *See* Copy of the 11/1/22 email attached hereto as **Exhibit A**.
2. On November 4, 2022, Respondent responded by email and stated that the e-mail strings of correspondence were sequentially numbered (in addition to being Bate stamped) and that the Settlement Agreement was located at IDOR 5043-5051. The Respondent objected to the production of the prior auditor Bob Ciafalo’s audit comments for earlier tax years which has become the subject of this Motion. *See* Copy of 11/4/22 email attached as **Exhibit B**.
3. In a letter dated January 29, 2021, Petitioner requested Mr. Ciafalo’s audit comments based on the following premises: “it is evident that Defendant relied on Mr. Ciofalo’s opinion and historic knowledge gained through auditing Petitioner in tax periods prior to the one at issue in this matter” and that “the email correspondence indicates that Mr. Ciofalo played a direct role

in the outcome of this audit, specifically, the conclusion that BOCT's receipts were not intercompany in nature." See Copy of 1/29/21 letter attached as **Exhibit C**.

4. As an aside, in Paragraphs 11 to 13 of Petitioner's motion, Petitioner makes reference to an alleged agreement that the Department would "no longer pursue this matter" if no specific inter-company switching receipts were found. The Department wants to state explicitly that no agreement was ever in place, and the continued mention of this by the Petitioner is improper.

ARGUMENT

5. Great latitude is allowed in the scope of discovery, and the concept of relevance is broader for discovery purposes than for purposes of admitting evidence at trial. Leeson v. State Farm Mutual Automobile Insurance Co., 190 Ill.App.3d 359, 365, 546 N.E.2d 782 (1989). Relevance for discovery purposes includes not only what is admissible at trial, but also that which leads to admissible evidence. Pemberton v. Tieman, 117 Ill.App.3d 502, 453 N.E.2d 802 (1983). Discovery should be denied, however, when there is insufficient evidence that the requested discovery is relevant. Rokeby-Johnson v. Derek Bryant Insurance Brokers, Ltd., 230 Ill.App.3d 308, 317, 594 N.E.2d 1190 (1992).

6. It has long been the law in Illinois that prior audits or other Department actions or failures to act do not bind the Department of Revenue and consequently do not prohibit it from taking contrary action in a current audit or other tax matter. Austin Liquor Mart, Inc., v. Department of Revenue, 51 Ill.2d 1, 5, 280 N.E.2d 437 (1972) ("It seems universally recognized that, generally, a State cannot be estopped by the acts and conduct of its officers or agents in the performance of the governmental function of collecting taxes legally due."), citing United States v. Globe Indemnity Co., 94 F.2d 576, 578 (2nd Cir. 1938); Peoria Hotel Company v. Illinois Department of Revenue, 87 Ill.App.3d 176, 180, 408 N.E.2d 1182 (3rd Dist. 1980) (Public policy generally opposes the application of estoppel against the state where public revenues are involved. "We cannot agree with Hilton that the law bars the State from collecting the taxes in question because the Department of Revenue failed to take such action in the years preceding Page 8 of 11 the audit in question."); Rockford Life Insurance Company v. Department of Revenue, 128 Ill.App.3d 302, 305, 470 N.E.2d 596 (2nd Dist. 1984)("the government is not estopped by previous acts or conduct of its agents with reference to the determination of tax liabilities or by failure to collect the tax, nor will the mistakes or misinformation of its officers estop it from

collecting the tax.”), citing 21 A.L.R. 4th 573 (1983); Citizens State Bank of Mount Morris v. Johnson, 130 Ill.App.3d 925, 933, 474 N.E.2d 791 (2nd Dist. 1985) (“In sum, the Department’s issuance of bulletin ITIB-1973-1 did not estop it from issuing a subsequent bulletin with new information, or from retroactively taxing income previously deemed exempt. As previously stated, public policy ordinarily forbids application of estoppel to the State and the mistakes of its agents will not estop it from collecting the tax.”); Semenek v. Department of Revenue, 166 B.R. 327, 332 (N.D. Ill. 1994)(“The general rule in Illinois is that the government is not estopped from collecting taxes that are due because of mistakes or misinformation provided by its agents in collecting the tax.”); Brown’s Furniture, Inc., v. Wagner, 171 Ill.2d 410, 432, 665 N.E.2d 795 (1996) (“Reflecting these policy concerns in the revenue collection context, this court has refused to estop the State from reexamining a taxpayer’s liability even when returns for the relevant tax period have been filed and approved. * * * There is no evidence to suggest that it fraudulently or unjustly misled Brown’s Furniture into not collecting the tax.”); Saco Industries, Inc., v. Illinois Department of Revenue, 301 Ill.App.3d 191, 197, 702 N.E.2d 1012 (3rd Dist. 1998)(“Even assuming that a Department auditor gave Saco incorrect information, erroneously approved Saco’s procedures, or failed to assess a tax liability at the time of the prior audit in 1989, Saco’s argument cannot stand.”); Communications and Cable of Chicago, Inc., v. Department of Revenue of the City of Chicago, 275 Ill.App.3d 680, 688, 655 N.E.2d 1078 (1st Dist. 1995)(“Where public revenues are involved, the application of estoppel against the government is greatly disfavored and will not lie in the absence of compelling or extraordinary circumstances. [citations omitted]

7. Applying the Illinois case law above to the present matter, there is nothing in Bob Ciofalo’s 2007-2009 audit comments that is relevant or that would ever lead to relevant evidence. Even if the audits in the present matter did rely on the previous audits, that fact alone is not sufficient to overcome the policy against estoppel toward the State. *See* Communications and Cable of Chicago v. Department of Revenue, 275 Ill.App.3d at 688 (“This is true even where detrimental reliance was present.”). There is no detrimental reliance by Petitioner in this matter.

CONCLUSION

Respondent respectfully requests that the Tribunal deny Petitioner’s motion and enter an order to that effect.

Dated: November 30, 2022

Respectfully submitted,

By: /s/ Sean P. Cullinan
One of Respondent's Attorneys

Sean P. Cullinan
Lori L. Jordan
Joseph Kasiak
Special Assistant Attorneys General
Illinois Department of Revenue
555 W. Monroe St., Ste 1100
Chicago, IL 60661
(312) 814-3078; (312) 814-3842; (312) 814-6012
sean.cullinan@illinois.gov; lori.jordan@illinois.gov; joseph.kasiak@illinois.gov

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she caused a copy of the foregoing Respondent's Response to Petitioner's Motion to Compel to be served by electronic mail before the hour of 5:00 p.m. on the 30th day of November, 2022 as follows:

Nikki E. Dobay
Eversheds Sutherland (US) LLP
(312) 535-4445

TimMcCaffrey@eversheds-sutherland.com

Timothy J. McCaffrey
Eversheds Sutherland (US) LLP
(916) 302-9527

NikkiDobay@eversheds-sutherland.com

Respectfully submitted,

By: /s/ Sean P. Cullinan
One of Respondent's Attorneys

Sean P. Cullinan
Lori L. Jordan
Joseph Kasiak
Special Assistant Attorneys General
Illinois Department of Revenue
555 W. Monroe St., Ste 1100
Chicago, IL 60661
(312) 814-3078; (312) 814-3842; (312) 814-6012
sean.cullinan@illinois.gov; lori.jordan@illinois.gov; joseph.kasiak@illinois.gov

Exhibit A

From: [Dobay, Nikki](#)
To: [Cullinan, Sean](#)
Cc: [Jordan, Lori](#); [Kasiak, Joseph](#); [McCaffrey, Timothy](#); [Nikki Dobay](#)
Subject: [External] CSX
Date: Tuesday, November 1, 2022 4:03:24 PM
Attachments: [LTR re follow-up discovery requests dated 1.29.2021.pdf](#)

Sean,

I'm writing in regard to outstanding discovery. I understand that the parties had previously agreed to put discovery on hold while the Department explored potential settlement. However, given the extraordinary delay we have experienced from the Department in considering and responding to settlement and other issues, we unfortunately can no longer agree to hold the case in abeyance.

Pursuant to a letter from Justin Brown to you dated January 29, 2021 (a copy of which is attached), we hereby request immediate production of the following:

- The audit narrative of the prior auditor Bob Ciafalo;
- Complete correspondence from the e-mail string (see IDOR005416); and
- The Settlement Agreement or Agreements referenced at IDOR005792 and IDOR005411.

As the parties previously had a discovery conference on January 13, 2021, we are not requesting another conference. Rather, please advise by 4:00 CST on November 3, 2022, whether you will produce the requested items. If you do not respond, we will have no choice but to pursue relief from the Court.

Thank you.

Nikki Dobay | Partner

nikkidobay@eversheds-sutherland.com

T: +1.916.302.9527

[Eversheds Sutherland \(US\) LLP](#)

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Exhibit B

From: [Cullinan, Sean](#)
To: [Dobay, Nikki](#); [McCaffrey, Timothy](#)
Cc: [Jordan, Lori](#); [Kasiak, Joseph](#); [Cullinan, Sean](#)
Subject: FW: CSX
Date: Friday, November 4, 2022 11:30:36 AM
Attachments: [LTR re follow-up discovery requests dated 1.29.2021.pdf](#)

Nikki:

We are currently preparing our response to your last settlement proposal. Pursuant to your email we respond as follows:

- The audit narrative of the prior auditor Bob Ciafalo; We want you to explain why the audit comments for TYE 2007-2009 in anyway could lead to relevant information in this matter.
- Complete correspondence from the e-mail string (see IDOR005416); The email strings we provided to you are numbered on the bottom in sequential order. For example, IDOR bate stamp 5411 (page 1) is the first page of the string of emails which ends at IDOR bate stamp 5417 (page 7).
- The Settlement Agreement or Agreements referenced at IDOR005792 and IDOR005411. Please see bate stamps IDOR 5043-5051.

Thanks, Sean.

Sean P. Cullinan
Special Assistant Attorney General
Illinois Department of Revenue
555 W. Monroe St., Suite 1100
Chicago, IL 60661
(312) 814-3078-ph.
(312) 814-4344-fax

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From: Dobay, Nikki <nikkidobay@eversheds-sutherland.com>
Sent: Tuesday, November 1, 2022 4:03 PM
To: Cullinan, Sean <Sean.Cullinan@Illinois.gov>
Cc: Jordan, Lori <Lori.Jordan@Illinois.gov>; Kasiak, Joseph <Joseph.Kasiak@Illinois.Gov>; McCaffrey, Timothy <timmccaffrey@eversheds-sutherland.com>; Nikki Dobay <nikkidobay@eversheds-sutherland.com>

Subject: [External] CSX

Sean,

I'm writing in regard to outstanding discovery. I understand that the parties had previously agreed to put discovery on hold while the Department explored potential settlement. However, given the extraordinary delay we have experienced from the Department in considering and responding to settlement and other issues, we unfortunately can no longer agree to hold the case in abeyance.

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Thank you.

Nikki Dobay | Partner

nikkidobay@eversheds-sutherland.com

T: +1.916.302.9527

Eversheds Sutherland (US) LLP

Helping our clients, our people and our communities to thrive

Eversheds Sutherland (US) LLP is part of a global legal practice, operating through various separate and distinct legal entities, under Eversheds Sutherland. For a full description of the structure and a list of offices, please visit www.eversheds-sutherland.com.

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Exhibit C

January 29, 2021

Via E-Mail (sean.cullinan@illinois.gov and lori.jordan@illinois.gov)

Mr. Sean Cullinan
Ms. Lori Jordan
Special Assistant Attorney General
Illinois Department of Revenue
100 West Randolph Street, 7th Floor
Chicago, IL 60601

Re: CSX Transportation, Inc., v. IDOR, 19 TT 130

Dear Sean & Lori:

On behalf of our client, CSX Transportation, Inc. (hereinafter "CSXT") This letter is in response to the discovery call on Wednesday, January 13, 2021, the respective counsels had in regard to the above-captioned consolidated matter pending before the Illinois Tax Tribunal. During the call, the Department objected to CSXT's request for the audit narrative of the prior auditor Bob Ciofalo on the grounds that it is outside the scope of discovery. The Department's objection is premised on the belief that Mr. Ciofalo only opined on the cross-group elimination issue. We agreed to provide specific cites to the audit file in which Mr. Ciofalo directly comments on the remaining issue pending in this matter, specifically the intercompany nature of the transactions between members of CSXT's unitary transportation group, i.e., BOCT and CSXT ("BOCT/CSXT Intercompany Issue"). It is evident by the email correspondence between Mr. Ciofalo and the audit team that they relied on his opinion and historic knowledge of auditing CSXT and its related companies. Further, the email correspondence illustrates that he played a direct role in the outcome of this audit, specifically, the conclusion that BOTC's receipts were not intercompany in nature.

Due to the fact that the email correspondence in the audit file is in no sequential order, there are many instances in which the same email may appear multiple times and be assigned multiple bates stamped numbers. We have provided just one citation to the audit file for each example below. Also, the following are illustrative of instances in which Mr. Ciofalo provides direct comment and/or analysis on the BOCT/CSXT Intercompany Issue and not inclusive of every single occurrence contained in the audit file as it is too voluminous. Additionally, included are also direct requests from the audit team for Mr. Ciofalo to provide any documentation that he may have from his prior audits of Petitioner that addresses the intercompany nature of the transactions between BOCT/CSXT.

- Bates Stamped Page IDOR006218 – 8/8/18 Email from Marsha Seitz to Robert Ciofalo, CC: Brian Fliflet, Carla Hawkins, Joann Lariviere; Requesting that Mr. Ciofalo send what he has on intercompany transactions:

...I am just trying to make sure we have all of our ducks in a row. It seemed when reading the prior agreement, the taxpayer was saying all the sales were intercompany so I want to get as much documentation as possible if we are going to pursue this...Please send what you have on intercompany as we certainly want to compare it to what Carla gets. Thank you for all of your input on this.

- Bates Stamped Page IDOR006210 – 8/8/18 Email from Marsha Seitz to Robert Ciofalo, CC: Brian Fliflet, Carla Hawkins, Joann Lariviere; Requesting that Mr. Ciofalo send what he has on intercompany transactions:

...Bob, you are stating that these sales would not be intercompany, is that correct?

...In the settlement agreement, it appears that the taxpayer stated that 98% of sales were between two members, however, Bob you are saying that is not the case and that you determined these sales were from 3rd parties. I did read your 2007-2009 audit narrative and if so would like to see what you have.

...Anyway Bob, if you have proof from an earlier audit showing that these were 3rd party receipts, it would help when we ask the taxpayer why are all receipts eliminated which I think they will do. We all know that special apportionment doesn't last forever.

- Bates Stamped Page IDOR006053 – 8/7/18 Email from Robert Ciofalo to Carla Hawkins, CC: Marsha Seitz, Joann Lariviere addressing CSXT Intercompany Eliminations:

...I can't say for certain that B&OCT sales are not part of it, but from having conducting prior audits, it is my understanding that none of B&OCT line 1 sales are intercompany with CSXT or any other transportation company in the group. We determined that their sales were 100% from outside customers. It never came up that there were any intercompany sales with any companies in the consolidated return."

- Bates Stamped Page IDOR006162 – 8/7/18 Email from Robert Ciofalo to Brian Fliflet; CC: Carla Hawkins, Marsha Seitz, Joann Lariviere; addressing alternative methods of adjustment for the audit team to pursue.

...They are getting away with something they shouldn't. The Illinois sales are not being reported in the numerator (or denominator). If we could include these sales in the numerator, somewhere, that would be fair. The question is which avenue is a stronger case to pursue. The decision would be which case would have a better chance for us to win, trying to show the services are transportation or non-transportation services.

- Bates Stamped Page IDOR006244 – 8/13/18 Email from Robert Ciofalo to Carla Hawkins; CC: Joann Lariviere, Marsha Seitz discussing intercompany sales between BOCT and CSXT.

The possible intercompany sales between BOCT and CSXT is another issue, they will have to prove sales are strictly intercompany. It was NOT our understanding that BOCT was performing a service for CSXT, I'm not sure I buy that argument they are making about intercompany sales between these two companies. I think they wanted the numerator out of the non-insurance group in the past and would want it out of the transportation factor since its 100% Illinois.

- Bates Stamped Page IDOR006219 – 8/8/18 Email from Robert Ciofalo to Marsha Seitz; CC: Brian Fliflet, Carla Hawkins, Joann Lariviere discussing BOCT intercompany transactions.

If you are going to pursue the switching services as transportation services, then their federal line 1 amount is 100% Illinois sales. These sales were not eliminated on consolidation and I don't see how the taxpayer could claim they are intercompany when the revenue originates from outside customers of B&OCT...There may be some administrative services that are intercompany but it was our understanding that line 1 sales was from outside customers to B&OCT.

- Bates Stamped Pages IDOR006222-006223 – 8/7/18 Email Exchange Between Brian Fliflet and Carla Hawkins, Joann Lariviere; CC: Marsha Seitz, Robert Ciofalo discussing intercompany eliminations.

Email from Brian Fliflet, Pg. IDOR006223 – *Looks like we treated BOCT as a disregarded entity and flowed up its factors and income to CSX. Wouldn't most/all of BOCT's transactions be intercompany and be eliminated.*

Email from Robert Ciofalo, Pg. IDOR006222 – *To answer your question, the answer would be no, it wouldn't be eliminated. It was determined through research on the 12/05 – 12/07 audit which eventually was submitted together with the 01-02 and 03-04 audits (although the 01-02 audit was the one submitted at an earlier time and the one in court) that BOCT derived its income from outside customers. There were several contracts documented with outside customers. Therefore, its income and factors were not from payments from services from CSXT.*

Contrary to counsel's assertions during the call, Mr. Ciofalo's input was not limited to the cross-group elimination issue. As a result, we are requesting to review anything that Mr. Ciofalo provided to the audit team for review that was not included in the audit file as well as his audit narrative from the prior audit that Ms. Seitz specifically states that she read.

Additional follow-up requests related to the audit file are as follows:

- Bates Stamped Page IDOR005416 – There appears to be email correspondence missing from this string provided. Please confirm that what was produced in the audit file is complete. As previously stated, due to the manner in which the audit file was compiled, it is at times very difficult to read.
- Bates Stamped Pages IDOR005792 and IDOR005411 – Email correspondence from both Laurie Evans and Brian Fliflet in which a copy of the settlement agreement from an earlier matter was attached. Please provide a copy of the settlement agreement or agreements if these emails are not referring to the same one.

If you have any follow-up questions or would like to discuss any of these further, please do not hesitate to reach out to Breen or me.

Very Truly Yours,



Justin T. Brown

Eversheds Sutherland (US) LLP

cc: Ms. Nicki N. Howard, Esq.
Ms. Breen M. Schiller, Esq.